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DATE		FILINGS—PROCEEDINGS	AMOUNT RECORDED IN JUDGMENT RETURNS
1-19-65	#1	Fil complaint w/bond for costs and petition w/judgment therefor authorizing parents and guardians of minors to maintain this action as next friends. Iss summons and handing to Marshal - orig. and 2 cys of complaint, petition and judgment. Iss JS 5	
1-22-65	#2	Fil summons returned executed by Marshal by serving David M. Harris and Dr. A. Craig Phillips on 1-19-65	
2-5-65	#3	Fil answer w/certificate of service	
2-10-65	#4	Fil interrogatories of pltf., w/cert. of serv.	
2-19-65	#5	Fil motion w/affidavit and notice of hearing w/cert. of service	
2-23-65	#6	Fil pltf's opposition to def's motion for extension of time to ~~answer~~ answer interrogatories w/affidavit therefor.	
3-11-65		Hearing on def.'s motion for extension of time to answer interrogatories- Def. allowed until April 15, 1965	
3-11-65	#7	Ent and fil order allowing def. until April 15, 1965 to file objections to Interrogatories or to answer the interrogatories. Cy of order mailed to Mr. Chambers and Mr. Barkley.	
4-15-65	#8	Fil answers to pltf.'s interrogatories w/cert. of serv.	
5- 3-65	#9	Fil notice of taking depositions - Drs. A. Craig Phillips and William L. Anderson	
5-26-65	#10	Fil motion for preliminary injunction, together with cert. of serv. one copy handed to U. S. Attorney's office	
5-27-65	#11	Fil answer to motion for preliminary injunction, with certificate of service.	
6- 1-65	#12	Fil notice, motion to intervene, and Complaint in Intervention, w/ certificate of service	
6- 1-65	#13	Fil memorandum of decision and order on motion for preliminary injunction - motion for preliminary injunction denied; copies mailed to counsel of record	
6- 9-65	#14	Fil answer to motion of the N. C. Teachers Association to intervene or be added as a party plaintiff, w/cert. of serv.	
6-21-65	#15	Fil deposition of Dr. A. Craig Phillips	
6-25-65	#16	Fil plaintiff's interrogatories, w/cert. of serv. (1 copy handed to USA)	
7- 9-65	#17	Fil defendant's answers to interrogatories, with certificate of service.	
7-12-65		Case called, issues joined, proceeds to trial w/o intervention of jury. Pltf's. wit. Dr. Reginald A. Hawkins S & Ex & X-Ex. Pltf's. wit. Louis I. Kramer S & Ex & X-Ex. Pltf. rests. Def's. wit. Richard H. Brown S (not examin Def's. wit. Dr. A. Craig Phillips S & Ex & X-Ex. End 5:40 P.M.	
7-13-65		Case recalled. Proceeds to trial before court w/o intervention of jury. Pltf's. wit. Dr. A. Craig Phillips recalled & X-Ex completed and Re-Ex & Re-X-Ex and Re-Ex. Def's. wit. Frank Dowd, Jr. S & Ex & X-Ex. Def's Wit. David W. Harris, S & Ex & X-Ex. Pltf's. wit. Mrs. Betsy McCloud Kelly S & Ex. Pltf. submits briefs to Court. Def. makes closing statement & submits briefs. Pltf. makes closing statement. Court adjourned .	
7-14-65	#18	Fil memorandum of decision	
7-14-65	#19	Ent and fil judgment approving proposed plan of desegregation submitted by Charlotte-Mecklenburg Board of Education except that the resolution with respect to teachers and staff is ORDERED to be amended so as to delete the word "ultimate" and substitute the word "immediate" therefor; and jurisdiction is retained to consider (upon motion of parties) implementation of the plan. Iss JS 6. (#19,Civ.Ord.I)	
7-16-65	#20	Fil defendant's answer to complaint in intervention, with certificate of service.	
7-16-65	#21	Fil plaintiffs' notice of appeal, with designation of record on appeal, and certificate of service.	

(Cont'd on page 2)

FPI--LK—2-8-64—2M—3600

DATE		FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
			PLAINTIFF	DEFENDANT	
7-21-65	#22	Fil plaintiffs' cost bond on appeal			
7-27-65	"	Fil defendant's designation of additional parts of record on appeal, w/cert. of service			
8-20-65		Certifying record on appeal to Clerk, U.S.Court of Appeals for the 4th Circuit; copy letter and of index to Mr. Chambers and to Mr. Barkley			
11-25-66	#24	Fil plaintiffs' interrogatories, w/cert. of serv.			
11-29-66		Fil mandate and printed copy of opinion, U.S. Court of Appeals for the Fourth Circuit, affirming judgment of District Court with costs. Record on appeal returned also.			
12- 2-66	#25	Fil objection to interrogatories, with notice of hearing. 3 copies to Asst. DA.			
12-15-66	#26	Fil motion to compel answers to interrogatories w/cert. of svc.			
1- 4-67		Hearing on objections to interrogatories - WW - taken under advisement			
9- 6-68	#27	Filing motion for further relief, w/cert. of service			
9- 10-68	#28	Fil plaintiffs' interrogatories, with cert. of service.			
9=16-68	#29	Fil answer to motion for further relief (by def.), w/cert. of serv.			
9-16-68	#30	Fil motion for extension of time until 11-1-68 to file objections to interrogatories, w/cert. of serv.			
10-4-68	#31	Fil Response to Defendant's Motion for Extension of time - 1 copy to D. A.			
10- 7-68	#32	Entering and filing order (JBM) - defendant to have until 11-1-68 to file answers to interrogatories; defendant required to make objections on or before 10-14-68. CO-Vol. Vol. 4-#9.			
10-31-68	#33	Filing answers to interrogatories propounded by plaintiffs, consisting of pleading, tables and exhibits together w/separate packet containing maps required by interrogatories w/cert. of serv.			
11-13-68	#34	Filing DEFENDANT's Interrogatories, w/cert. of ser..			
11-26-68	#35	Fil order (consent) for extending time for plaintiff to answer defendant's interrogatories to and including the 10th day of January, 1968(JBM)			
1- 9-69	#36	Fil answers of PLAINTIFFS to Interrogatories of DEFENDANT, w/cert. of service			
1-21-69		Hearing on motion by counsel for plaintiffs for adverse examination or deposition of a number of officers and agents of the School Board, and on motion by cou nsel for defendants for an order requiring more factual answers than filed Jan. 9, 1969.			
1-21-69	#37	Ent & Fil Order (JBM) Court ruled plaintiffs entitled to proceed with discovery suggested and that defendants entitled to answers requested. Deadline for discovery set for March 3, 1969 if possible, with case to be set for hearing during week of Mar. 10, 1969. CO. VOL. IV, #103. Copies to counsel and D. A.			
2- 3-69	#38	Fil plaintiffs' interrogatories to defendant. Copy to D.A. Cert.of service attached.			
2-10-69	# 39	Filing Motion of defendant for extension of time to answer plaintiff's interrogatories, w/cert. of serv.			
2-13-69	#40	Filing order (consent) for extension of time for defendant to have up to and including the 2nd day of March, 1969 to file answers to interrogatories submitted and filed Jan. 31, 1969.			

Cont'd on page 4

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
2-26-69	#41 Filing Defendant's Interrogatories to Plaintiff, w/cert. of service			
3- 3-69	#42 Fil plaintiffs' answers to interrogatories, with certificate of service			
3- 3-69	#43 Fil plaintiffs' interrogatories to defendants, with cert. of service.			
3- 4-69	#44 Fil Defendants Answers to Plaintiffs' interrogatories, w/cert. of serv.			
3- 6-69	# 45 Fil Plaintiffs' answers to Defendants' Interrogatories, w/cert. of serv.			
3-10-69	#46 Fil depositions of Carroll O. York, Ralph W. Eaton, James Burch, Dorothy Boone, James Clark, Mary Jane Kistler, Dr. William C. Self, William E. Poe, Gertrude Coward, J. B. Davis, Jr., Joseph Frankford, Dr. James Mikkelson, William L. Anderson, Dr. Robert C. Hanes, John W. Phillips, Dr. W. Leslie Bobbitt, Herbert L. Prickett, John W. Harrilson, Ann Hausmann, Henry L. Smith			
3-10-69	Case called - hearing on pltf.'s motion for further relief. Pltf. enters documentary evidence. P-wit. Chas L. Green s, ex and x-ex. P-wit. Daniel T. Hemmigan s and ex. Def. moves testimony of this witness be stricken - motion denied. P-wit. Paul R. Leonard s, ex and x-ex. P-wit. Jack L. Larson s and ex. - JBM -			
3-11-69	Case re-called - Dr. Jack L. Larson ex and x-ex. P-wit. John A. Finger, Jr., s, ex and x-ex.; P-wit. Robert A. Passy s and ex.			
3-12-69	Case re-called - P-wit. Robert A. Passy ex and x-ex. Pltfs. rest. D-wit. James Thomas Burch s, ex and x-ex. D-wit. William C. Self s, ex and x-ex.			
3-13-69	Case re-called - D-wit. Wm. C. Self ex and x-ex.; P-wit. Ralph W. Eaton s, ex and x-ex.; D-wit. Robert C. Hanes s, ex and x-ex.; D-wit. John W. Phillips s, ex and x-ex. Further testimony for pltfs. to be taken 3-17-69. Record remains open for any further evidence either party might want to introduce. Parties to submit briefs, etc. by 3-24-69			
3-17-69	Case re-called- P-wit. Yale Rabin s, ex and x-ex. Record left open until further notice. Pltfs. to submit findings of fact, etc., by March 24 and defendants to have five days thereafter.			
3-26-69	Case re-called. D-wit. Wm.McIntyre s, ex and x-ex.			
4-23-69	#47 Ent & fil Order (JBM) - Defendant is to submit by May 15, 1969, a plan for active and complete desegregation of teachers, to be effective with 1969-70 school year; defendant to submit by May 15, 1969, a plan and time table for active desegregation of pupils, to be predominantly effective in fall of 1969 and completed by fall of 1970; Board is free to use all of its own resources and any or all of numerous methods; plan should be for effective operation of schools in a desegregated atmosphere. CO. VOL. IV, #180 Copies to counsel.			
5- 1-69	# 48 Fil Court Reporter's transcript, two volumes			
5-14-69	#49 Fil Petition for Extension of Time to File Plan of Desegregation w/cert. of service			
5-14-69	#49a Ent & Fil Order (JBM) allowing extension of time extended to and including May 29, 1969. Copies to counsel. CO VOL. IV, #194.			
5-15-69	#50 Fil Motion for Temporary Restraining order restraining the def. from initiating or continuing construction of new schools or new facilities at any existing schools without specific prior approval of Court. Cert. of service attached.			
5-28-69	#51 Fil Plan for Desegregation of Schools w/certificate of service.			
5-28-69	#52 Fil Report in Connection with Submissionof Plan of Desegregation (certificate of service with Plan covers this document also.			
5- 29-69	#53 Fil Defendant's response to Motion for Temporary Restraining Order, w/cert. of service			
6-4-69	#54 Ent & Fil Order (JBM) ordering members of Charlotte Mecklenburg Board of Education formal parties to this action. CO. VOL. IV, #210.			

DATE		FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN ENCUMBRANCE RETURNS
			PLAINTIFF	DEFENDANT	
6-4-69	#56	& Fil Order (JBM) CO. VOL. IV, #211			
6- 9-69		Report Pursuant to Order of Court dated -69 Requesting Notice w/respect to production of existing records, w/cert. of serv.			
6-10-69	#57	Fil Marshal's return on Nos. 54 and 55 - served on Members William E. Poe; Dan Hood; Ben Huntley; Coleman Kerry; Julia Mauldin; Sam S. McMinch III; Betsy Kelly - June 5, 1969			
6-12-69	#58	Fil Motion to set aside order joining additional parties defendant, w/cert. of service			
6-12-69	#59	Fil Plaintiffs' response to Defendants' Plan for Desegregation of schools and Motion for Civil Contempt, w/cert. of serv.			
6-13-69	#60	Fil Motion to set aside or drop William E. Poe as a defendant.			
6-13-69	#61	Fil Marshal's return - served on Board Member Henderson Belk, at -:00 P.M. on June 10, 1969.			
6-16-69	#62	Fil Response of Defendant William E. Poe to Motion of Plaintiffs, w/cert. of serv.			
6-16-69	#63	Fil Response to Defendants' Motions to Strike Additional Parties Defendant, w/cert. of serv.			
6-18-69	#64	Fil Marshal's Return served on Dr. Carlton G. Watkins, at 1630 Mockingbird Lane, Charlotte, N. C., at 11:15 A.M, June 13, 1969.			
6-16-69		Case called (JBM). Motion of individual members of Board of Education to set aside order joining additional defendants denied. Hearing on Plan for Desegregation submitted by Board of Education held. P-wit. Dan Hood s and ex and x-ex.; P-wit. Ben F. Huntley s, ex and x-ex.; P-wit. Rev. Coleman W. Kerry, Jr., s and ex.			
6-17-69		Case re-called - P-wit. Rev. Coleman W. Kerry examined and x-ex.; P-wit. Sam S. McNinch III s, ex and x-ex.; P-wit. Wm. E. Poe, s, ex and x-ex.; P-wit. Julia Maulden s, ex and x-ex.; P-wit. Mrs. Betsey Kelly s, ex and x-ex.; P-wit. Mary Hazel Hatchett s and ex.			
6-18-69		Case re-called - proceeds to trial. P-wit. John Finger s, ex and x-ex.; P-wit. Henderson Belk s, ex and x-ex.; P-wit. Carlton C. Watkins s, ex and x-ex.; P-wit. Jo G. Foster s, ex. Pltf. rests. Def. wit. Dr. Robert C. Hanes s and ex; D-wit. Dr. William Self s, ex and x-ex. Dr. Robert C. Hanes re-called and x-ex. by Mrs. Betsy Kelly.; Dr. Watkins re-called by Mrs. Kelly and examined; D-wit. Wm. E. Poe re-called and examined. Defendants rest. Matter taken under advisement.			
6-20-69	#65	Ent & Fil Opinion and Order (JBM) CO VOL. IV, #220. (Copies mailed to Mr. Barkley and Mr. Waggoner. Copies picked up by Julius Chambers office). Copy to Gaston Gage and Mrs. Betsy Kelly. 8 copies sent to Mr. Barkley for school board members. (1) Motion of individual defendants to dismiss denied; (2) No citations for contempt are made; (3) Decision on faculty assignment plan deferred pending report on progress on or before Aug. 4, 1969; (4) Penalty on transferring high school athletes disapproved; (5) Transportation provision for transferring students approved; (6) Directed to halt action on Metropolitan High School until adequate proof of desegregation of school; (7) Motion restrainted on construction of other building projects; (8) Defendants ordered to proceed to prepare and submit a positive plan for desegregation - Plan to be submitted by August 4, 1969.			

(Contd on page 6)

DATE		FILINGS—PROCEEDINGS	CLERK'S FEES		AMOUNT REPORTED IN EMOLUMENT RETURNS
			PLAINTIFF	DEFENDANT	
6-16-69	#66	Fil defendant's answer to Questions posed by the Court in its order dated 6-4-69			
6-16-69	#67	Fil Defendant's answer to response and motion of plaintiffs pertaining to plan for school desegregation			
6-24-69	#68	Fil supplemental findings of fact in connection with the order of June 20, 1969. Copies to counsel and to each member of the School Board. (CO V4 #226)			
7-15-69	#69	Fil Vol. I of Court Reporter's Transcript - June 16, 1969 hearing			
7-22-69	#70	Fil Motion for Leave to File Supplemental Complaint, to Add Additional Defendants and for Temporary Restraining Order, w/affidavit of Reginald A. Hawkins, w/cert. of service			
7-22-69	#71	Fil Memorandum of Law in Support of Plaintiffs' Motion for leave to file a supplemental complaint, add parties-defendant and for temporary restraining order.			
7-22-69	#72	Fil Vol. II of Court Reporter's Transcript - June 16, 1969 hearing			
7-22-69	#73	Ent & Fil Order (JBM) allowing plaintiffs' motion for leave to file a supplemental complaint ; U S Marshal directed to serve same upon defendants. CO VOL. V, #5. Copies to counsel.			
7-22-69	#74	Fil Supplemental Complaint w/certificate of service - contains request for 3-judge court - N. C. Statutes 115-176.1 re involuntary bussing of students			
7-23-69		Mailed copies of #70, #71, #73 and #74 to School Board members (9) by mailing to Mr. Brock Barkley for distribution.			
		Mailing to US Marshal, Asheville, N. C., summon and true copies of summons, true copies of supplemental complaints plus true copies of #70, #71 and #73 for service on Dr. A. Craig Phillips, Superintendent of Public Instruction, Raleigh, N. C., and Dr. A. Craig Phillips, State Board of Education, Raleigh, N.C.			
7-29-69	#75	Fil amendment to plan for further desegregation of schools, with certificate of service.			
8- 4-69	#76	Fil report in connection with amendment to plan for further desegregation by counsel for Charlotte-Mecklenburg Board of Education .			
8- 5-69	"	Case called for hearing on plan- Dr. Wm. Self s, ex and x-ex. Rev. Leak & Paul Whitfield's and give statement			
8- 7-69	#77	Fil Summons w/Marshal's returns - served 7-29-69 on Dr. Craig Phillips, Superintendent of Public Instruction and on Dr. Craig Phillips, Secretary of State Board of Education.			
8-11-69	#78	Fil Answer of the Defendants, the North Carolina State Board of Education and Superintendent of Public Instruction of the State of N. C., to the Supplemental Complaint, w/cert. of serv.			
8-12-69	#79 a	Fil Motion with Notice of Motion to Intervene as a Plaintiff in a Class Action , with certificate of service			
	#79 b	Fil Complaint of Intervening Plaintiffs - Paw Creek School District			
8-15-69	#80	Fil plaintiffs' response to motion to intervene, with certificate of service.			
8-15-69	#81	Fil petition to file another plan(presented by Thomas Ray) by a group of citizens. Handing to Judge McMillan with letter, and chart.			
8-15-69	#82	Ent & Fil Order (JBM) that 1) policy statement of Board approved; 2) faculty desegregation program approved; 3) closing of 7 all-black schools approved reluctantly for a one-year, temporary arrangement; 4) plan to reassign 1,245 students from overcrowded black schools approved; 5) reassignment of Paw Creek students to Woodland approved; 6) proposals of Board for restructure of attendance lines, etc. approved as presented; 7) Board is further directed to plan for complete faculty desegregation for 1970-71 as well as complete desegregation of students to the maximum extent possible and present a detailed report showing, complete with figures and maps, location and nature of each construction project proposed, etc; 8) Board ordered not to divest itself of land, etc. in Second Ward area; 9) jurisdiction retained. CO VOL. V, #22 Copies mailed to counsel and School Board members . New plan to be submitted by November 17, 1969.			

D. C. 110A Rev. Civil Docket Continuation

DATE		PROCEEDINGS
8-29-69		Fil defs' motion for order authorizing and approving proposed amendment to use IRWIN AVE Junior High instead of ZEB VANCE Elementary
8-29-69	#84	Ent and fil order allowing defs.motion to amend plan to use IRWIN AVE. Junior High instead of ZEB VANCE ELEMENTARY; disapproving proposal to provide transportation for any students attending IRWIN AVE. Copy mailed to counsel of record. Ten copies mailed to Waggoner for School Board Members
9- 2-69	#85	Fil pltfs.' motion for further relief and for show cause, w/cert. of serv.
9- 4-69	#86	Fil Court Reporter's Transcript (orig.) of proceedings of 8-5-69
9-11-69	#87	Ent and fil order releasing certain plaintiffs' exhibits to plaintiffs' counsel for period of 30 days - JBM. CO-Vol. V-#82
9-12-69	#88	Fil defs' response to motion for further relief, w/cert of serv.
9-16-69	#89	Ent and fil order (JBM) allowing Board of Education to surrender premises formerly occupied by GLIDDEN PAINT CO-Vol. V-92. Copies to counsel
10- 2-69	#90	Fil defs' motion for extension of time to file desegregation plan w/cert. of serv.
10- 8-69	#91	Fil pltfs' response to motion of defs. for extension of time, w/cert. of serv.
10-10-69	#92	Ent and fil order (JBM) - Board directed to file w/Court by 10-29-69 answers to numerous questions re results to date of efforts, as well as details of instructions to Mr. Weil, mission, goals, etc. Action deferred on motion for extension of time, as well as pltfs' motion which requests abolition of freedom of choice and appointment of outside expert to devise plan in default of Board Action. CO-Vol. IV-#123. Ten copies mailed Waggoner for counsel and school board members; copies mailed Chambers and Barkley, and two copies mailed VANORE
10-30-69	#93	Fil defendants' Report to Court Pursuant to Order of 10-10-69 w/cert. of serv.
11- 3-69	#94	Fil plaintiffs' further response to defendants' motion for extension and motion for further relief, w/cert. of serv.
11- 5-69	#95	Fil defendants' reply to plaintiffs' further response to defendants' motion for extension of time and plaintiffs' motion for further relief, w/cert. of serv.
11-10-69	#96	Fil order (JBM) - motion of defendants for extension of time denied. CO-Vol. V-#136 - also filing Memorandum Opinion
11-17-69	#97	Fil defendants' Amendment to Plan for Further Desegration of Schools, and Report submitted in connection with 11-13-69 amendment to plan for further desegregation
11-18-69	#98	Ent and fil order (JBM) directing pltfs to file by 11-21-69 objections or comments to amendment to plans of defendants. CO-Vol. V-#143. Copies mailed counsel
11-19-69	#99	Fil certificate of service for amendment to plan for further desegregation and report in connection therewith.
11-21-69	#100	Fil pltfs. response to defs.' amendment to plan for further desegregation of schools, w/cert. of serv.
12- 1-69	#101	Ent and fil Opinion and order (JBM) that November 17 plan is disapproved; defs. directed to desegregate faculities in all schools effective not later than Sept. 1, 1970, so ratio of black teachers to white teachers in each will be approximately same as ratio of black teachers to white teachers in entire school; consultant will be designated by court; defs. directed to cooperate w/consultant, providing space, pay fees and expenses, etc.; pltfs.' motion for order directing immediate desegregation of entire

(Cont'd on page 8)

DATE		PROCEEDINGS	Date Or Judgment
		(Cont'd from page 7)	
		school system deferred; further orders re restraining construction and enlargement of schools deferred; motion for citation of school board members for contempt of court deferred. CO-Vol. V-#150	
12- 2-69	#102	Ent and fil order (JBM) appointing DR. JOHN A. FINGER, JR., consultant. CO-Vol. V-#151. Copies mailed to counsel.	
1-20-70	#103	Fil motion for immediate desegregation of public school, w/cert. of service	
1- 20-70	#104	Ent and fil order (JBM) directing Clerk to set case for immediate hearing	
2- 2-70	#105	Fil defendants' plan for desegregation	
2- 2-70		Hearing - JBM - on plaintiffs' motion for immediate desegregation. Motion taken under advisement. School Board Plan and Statement of Coleman Kerry presented to Court. Dr. Wm. C. Self s and questioned by Court. Court will discuss w/counsel need for further testimony on school plans - hearing left open	
2- 4-70	#106	Fil defendants' motion for hearing on plans for desegregation of schools, w/ cert. of serv.	
2- 5-70		Hearing - JBM -(further hearing) - on plans for desegregation. D-wit. Wm. C. Self s, ex and x-ex.; D-wit. J. D. Morgan s, ex and x-ex.; D-wit. D. J. Dark s and ex.	
2- 5-70	#107	Ent and fil order (JBM) setting out guidelines for desegregation of schools. Jurisdiction retained. CO-Vol. VI-#59.	
2-12-70	#108	Fil Report of the School Board to Judge McMillan, dated this day.	
2-13-70	#109	Fil motion to add additional parties defendant and for further relief w/certificate of service	
2-13-70	#110	Fil points of authorities in support of above motion, w/certificate of service	
2-18-70	#111	Fil reporter's transcript of proceedings February 2, 1970 and Feb. 5, 1970	
2-19-70	#112	Fil Report of the School Board to Judge McMillan, dated this day.	
2-20-70	#113	Fil Notification and Request for Designation of Three-Judge Court	
2-24-70	#114	Fil DESIGNATION OF THREE-JUDGE COURT - designation of Judges Craven and Butzner, Circuit Judges, and Judge James B. McMillan, District Judge	
2-24-70	#115	Fil certificate of mailing - notification and request for designation of three-judge court and designation of three-judge court	
2-24-70	#116	Fil Tender of Evidence Nunc Pro Tunc and Objections by Defendants, together with Affidavits of Dr. William C. Self, J. D. Morgan, Louis W. Alexander, Herman J. House and Robert L. Deaton and tender of evidence contained in Report of Court Consultant delivered to Court but not introduced into evidence, w/cert. of serv.	
2-25-70	#117	Fil notice of appeal of Charlotte-Mecklenburg Board of Education, Wm. E. Poe, Henderson Belk, Dan Hood, Ben F. Huntley, Betsey Kelly, Sam McNinch,III and Carlton G. Watkins toFourth Circuit Court of Appeals from the following orders: 1. Opinion and Order dated 4/23/69; 2. Two Orders dated 6/4/69; 3. Opinion and Order dated 6/20/69; 4. Order dated 8/15/69; 5. Order dated 8/29/69; 6. Order dated 10/10/69; 7. Order dated 11/7/69; 8. Order dated 12/1/69 and opinion; 9. Order dated 12/2/69; and 10. Order dated 2/5/70, - together w/findings of fact and conclusions of law in support of foregoing orders. Copies of notice to J. LeVonne Chambers, Ralph Moody, and Andrew A. Vanore, Jr.	
2-25-70	#118	Fil appeal bond, cash bond in amount of $250.00 - R#47334	
		(Cont'd on page 9)	

D. C. 110A Rev. Civil Docket Continuation

DATE		PROCEEDINGS
2-25-70	#119	Fil notice of three-judge court to consider current matters before Judges Craven, Butzner and McMillan, at US District Court, Charlotte, N. C., at 10 A.M., Tuesday, March 10, 1970. Copies mailed - certified, return receipt requested - to additional parties, defendant. Copies mailed to other counsel by regular mail.
2-25-70	#120	Ent & Fil Order (JBM) additional party defendants made parties - Hon. Robert W. Scott, Hon. A. C. Davis, Hon. W. K. McLean, Tom B. Harris, G. Don Roberson, A. Breece Breland, James M. Postell, W. E. Rorie, Jr., Chalmers R. Carr, R. T. Wilson, Concerned Parents Association, James H. Carson, Jr., and W. H. Booe. Plts. directed to prepare and file on or before Monday, March 2, 1970, proposed findings of fact and conclusions of law and a proposed order, and brief in support of their position. Other parties directed to prepare and file on or before Friday, March 6, 1970, proposed findings of fact and conclusions of law and a proposed order, and brief in support of their position. CO VOL. VI, #91
2-26-70	#121	Fil answer of Defs. N. C. STATE BOARD OF EDUCATION , Dr. A. Craig Phillips, Superintendent of Public Instruction, Robert H. Scott, Governor of the State of North Carolina, A. C. Davis, Controller of the State Department of Public Instruction, and William K. McLean, Judge of the Superior Court of Mecklenburg County to Motion to Add Additional Parties Defendant and for Further Relief, w/certificate of service.
2-26-70	#122	Fil report to Judge McMillan by Supt. Self of Charlotte-Mecklenburg Schools
2-27--70	#123	Fil Plaintiffs' motion to add additional parties defendant and for further relief
2-27-70	#124	Fil motion of plaintiffs for temporary restraining order and for contempt, with certificate of service
2-27-70	#125	Fil plaintiffs' request for admission, to be served on pltfs.' attorneys within ten (10) days - w/cert. of service
3- 2-70	#126	Fi l copy of application for stay, w/accompanying papers, directed to Judge J. Braxton Craven, Jr., Circuit Judge
3- 2-70	#127	Fil motion for hearing on Superior Court Order in Civil 2631
3-2-70	#128	Fil Deposition of J. D. Morgan
3-2-70	#129	Fil Deposition of William C. Self
3-2-70	#130	Fil Deposition of D. J. Dark
3-2-70	#131	Fil Deposition of E. D. McMillan, Jr.
3- 2-70	#132	Fil motion to dismiss and vacate order (making Concerned Parents Assn. additional defendant) by their counsel, Wm. H. Booe, w/cert. of service
3- 2-70	#133	Fil motion to dismiss and vacate order (making Harris, Roberson et al. additional parties defendant), w/cert. of service
3- 2-70	#134	Fil motion for continuance, w/cert. of service.
3- 3-70	#135	Fil Plaintiffs' proposed findings of fact, conclusions of law and order, together w/brief and cert. of serv.
3- 2-70	#136	Fil Defendants' Application for Order
3- 2-70	#137	Fil Plaintiffs' Brief in Support of their Motion for a Temporary Restraining Order and for Contempt
3- 3-70	#138	Fil Motion of Defendants, State Officials, for Continuance, together with Notice of Motion
3- 3-70	#139	Ent and fil order continuing three-judge hearing to 10:00 AM on Tuesday, March 24, 1970. Copies mailed all counsel of record. CO-Vol. VI-#98

(Cont'd on page 10)

DATE		PROCEEDINGS	Date Judgment
3- 3-70	#1[illegible]	Ent and fil Amendment, correction or clarification of order of February 5, 1970. Copies mailed to all counsel of record. CO-Vol. VI-#99	
3- [illegible]	#[illegible]	Fil Plaintiffs' List of Additional Exhibits and Proposed Evidence w/cert. of service	
3- 5-70	#142	Fil Defendants' answers and objections to plaintiffs' Request for Admission, w/cert. of serv.	
3-5-70	#143	Fil Motion of Robert Morgan, Attorney General of N. C. requesting that the Honorable James B. McMillan disqualify and remove himself from the panel assigned to hear this case; w/certificate of service.	
3- 5-70	#144	Fil School Board's Report to Judge McMillan for the week ending March 5, 1970	
3- 6-70	#145	Fil Objections to Plaintiffs' List of Additional Exhibits and Proposed Evidence	
3- 6-70	#146	Fil Motion of William H. Booe, et al, to Recuse and Disqualify	
3-6-70	#147	Fil motion for relief from conflicting orders from the courts , w/certificate of service	
3-6-70	#148	Ent & Fil Order (JBM) motion filed by Atty. Gen. requesting Judge James B. McMillan to disqualify himself from three-judge panel denied . CO VOL. VI, # 101	
3-6-70	#149	Ent & Fil Order (JBM) motion to recuse and disqualify by William H. Booe, disallowed. CO VOL. VI, # 102	
3-6-70	#150	Ent & Fil Order (JBM) objections of defendants to requests for admissions submitted by plaintiffs overruled, and defendants directed to answer all requests for admissions, under oath, in full, not later than Fri., March 13, 1970. CO VOL. VI, #103	
3-6-70	#151	Ent & Fil Order (JBM) order heretofore signed by Judge Snepp in Civil Action #2631 in Superior Court of Meck. County hereby suspended and held in abeyance and of no force and effect pending the final determination by a three=judge court or by the Supreme Court of the issues which will be presented to the three-judge court; and, that the Moore Case, No. 2631, be referred to the three-judge court on March 24, 1970, for such hearing and determination as that court may find proper. CO VOL. VI, # 104	
3-6-70	#152	Ent & Fil Order (JBM) court directed to prepare and file with Clerk of this court not later than Fri., March 13, 1970, all evidence they would like the court to consider hearing upon factual questions referred to in March 5, 1970 order of Court of Appeals; counsel for all parties directed to produce upon written request of opposing counsel all documents, etc. requested by opposing counsel; counsel directed to appear before the court at 2 P.M., Monday, March 16, 1970 for purpose of examining such evidence as may then be available, etc.; if further hearing is necessary after conference among court and counsel scheduled for March 16, 1970, it will be conducted on Tuesday, March 17, 1970, at 10 A.M. CO VOL. VI, # 105	
3-6-70	#153	Ent & Fil Order (JBM) parties directed to procure and supply the court by March 13, 1970, with information and stastitics. CO VOL. VI, #106	
3-9-70	#154	Fil motion to The Honorable, The Chief Judge of the United States Court of Appeals For The Fourth Circuit by Attorney Gen. of N. C., Robert Morgan, requesting that The Honorable James B. McMillan be disqualified and removed from the panel of the three-judge court.	
3-9-70	#155	Ent & Fil Order (Chief Judge, Fourth Circuit of Appeals, Clement F. Haynsworth, Jr.) denying motion that Judge McMillan be disqualified and removed from panel of three-judge court. CO VOL. VI, # 109	
3-9-70	#156	Fil notice of deposition - depositions of James H. Carson and Dr. John A. Finger and J. D. Morgan to be taken by plaintiffs on March 11, 1970 , w/ certificate of service.	

(continued)

D. C. 110A Rev. Civil Docket Continuation

DATE		PROCEEDINGS	Date Ord Judgment
3-11-70	#157	Fil motion to quash subpoena for taking deposition of J. D. Morgan, w/certificate of service	
3-11-70	#158	Fil plaintiffs' response to defendants' motion to quash subpoena, w/certificate of service	
3-11-70		Hearing - WW - on defendants' motion to quash subpoena for taking deposition of J. D. Morgan - Court ruled deposition should be taken at 5:00 P. M., 3-11-70.	
3-12-70	#159	Fil stipulation - by pltfs. and State Supt of Public Instruction and State Board of Education - re enrollment in public schools of N. C.	
3-12-70	#160	Fil Report of School Board to Judge McMillan	
3-13-70	#161	Fil Brief in behalf of Robert W. Scott, Governor of North Carolina; State Board of Education; State Superintendent of Public Instruction; A. C. Davis, Controller; William K. McLean, Judge of the Superior Court, and James H. Carson, Jr., Member of the North Carolina General Assembly. Copies mailed to Judges Craven and Butzner.	
3-13-70	#162	Fil Submissions to Court in Response to March 6, 1970 Order and Motion for Extension of time, including Maps requested by Court Order of March 6, by def. Affidavit of Herman J. Hoose, Director of Traffic Engineering for city of Charlotte att., w/cert. of service.	
3-13-70	#163	Fil Def's Response to pltf's Request for Admissions; w/cert. of service.	
3-13-70	#164	Fil Motion for Public Hearing or Presence of Court Reporter at Conference. w/certificate of service.	
3-13-70	#165	Fil Adoption of Attorney General's Brief on Behalf of the Defendant Board of Education and the Individual Board Members. w/cert. of service.	
3-16-70	#166	Fil Findings of Fact and Conclusions of Law submitted by Robert Morgan, Attorney General. Copies to Judges of Three-Judge Court.	
3-16-70	#167	Fil Deposition of J. D. Morgan.	
3-16-70	#168	Fil Deposition of James H. Carson, Jr.	
3-16-70	#169	Fil Deposition of John A. Finger.	
3-16-70	#170	Fil plaintiffs' submission of additional data pursuant to order of the court of March 6, 1970 (plus exhibits), w/certificate of service	
3-17-70	#171	Fil submissions to Court on behalf of defendants (affidavits of John W. Harrison, J. D. Morgan, John W. Harrison Sr., and letter from Chas. M. Lowe to Wm. E. Poe - all dated March 16, 1970)	
3-17-70	#172	Fil defendants' submissions pursuant to orders of March 6, 1970, w/ cert.	
3-17-70	#173	Fil submissions to Court in response to March 6, 1970, order (data), w/certificate of service.	
3-18-70	#174	Fil plaintiffs' list of additional exhibits , w/certificate of service	
3-18-70	#175	Fil objection to further submission by plaintiffs of exhibit 30, part II, w/certificate	
3-19-70	#176	Fil Transcript of Proceedings of March 16, 17, 1970.	
3-19-70	#177	Ent and Fil Order (JBM) for deposition of Mr. J. D. Morgan, and allowing Exhibit 30 to be filed with Clerk, and that all parties be accorded opportunity to examine same. Copies to Counsel of record. CO Vol. #V1 #113	
3-19-70	#178	Fil Report to Judge McMillan of William C. Self, Superintendent of Schools.	
3-20-70	#179	Fil Brief in behalf of Tom B. Harris, G. Don Roberson, A. Breece Breland, James M. Postell, William E. Rorie, Jr., Chalmers R. Carr, Robert T. Wilson, and William H. Booe. w/certificate of service.	
3-23-70	#180	Fil COPY of Renewal of application for stay of portion of court order of February 5, 1970 as amended by order of March 3, 1970	
3-23-70	#181a & b	Fil copy of Judge McMillan's supplementary findings of fact and supplemental memorandum submitted toU.S.Court of Appeals, Richmond,dated 3/21/70	

DATE		PROCEEDINGS	Date Order or Judgment
3-23-70		Issuing summons making additional parties	
3-23-70	#182	Fil Defendants' Response to Plaintiffs' Supplemental Exhibit of March 20, 1970, with certificate of service.	
3-24-70	#183	Fil Plaintiffs' Memorandum of Additional Points of Authority. w/cert. of service.	
3-25-70	#184	Ent and fil order noting exceptions to order by Court on 3-6-70 disallowing motion to recuse and disqualify filed by Wm. H. Booe and others. CO-Vol. VI-#122.	
3-25-70	#185	Ent and fil order staying time table for implementation of this court's order of 2-5-70 until September 1, 1970. CO-Vol. VI-#123. JBM Copies mailed to counsel of record.	
3-26-70	#186	Fil by Defendants Charlotte-Mecklenburg Board of Education and individual members, objections and exceptions to Supplementary Findings of Fact of March 21, 1970, and motion for modivication and clarification thereof	
3-26-70	#187	Fil Notice of Appeal by plaintiff. Copies mailed to counsel of record.	
3-31-70	#188	Fil Plaintiffs' appeal bond in sum of $250.00 - United States Fidelity and Guaranty Company, surety	
3-30-70	#189	Fil Marshal's return of service of summons, complaint and exhibits for plaintiffs on additional defendants, executed by serving Whiteford S. Blakeney (individually and as attorney) and William H. Booe (individually and as attorney), representing Mrs. Robert Lee Moore et al., additional parties-defendant - on March 23, 1970	
4- 2-70	#190	Fil Deposition of J. D. Morgan, taken 3/19/70 - 98 pages	
4- 2-70		Certifying record to Clerk, USCA, Richmond	
4- 6-70	#191	Fil Further Findings of Fact on matters raised by March 26, 1970, Motions of Defendants (original filed by Court with Clerk, USCA)	
4-29-70n	#192	Fil Opinion - Three Judge Court - Copies to counsel.	
6- 9-70	#193	Fil copy of order USCA - Judge Craven's order of disqualification and memorandum of decision	
6-22-70	#194	Ent & Fil Final Judgment (JBC-JDB-JBM) - N. C. General Statute 115-176.1 prohibiting assignment by race and bussing be and is hereby held unconstitutional; pltfs. motion to hold defendants in contempt denied; various motions to dismiss are denied. CO VOL. VI, #208 - Copies to counsel	
6-30-70	#195	Fil Submission Pursuant to Order of Court of Appeals for the Fourth Circuit w/certificate of service and exhibits A (HEW's plan for the establishment of a unitary system for the Charlotte-Mecklenburg School District; exhibit B (Statement of Board Minority Members); and, exhibit C (Resolution).	
7- 2-70	#196	Fil Notice of Appeal to Supreme Court of United States by Defs. Scott, Davis, McLean, N. C. State Board of Education and Phillips. Copy mailed to counsel for all parties.	
7-7-70	#197	Fil Plaintiffs' Response to the Defendants' Submission to Order of the Court of Appeals for the Fourth Circuit. w/cert. of service	
7-13-70	#198	Fil deposition of John P. Cross, July 8, 1970	
7-13-70	#199	Fil deposition of Henry L. Kemp, July 8, 1970	
7-14-70	#200	Fil deposition of Dr. Carlton G. Watkins - July 8, 1970	
7-14-70	#201	Fil deposition of William E. Poe - July 10, 1970	
7-14-70	#202	Fil motion for leave to participate as amicus curiae	
7-14-70	#203	Ent & Fil Order (JBM) granting leave for the United States to appear and participate in the July 15, 1970 hearing respecting the HEW plan. CO. VOL. #217 Copies mailed to counsel	

Continued on Page 13

D. C. 110A Rev. Civil Docket Continuation

DATE		PROCEEDINGS
7-15-70	#204	Fil Deposition of J. D. Morgan.
7-15-70	#205	Fil Deposition of Dr. William C. Self.
7-17-70	#206	Fil objection and exception to certain portions of final judgment of 3-judge court by additional parties-defendant, signed by Judge McMillan; also object to the signing and entry of the judgment. Copies to Mr. Waggoner, Hon. Robt.Morgan, Mr. Chambers, and Mr.Booe (who submitted paper). (CO V7 #8)

Docket Entries

Motion for Further Relief

(Filed September 6, 1968)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

CIVIL ACTION NO. 1974

JAMES E. SWANN, *et al.*,

Plaintiffs,

and

THE NORTH CAROLINA TEACHERS ASSOCIATION, a corporation,

Plaintiff-Intervenor,

—vs.—

THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public corporate,

Defendant.

The plaintiffs and plaintiff-intervenor, by their undersigned counsel, respectfully move the Court for further relief in the above-styled cause, and, as grounds therefor, show the Court as follows:

1. This cause was initially filed by plaintiffs on January 15, 1968, seeking injunctive relief against the racially discriminatory practices and policies of the defendant in the operation of the Charlotte-Mecklenburg Public Schools.

Plaintiffs challenged at that time (a) the attendance zones of the various schools which limited or restricted desegregation; (b) the exception by the School Board of 10 Negro schools from attendance zoning; (c) the use of freedom of choice imposed on attendance zoning, permitting students assigned to integrated schools to transfer out, thus resegregating the schools and (d) the failure of the board to take immediate and effective steps to desegregate teachers and staff personnel.

2. Following the hearing of this cause in July, 1965, the District Court entered an order dated July 14, 1965 approving of the plan adopted by the school board providing for attendance zones for 99 of the 109 schools, exception of the 10 Negro schools from geographic attendance plan, transfer of pupils from integrated schools to segregated after initial assignments, and modification of the plan with respect to teachers, requiring immediate integration of teachers. The United States Court of Appeals for the Fourth Circuit affirmed the District Court order on December 24, 1966, reasoning that the 10 excepted Negro schools had been closed, that there was no affirmative duty on the school board to act consciously for the purpose of achieving the maximum mixture of races in the schools, and holding further that any party may apply to the District Court for further relief or for modification of the District Court order, the United States Supreme Court decided *Greene* v. *County School Board of New Kent County*, —— U.S. ——, 20 L.ed.2d. 727; *Monroe* v. *Board of Commissioners of the City of Jackson*, —— U.S. ——, 20 L.ed. 2d 733, and *Raney* v. *Board of Education of Gould School District*, —— U.S. ——, 20 L.ed. 2d 727, and the United States Court of Appeals for the Fourth Circuit decided *Brewer* v. *School*

Board of the City of Norfolk, —— F.2d —— (Fourth Cir. #11782, May 31, 1968). It is clear from these decisions that the further modification of the District Court order of July 14, 1965, is warranted.

3. Since the District Court order of July 14, 1965, the school board has closed the 10 Negro schools, excepted from the geographic attendance program of 1965 and has established new boundary lines for the schools. In addition, the school board has constructed and made additions to several new schools. The new boundary lines established and the placement of the new schools and additions to existing schools were designed and have had the effect of perpetuating segregation in the school system. The defendant has also continued the free transfer provisions allowing students to transfer out of integrated schools and has failed to take appropriate steps to completely desegregate staff and school personnel.

4. Specifically:

(A) Defendant has perpetuated attendance area school districting in such manner as to maintain and perpetuate segregated schools. The all-white, all-Negro and tokenly integrated schools in this system result from racially gerrymandered school districts, the use of attendance areas based on racially segregated and developed housing, both publicly and privately contrived, the use of a feeder system which perpetuates the racially segregated system as existed before *Brown* v. *Board of Education*. This practice has been condemned both by the Supreme Court and by the United States Court of Appeals for the Fourth Circuit. Alternative methods exist here for complete disestablishment of the segregated system, and, under the decision cited

above, the school board is required to pursue these alternative methods.

(B) Defendants use of the freedom of choice or free transfer plan is clearly for the purpose of perpetuating segregated schools. The use of freedom of choice in this system, imposed on geographic attendance zones where the results have been to perpetuate segregated schools, has been condemned by the Supreme Court and the United States Court of Appeals for the Fourth Circuit. Under the decisions cited above the school board is constitutionally required to eliminate this practice.

(C) Defendant's "feeder system" has also been used to perpetuate racial segregation of students. This system, as used by the defendant, tends to filter Negro and white students, who initially began their education in segregated elemetary schools, into segregated junior and senior high schools. Such a system, if properly oriented, may be a constitutionally permissable step in the integration of the public schools. See *Monroe* v. *Board of Commissioners of the City of Jackson, supra.* However, where such a system is used to perpetuate segregation, as here, it violates the requirements of *Brown* v. *Board of Education.*

(D) Defendant has failed to take immediate and effective steps to desegregate its teachers and school personnel. Where such integration has taken place, the school personnel assigned have consisted primarily of librarians, music, art, reading and Special Education teachers. Schools with large Negro or white student enrollments have fairly completely segregated faculties. This practice fails to meet the constitutional mandate of the Supreme Court, the United States Court of Appeals for the Fourth Circuit and the Court order entered in this case.

(E) Defendant has followed a practice and policy of discrimination against predominantly or all-Negro schools by providing them with inferior educational programs and facilities. Defendant has maintained ability grouping ("advanced," "regular," and "basic") systems in predominantly white schools. Negro students in predominantly white schools, are for the most part, relegated to the lower groupings and given little opportunity to reach the "advanced" levels. In general, the curriculum in the white schools is broader and more varied than that in the Negro schools.

Defendant has failed to provide adequate funds for building and school construction and the purchase of needed school facilities at the all-Negro or predominantly Negro schools. Funds even though immediately allocated to Negro schools have been diverted to white schools often to the detriment of the Negro schools. Moreover, even with the construction of new schools or the additions to existing schools, the effect has been to limit the integration of schools. There is presently no plan for the construction of new schools which would bring together a highly integrated student body.

WHEREFORE, plaintiffs respectfully pray that this matter be set for hearing at the earliest possible date and that upon such hearing the Court permanently enjoin defendant:

(1) to present a plan within a period of time that will permit its implementation at the beginning of the 1969-70 school year, establishing school zone lines, school and grade consolidation, or both, in order to completely desegregate all schools in the school system, and to eliminate the racial identity of the various schools;

Motion for Further Relief

(2) to completely desegregate all teachers and school personnel in the school system so that for the 1969-70 school year the percentage of Negro and white teachers and school personnel in all schools in the system will approximate the number of Negro and white teachers in the school system;

(3) to cease planning and constructing schools, additions to schools, and school facilities on the basis of race and color. In this connection, that the defendant be enjoined to present to the Court, with copies being served upon plaintiffs, a report of any planned construction, addition, alteration or closing;

(4) to eliminate, effective with the beginning of the 1969-70 school year, any and all disparatives in school facilities, school buildings, curriculum and equipment;

(5) to discontinue and eliminate any and all other practices in the school system based on race and color.

Plaintiffs further pray that pending a full and complete implementation of the Order of the Court that the Court retain jurisdiction of this cause; that the plaintiffs be awarded the causes herein and granted such other and further relief as the Court may deem equitable and just.

Motion for Further Relief

Respectfully submitted,

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Durham, North Carolina

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New York, New York

Attorneys for Plaintiff

Answer to Motion for Further Relief

(Filed September 6, 1968)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

CIVIL ACTION No. 1974

JAMES E. SWANN, *et al.*,

Plaintiffs,

—VS.—

THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

Defendant.

The defendant, answering the motion of the plaintiffs filed herein on the 6th day of September, 1968, says and alleges

1. The allegations of paragraph 1 deal with matters and things appearing of record in this case and this defendant is not required to either admit or deny said allegations, except that it is alleged that this cause was initially filed on January 12, 1965.

2. The allegations of paragraph 2 deal with matters and things appearing of record in this case and this defendant is not required to either admit or deny the same except that it is denied that further modification of the District Court order of July 14, 1965 is justified.

Answer to Motion for Further Relief

3. Answering the allegations of paragraph 3, it is admitted that since said Court order of July 14, 1965, the defendant has abolished the dual school system as it relates to race, has made some necessary changes in boundary lines of attendance areas, has constructed and made additions to new schools and old schools and has permitted pupils to transfer from one attendance area to another when there was sufficient room in such other attendance area to accommodate the pupils. Except as herein admitted the allegations of paragraph 3 are denied.

4(A). The allegations of paragraph 4(A) are denied.

4(B). Answering the allegations of paragraph 4(B), this defendant denies that the transfer plan permitting pupils to transfer from one attendance area to another has been for the purpose of perpetuating segregated schools and this defendant alleges that such transfer plan has been used by pupils without regard to race and has proven of value and convenience to pupils without regard to race.

4(C). The allegations of paragraph 4(C) are denied.

4(D). The allegations of paragraph 4(D) are denied.

4(E). The allegations of paragraph 4(E) are denied.

Wherefore, the defendant prays the Court that the relief demanded by the plaintiffs in said motion be denied, that this action be dismissed and that this plaintiff recover its cost and have such other and further relief as it may be entitled to receive.

Brock Barkley
Attorney for the Defendant
814 Law Building
Charlotte, North Carolina 28202

Transcript of Hearing March 10, 1969

[18] • • •

All right, the plaintiffs may proceed with their testimony.

Mr. Chambers: We would like to identify Plaintiff's Exhibit #1, Defendant's answers to plaintiff's interrogatories of September 9, 1968, defendant's answers being dated October 31, 1968.

Court: This is the defendant's answers?

Mr. Chambers: Yes, sir, defendant's answers. As Plaintiff's Exhibit 2 the defendant's answers to plaintiff's interrogatories of January 31, 1969, defendant's answers being dated March 3, 1969. We would like permission of the Court to substitute the original of these answers now on file with the Clerk in lieu of our copies.

Court: I was looking at the exhibit and didn't realize you were asking a question. You asked if the original might [19] be substituted, it may be, yes.

Mr. Chambers: Plaintiff's Exhibit 3, Collective Exhibit 3, consists of the depositions of Mrs. Gertrude Coward, Mr. James Burch, Mrs. Mary Jane Kistler, Dr. Robert C. Hanes, Mr. Joseph Frankford, Mr. John B. Phillips; Mr. William L. Anderson, Mrs. Ann Hausmann, Mr. Carroll C. York, Mr. John W. Harrison, Mr. Henry L. Smith, Mr. Ralph W. Eaton, Mr. Herbert L. Puckett, Mr. James Clark, Mr. J. B. Davis, Jr., Dr. James Mikaelson, Mrs. Dorothy Boone, Dr. Leslie Bobbitt, Dr. William C. Self, and Mr. William E. Poe.

Plaintiff's Exhibit #4 I'd like to identify an overlay showing the racial housing pattern in the City of Charlotte.

Court: That's an overlay on itself or on something else?

Mr. Chambers: It's an overlay of the County map of the various district lines of the School Board.

Mr. Chambers: Prepared by Mr. Green. We will call him as the first witness. We just wanted to identify them

now. As Plaintiff's Exhibit 5, a census tract map of Mecklenburg County for 1960.

Court: What is a census tract map?

Mr. Chambers: The Bureau of the Census prepares various districts for the County for census purposes.

Court: What does a tract mean?

[20] Mr. Chambers: That is the district, the tract itself.

Mr. Barkley: We are not admitting the competency.

Mr. Chambers: Plaintiff's Exhibit 6, we have a racial breakdown on the census tract map showing the percentages of non-whites in the various tracts in the City of Charlotte as of 1960. As Plaintiff's Exhibit 7 we have an overlay of that census tract map showing the racial composition as of 1968, October 31, 1968. As Plaintiff's Exhibit 8 we have a map showing the income for family in the various tracts of Mecklenburg County as of the 1960 census. As Plaintiff's Exhibit 9 we have a zoning map for the City of Charlotte for 1947.

Court: Mr. Chambers, we have some visitors in the back who may be personally involved in the suit. Is the nice looking lady in the back row in charge of these folks? Are you the teacher?

Voice from the Audience: Yes, I am.

Court: If you'll tell us who you are, we'll be glad to welcome you to the court as long as you want to stay.

Mrs. Kelley: Thank you. I am Betsy Kelley, member of the School Board and this is a group of students from St. Gabriel's Elementary School, eighth graders.

Court: We are glad to have you with us, Mrs. Kelley.

Mr. Chambers: Plaintiff's Collective Exhibit 10, zoning ordinance for the City of Charlotte 1968 and the [21] zoning maps with index for the City of Charlotte 1968. Plaintiff's Exhibit 11, copy of zoning ordinance for the County of Mecklenburg.

Colloquy

Court: Is that current?

Mr. Chambers: Current. Plaintiff's Exhibit 12, a publication of the Charlotte-Mecklenburg Planning Commission entitled The Next 20 Years with the map showing the recommended residential zoning and industrial zoning for the next twenty years for the City of Charlotte. Plaintiff's Exhibit 13, a map showing the major thoroughfares for the City of Charlotte dated June 1, 1968. Plaintiff's Exhibit 14 a map showing the urban renewal areas for the City of Charlotte dated November, 1968. Plaintiff's Exhibit 15, a publication of the Charlotte-Mecklenburg Planning Commission entitled Residential Blight in Charlotte dated September, 1962. Plaintiff's Exhibit 16, a copy of a publication of the Charlotte-Mecklenburg Planning Commission entitled Review of Community Facilities, dated 1964. Plaintiff's Exhibit 17, a copy of publication by the Charlotte-Mecklenburg Planning Commission entitled A Statistical Summary of Population and Economic Data dated March, 1968. Plaintiff's Exhibit 18, publication of the City of Charlotte entitled Model Neighborhood Proposal dated April, 1967. Plaintiff's Exhibit 19, a copy of the Workable Program Report submitted by the City of Charlotte to the United States Department of Housing and [22] Urban Development, dated January 27, 1969. Plaintiff's Exhibit 20, a two volume publication of the Charlotte Area Fund prepared by the North Carolina Fund entitled A Profile of Community Problems dated 1964. Plaintiff's Exhibit 21, a publication of the Charlotte Area Fund prepared by the North Carolina Fund entitled Characteristics of Individuals in Areas Served by the Charlotte Community Action Program, dated August, 1967. Plaintiff's Collective Exhibit 22, a copy of the Code of the City of Charlotte 1946, Chapter 14; Code of the City of Charlotte 1946, Chapter 1; Code

of the City of Charlotte 1931, Chapter 5, Section 320(a), Chapter 14, Sections 483 through 486, Chapter 15, Section 544; Code of the City of Charlotte dated 1902 showing the City census Part 1 and the unofficial appendix attached to the code. Plaintiff's Collective Exhibit 23, interim reports and summary prepared by Engelhardt & Engelhardt for the Charlotte-Mecklenburg Board of Education.

Your Honor, for the purpose of the hearing we would like to identify also exhibits that are attached to defendant's answers to interrogatories which show elementary, junior high and senior high school distribution for the City of Charlotte.

We'd like to follow with Exhibit 24, a map of the City of Charlotte elementary school districts; as Plaintiff's Exhibit 25 the map of the City of Charlotte junior high [23] school districts; and as Plaintiff's Exhibit 26, the map of the senior high school districts for the school system.

Court: What vintage is that?

Mr. Chambers: 1968-69.

Court: Are they separate, you say the City of Charlotte.

Mr. Chambers: The Charlotte-Mecklenburg School System.

Court: You're still talking about the same thing. Those three are all 1969.

Mr. Chambers: 1968-69 school year. We'd like to call at this time Mr. Green.

Court: Let's take a ten minute recess.

SHORT RECESS

Mr. Chambers: In connection with Plaintiff's Exhibit 14, we have a statistical listing by the Charlotte Redevelopment Commission showing where families in the urban

renewal areas were located and we'd like to have this document attached to our Exhibit 14.

Court: All right.

Mr. Barkley: We haven't had a chance to read any of these or check them. We have agreed that we will admit that the source of the material comes from where it appears that it comes. This particular document, it doesn't show it, but we have one like it and we will admit it comes from the Redevelopment Commission.

Court: Let me see if I can put this question in a [24] light that will leave everybody at ease about it. I intend to entertain all objections to any evidence before the record is closed, but I intend to consider all evidence that is pertinent to the case that is introduced if, in my opinion, it is pertinent to the case and is not incompetent for some clear reason. But all of these exhibits are being accepted subject to your right to make any objection that appears when you have had time to study them and before the record is closed with the presumption being that the Court is going to sift the wheat from the chaff in making any decision that is made and with your objections in mind when that is done.

Mr. Barkley: It is understood that we do not admit the competency of any of this material.

Court: That's all right.

Mr. Chambers: As Plaintiff's Exhibit 27 we'd like to introduce a copy of the regulations of the Department of Agriculture dealing with the school lunch program.

CHARLES L. GREEN, a witness for the plaintiffs, having first been duly sworn, was examined and testified as follows:

Charles L. Green—for Plaintiffs—Direct

Direct Examination by Mr. Chambers:

Q. Will you state your name, please? A. Charles L. Green.

Q. What is your address, Mr. Green? [25] A. 711 Baugh Building in Charlotte.

Q. What is your occupation, Mr. Green? A. I am engaged in Marketing Research.

Q. Would you describe for the Court what this consists of? A. It consists of various studies, statistical, primarily in the development of information dealing with a number of things, socio-economic problems, the testing of radio commercials, interviewing people for consumer products, sales, any sort of information that is concerned with marketing or social problems.

Q. Does your work consist at any time of counting houses or where people live or determining where people live? A. That is correct. I have done a considerable amount of this type of work.

Q. How long have you been involved in this particular kind of practice? A. Since 1954.

Q. In studying where people live, have you concerned yourself with racial areas where people live, whether they were black or white? A. I have done a study on this, yes, sir.

Q. Have you studied residential patterns according to the income of families? A. This was in connection with the study on the white and non-white population distribution.

[26] Q. Now, were you requested, Mr. Green, to make a study of the City of Charlotte for us for this lawsuit? A. That is correct.

Q. Were you requested to do a map to show the racial housing patterns in the City of Charlotte? A. That is correct.

Q. Were you requested to do a study for the plaintiffs to show the income of families according to the census tract? A. That is correct also.

Q. Did you prepare such maps? A. I did.

Q. I show you a document which has been marked plaintiff's Exhibit 4 and ask if you prepared this document. A. I did, sir.

Q. Would you state for the record what this exhibit is. A. This is an overlay of a map of Mecklenburg County. On the overlay the census tracts are outlined and the overlay itself is color-coded by census tract as to the percentage of non-white population within the individual tract. These percentages are as of September 1, 1968. I think you should clarify that in view of the other exhibits.

Q. The overlay, Plaintiff's Exhibit 4, is a representation of the non-whites in the various census tracts as of September 1, 1968? A. Right.

[27] Q. Now I show you a document marked Plaintiff's Exhibit 5 and ask if you will tell us what that is. A. This is a blank census tract map showing the census tracts within the Charlotte area, commonly called the urbanized area of Charlotte.

Q. Who prepared that document, Mr. Green? A. The base map was prepared by the Bureau of Census.

Q. Do you know the basis for the divisions of the tracts? A. The Bureau of Census, in connection with a local committee, establishes census tracts and they try as much as possible to get homogeneous groups of population, income, size, not necessarily geographic size but the size of the population should be fairly consistent. The average of 4000 is the national average within a census tract.

Mr. Waggoner: We object to this line of testimony because it's based on what he assumes other

people have done and at best on hearsay.

Court: Is this identification necessary for any testimony he is going to give? It's a map of an area. Do I understand you're going to fill in what you want the Court to know about his testimony?

Mr. Chambers: Yes, sir.

Court: I think the objection is technically well taken. I'll sustain it.

Q. Mr. Green, is there a publication that sets out how the [28] census tracts are established? A. Yes, sir.

Mr. Chambers: I'd like to identify as Plaintiff's Exhibit 28 a document prepared by ServAnalysis of Charlotte entitled Charlotte, North Carolina, Census Tracts 1 through 54, estimates of number of households and populations by tract as of June 1, 1966.

Mr. Barkley: It's not contended that was prepared by him, is it?

Mr. Chambers: By Mr. Green. I'm just going to establish that.

Q. Would you look at that document, Mr. Green, and tell us what it is? A. It is an update of the 1960 census figures, estimated number of households and population by census tract in the '54 urban census tracts of Charlotte as of the 1st of June, 1966.

Court: Updated from—?

A. 1960 census figures.

Q. Did you prepare this document, Mr. Green? A. I did.

Q. I show you another document marked Plaintiff's Exhibit 6 and ask if you will state what this is? A. This is a

map showing by census tract the percentage of non-white population in Charlotte as of 1960. These are 1960 census figures.

[29] Q. Did you prepare that document, Mr. Green? A. I did, sir.

Q. I show you a document marked Plaintiff's Exhibit 7 and ask if you will state what that is. A. This is an overlay for Exhibit 6, which is the previous map, showing the estimated percentages of non-white population in the census tracts of Charlotte as of 1968, September 1.

Q. I show you a document marked Plaintiff's Exhibit 8 and ask if you will state what that document is. A. This is a map showing by census tracts the median family income for the Charlotte census tracts as of 1960. These also are Census Bureau figures.

Court: Is this exhibit something you prepared?

A. Yes, sir.

Court: You prepared #4, #6, #7 and#8?

A. That is correct, Your Honor.

Q. Mr. Green, would you state to the Court the procedure you followed in preparing Exhibit #4? A. Well, having the 1960 census figures and the percentages and the number of people within the various tracts according to race, I had conferences with the City Planning Commission, with the Redevelopment Board, relocation people, with real estate agents, with the Chamber of Commerce, with various and sundry people who would have some knowledge of any shift in population since 1960. We established roughly the areas [30] into which there had been population shifts, especially of the non-white. That

was really the main thing we were trying to determine, where the non-white population had migrated since 1960. Having established these areas, we were then able to work from small maps that the Planning Commission has and street by street to come up with percentages of the non-white population on these streets. This was done only in the areas of transition. There were some areas that were quite obvious there had been no change, no significant change. Having established these percentages, of non-white population, we could then equate that to numerical population. The overlay was prepared from the percentages. It is color-coded in 20% gradations.

Q. Looking at the overlay, Mr. Green, would you tell the Court the various percentages represented by the colors?

Court: Are they set out on the face of the exhibit?
Mr. Chambers: Yes, sir.

Q. Would you accompany me over here to this map and explain how this overlay is to work on the maps of the School Board? (The witness does so.) Mr. Green, where would your greatest concentration of non-whites reside? A. Your greatest concentration of non-whites would be in the areas of shaded purple. That percentage runs from 81 to 100% of non-white population, in these purple areas.

Q. That would include this section down here indicated by 23? [31] A. That would include census tract 23.

Court: Is that near Griertown?

A. Yes, sir.

Q. As you indicated just a moment ago, the overlay is based on the various census tracts? A. That is correct. The black lines on the overlay are the outlines of the census tract

boundaries. These are the census tract numbers.

Q. Now, while you're there, Plaintiff's Exhibit 8 is also based on the census tract as of 1960, is that right?

Court: This exhibit on the board, #4 and 24, this speaks as of what time, 1968?

A. Yes, sir.

Court: Go ahead.

Q. This exhibit shows the income level in the community as of 1960, is that correct? A. That is correct.

Court: You're talking now about exhibit what?
Mr. Chambers: Exhibit 8.

Q. The only difference in your Exhibits 6 and 7 and Exhibit 4 is that you show a change in the population in Exhibit 6 and 7 from 1960 to 1968. A. Right.

Q. Take the stand. (The witness does so.)

Mr. Chambers: I'd like to mark as Plaintiff's Exhibit [32] 29 copies of the census tracts 39 and 36, and as Plaintiff's Exhibit 30 copy of the census tract 38.

Q. Mr. Green, would you look at Exhibit 29 and explain to the Court what that is? A. Your Honor, this is a more detailed map of all portions of these two census tracts. They are two that are in transition as far as black and white inhabitants go.

Court: Those tracts are what?

Charles L. Green—for Plaintiffs—Cross

A. Tract 36 and Tract 39.

Court: Where is that in the town?

A. Both of these tracts are bounded on the north by the Southern Railway tracks. They are in the western part of town, West Boulevard runs through them. You get into the Clanton Park area.

Q. Would you look at Exhibit 30 and tell the Court what that exhibit is? A. This is also a more detailed map of census tract 38 which is north of Yorkmont Road. It runs over off the Revolution Park area. All three of these tracts are together. This is the northern portion and this includes also portions of the Clanton Park, Rolling Wood area.

Q. Mr. Green, you prepared the Exhibit 4, the Exhibit 6 and 7, the Exhibit 29 and 30 which you have just been testifying about. In your opinion do they truly and accurately represent the non-white population in the County of Mecklenburg? [33] A. Yes, sir, I think they do. We consider they are accurate within plus or minus 5% which, in the fields of statistics, is quite an acceptable figure.

Q. You also prepared Exhibit 8, which is the income distribution by census tract for 1960. In your opinion does that exhibit truly and accurately represent the income by census tract for 1960? A. I think that as far as Govern- figures go, that is 100% accurate.

Mr. Chambers: I have no further questions.

Cross Examination by Mr. Barkley:

Q. Mr. Green, what is your profession? A. Marketing research.

Q. Did you graduate from college in Marketing Research?

A. No, sir. My degree is Bachelor of Science on Commerce. It included courses in marketing, marketing research, statistics. At that time we were required to write a thesis for a degree and my thesis was in the field of Marketing and Research, or Polling, really, at the time.

Q. Where did you graduate? A. Washington and Lee University.

Q. When did you graduate? A. 1949.

Q. And you went into this business in 1954? [34] A. Yes, sir.

Q. For whom do you prepare charts and make surveys of this nature? Have you done this before? A. Yes. Some of my clients have included local banks in connection with the location of branch banks, the Chamber of Commerce, the Model Cities people, several insurance companies. There is a wide range of people who need and use marketing research of one kind or another.

Q. And your specialty is Marketing Research, I would figure. A. Yes, sir.

Q. Now, this overlay that you have here, Exhibit #4, it's not based on school attendance lines under any circumstances, is it? A. No. My commission was to work by census tracts.

Q. And you worked solely by census tracts? A. That is correct, yes, sir.

Q. And you have no knowledge as to the attendance areas in those particular sections? A. Not as such, no, sir. I tried to do no correlation between the two.

Q. Can you tell us the approximate distance between the southern boundary of this purple, which I believe you say is colored, and the northern boundary, just your best estimate as to the number of blocks or miles that it would be. A. Sir, would you object if I came closer?

[35] Q. Well, the northern boundary of the Negro area with the southern boundary of the Negro area, which appears to be about Dilworth Road. A. It runs up to I-85, if I am not mistaken.

Q. That is what it may be, yes. A. Well, I would estimate that that would possibly be five miles.

Q. Now what is the yellow here, the orange, what is this supposed to show? A. You have the color-coding chart on the overlay, sir. I do not have it before me.

Q. You don't remember what your code was? A. No, sir, I code so many things it's difficult to remember.

Q. Well, on your code of orange you have 61-80%, what does that mean? A. That means that within the census tracts coded in orange your estimated non-white population is between 61 and 80%.

Q. It would be between 61 and 80%? A. Yes, sir.

Q. Now, what area of the community is that, do you know? A. That is west of Pineville Road and parts of South Boulevard, your large area there.

Q. Well, would that also take in large residential areas in there? A. Yes, sir. Parts of those tracts are industrialized but the southern part of, I think it's tract 38, the lower part there, [36] has had a tremendous residential growth in the past several years.

Q. And you say that is only 61% white? A. Non-white, sir.

Q. 61% non-white? A. Yes, sir.

Q. Do I understand that a majority of the people living in the area shown by the orange color would be Negro? A. That is correct.

Q. What residential areas does it embrace?

Charles L. Green—for Plaintiffs—Cross

Mr. Chambers: Your Honor, Mr. Green would like to come down and look at the map.

Court: Go on down and look at the map.

A. I would like to look at it, sir. (The witness goes to the map.)

Q. This area here 38 and 39, first tell me, if you can, roughly where does it run? A. This is Camp Green, I believe it runs south of the Southern Railway tracks over to the Wallace Neil Road. It runs then on Byrum Drive and down to Beam Road to the Arrowood Road and then over to the Pineville Road.

Q. The southern part of that tract is Pineville Road, then? A. The boundary, yes, sir.

Court: Mr. Green, you're going to get me confused right at the beginning. I think Pineville Road runs [37] north and south and the Southern Railroad runs east and west. I'm wrong, of course, geographically, but that's the way it always seems to me. You're talking about an area west of the Pineville Road and south of the Southern Railroad generally speaking?

A. Yes.

Court: And it runs generally along the west side of South Boulevard and Pineville Road for three or four miles and extends along the Airport Road and south of that?

A. Yes, sir.

Court: What is the northern boundary, the upper boundary the way the map is hanging now?

A. The upper boundary would be the Southern Railway.

Q. And what is this neighborhood in here? A. Arrowood Road down here.

Q. And you say that is 60% black? A. Between 60 and 80%, yes, sir. You see, you have a large concentration up in these areas.

Q. What does this green mean? Is that industrial or business? A. No, sir. That means between 41 and 60% of the population is non-white. The witness returns to the stand.)

Q. Did you make the samples yourself from which you determined your estimate of the population within the area? A. I don't understand your question, sir.

[38] Q. Did you examine the residents to determine the number of Negro residents in a given area? A. Yes, we sampled. We did a great deal of visual inspection.

Q. How many people would you see during the course of your sampling? A. In certain areas there was no need to sample. In a transition area in some cases we checked each household.

Q. What are the transition streets or areas, can you tell me that? A. I can tell you by tract numbers. Would that help any?

Court: It won't mean a thing.

A. Well, your main areas are in the Clanton Park, Rolling Wood and Barringer Wood areas. You have some transition up off Tuckasegee Road. You have had a great deal over in the northeastern part of town, headed up towards North Charlotte, starting at the Seaboard Railroad tracks and working up north towards the North Charlotte area, up through Belmont and Villa Heights. That is in a tremendous state of transition. You're having some transition off

North Tryon Street. Those are the major areas of transition.

Q. Your study wasn't concerned with the white race as far as its location and transition. A. Only in respect to if you get percentages for one, you have the percentage for the other.

Q. That would be by deducting the black percentage from the [39] total, would it not? A. Yes, sir, that's correct.

> Court: Did your studies take into account thaf we've got a lot of pastureland where there used to be a lot of people living?

A. We allowed for that, yes, sir. It also takes into consideration the fact that there has been a considerable amount of demolition of housing through the Urban Renewal Programs and express right-of-ways, and such.

Q. You were really looking for transition areas, weren't you? A. I was looking for the total picture. The transition areas were the ones that we had to devote the most time to. There was no point, really, in taking a sample of the Greenville area, for instance, because that is, I would say, 100% non-white population.

> Mr. Barkley: That is all I care to ask him, if it please the Court.
>
> Mr. Chambers: Does the Court have any questions?
>
> Court: No, sir.
>
> Mr. Chambers: Thank you very much, Mr. Green.

* * * * *

[41] * * *

Daniel O. Hennigan—for Plaintiffs—Direct

DANIEL O. HENNIGAN, a witness for the plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Chambers:

Q. Will you state your name, please? A. I am Daniel O. Hennigan. The O is Othello.

Q. What is your address, Mr. Hennigan? A. 2500 Newland Road.

Q. That's here in Charlotte. A. Here in Charlotte.

Q. What is your occupation? A. I am an ordained Presbyterian Minister and a real estate broker.

Q. Would you tell the Court your educational background? [42] A. Yes. I completed the elementary and high school education, Salisbury, North Carolina; I am a graduate of Johnson C. Smith University, both college and seminary with majors in mathematics and Bachelor of Divinity.

Q. Have you had any further study since then? A. Not formally. I have attended a number of institutes in relationship to appraising and in relationship to the pursuit of brokerage work, etc. I have not pursued anything in terms of a Masters or Doctorate.

Q. Were you born in Charlotte? A. I was not. I was born in Salisbury and at the age of 2 I came to Charlotte. My father and grandparents, this is their home, and from age 2 on I have lived principally in Charlotte and Salisbury, North Carolina. Because of family reasons I did my elementary and high school education in Salisbury. However, until that time I lived in Charlotte and after which I returned to Charlotte.

Q. Where did you live when you first moved to Charlotte?

A. My home place is on Douglas Street, 2224-26, and my grandparents on my father's side have lived here as long as I can remember.

Q. Is Douglas Street in the northwestern part of Charlotte? A. It is.

Q. Is it out near Johnson C. Smith University? A. Beyond Johnson C. Smith University. Douglas Street intersects [43] Beatties Ford Road, or enters Beatties Ford Road. It does not go all the way across, just in front of the City Water Works.

Q. When you first moved to Charlotte had Beatties Ford Road developed to the extent that it is today? A. It had not. Beatties Ford Road was, of course, one of the main and respected streets and so was Douglas Street at that time and perhaps was the section where most of the echelon Negroes lived when I was a boy.

Court: What is your age, Mr. Hennigan?

A. Sorry you asked that, sir, but I am 43.

Q. Now, when you first moved to Charlotte had the Griertown area been developed to the extent that it is today? A. Grier Heights had not been developed. When I first moved to Charlotte there was some scattered families in that section. Arthur Grier developed the Griertown section I think somewhere around age 12 or 13. I was somewhere in that age range when the Grier Heights section developed as a community as such under the leadership of the late Mr. Arthur Grier.

Q. Had the Cherry section of Charlotte developed to the extent that it is today? A. The section in Cherry was a budding community and had developed to some extent but not to the extent to which it is today. Cherry, as most of

us who are settlers in Charlotte know it, is the section that was principally developed for [44] the convenience of those who were servants to the Myers Park and I believe the Dilworth area, and this characteristically is what Cherry has meant to the City of Charlotte and to us who have lived here.

Q. Would these servants be black or white?

Mr. Barkley: I don't want to be interrupting the court but we object to all of this testimony. I take it to be testimony relative to racial patterns. I don't want to keep interrupting the Court but it is understood we can object to these questions after they are all in?

Court: Yes, sir. It's all right with me if you object at any time.

Mr. Barkley: I just don't think it's competent.

Court: I have a little trouble knowing what is relevant and what isn't. This would be competent, if relevant, and I think we just have to go ahead and find out what the relevance is. There may not be any. You may object any time or later on, if you want to. The real problem is one of relevance to any question the Court has to decide.

Mr. Barkley: Yes, sir, I think relevance is more correct than my idea of incompetency. The point that I am undertaking to make is that the testimony with reference to racial patterns, residential patterns, is [45] not relevant to this case.

Court: I'd have to turn my strainer down a little finer than I have it now to say it's not relevant. So let's go on and see what he says. If it's not relevant, it will be disregarded.

Daniel O. Hennigan—for Plaintiffs—Direct

Q. Mr. Hennigan, what were basically the Negro or black sections of Charlotte when you moved to Charlotte?

Court: When is this you're talking about now, what year?

Q. What year did you move here, Mr. Hennigan? A. 1927, or '28.

Q. What basically were the Negro or black areas of Charlotte at that time? A. Greenville was a Negro community at that time. The Brooklyn area and, of course, the First Ward area, and we have mentioned already the Cherry community and of course, the Grier Heights area. These were the principal Negro communities at the time I came to Charlotte.

Court: How do you locate the Greenville area today?

A. How do I locate it?

Court: How would you describe it?

A. Generally the northwest section. Statesville Avenue back over to Beatties Ford Road and Beatties Ford Road on now to the new I-85 which, I guess, would be a natural divider. We normally consider it to be in the northwest section.

[46] Court: How far into town do you come in locating what you refer to as Greenville?

A. We come to the Seaboard Railroad. That comes across, let's see—there's a school there on Burton Street, Fairview

I believe it is, and the Seaboard Railroad track comes across there on the other side of that property and on—

Court: Generally north between Beatties Ford and Statesville Road?

A. That's right. Oaklawn Avenue, perhaps, would be the other boarder for Greenville going north?

Court: Oaklawn?

A. Oaklawn.

Court: Oaklawn is a Quartermaster Depot, isn't it?

A. No, that's on Statesville Avenue, between Graham and Statesville, and Oaklawn is, I guess, the last natural thoroughfare this side of Newland Road and the next thoroughfare going across to Beatties Ford would be I-85.

Mr. Chambers: I'd like to identify as Plaintiff's Exhibit 31 a map of the City of Charlotte as of 1950 with various census tracts and wards.

Mr. Barkley: Let the map speak for itself. We admit the source of the map is as stated on the bottom but we don't admit anything else.

Court: All right, sir.

Mr. Chambers: And as Plaintiff's Exhibit 32, census [47] population figures by wards for the City of Charlotte 1940.

Q. Mr. Hennigan, you were talking about the general Negro areas of the City as of the time that you moved

here. Coul
areas you int out by words on the Exhibit 31 the
normally c ferring to? A. Yes, I can. What we
this map s o be the Brooklyn area is designated on
First War 1 and 2. What we consider to be the
C ormally—
as i
u say that First Ward was thought of
A. No. I Brooklyn?
lyn area is
we norma that what we consider to be the Brook-
north of ed as Wards 2 and 1 on this map. What
as Wards der to be First Ward is that section
le Street and I believe it's shown here
(
Wa
isn't the line between First and Second
A. Just s rade or Elizabeth Avenue?
This is n
correct. think we have the map turned around.
north of In that particular case, that would be
that with Trade would be Wards 1 and 2 and
then tha ld be Wards 3 and 4. May I correct
area is d en being in its proper direction we find
we norm normally consider to be the Brooklyn
designat n this map as Wards 3 and 2 and what
Q. No er to be [48] the First Ward area is
Smith be ap as Wards 1 and 4.
4 would ould the residents around Johnson C.
map. Of n that map, in which ward? A. In Ward
ignation of Johnson C. Smith on this
S beyond Ward 4.

d First Ward extend west of Tryon
d not, did it?

A. It did not extend west of Tryon. It extended east of North Tryon.

Court: I had the notion that the wards were numbered starting at Tryon you just go around the clock, 1, 2, 3 and 4, clockwise.

A. That's generally correct. I believe those four wards are around Tryon Street and I believe Ward 4 is from Tryon to Graham or Statesville, basically, and then of course the Greenville area adjoining Ward 4 going in a northerly direction which is not shown on that map.

Court: Does this make a difference in reading the exhibits?

Mr. Chambers: No, Your Honor, we just wanted to indicate where the areas were.

Court: Let's go on to something else, then.

Q. Mr. Hennigan, you have had an opportunity to observe the growth and development of Charlotte since you moved to Charlotte? [49] A. Yes, I have.

Q. Now, how long have you been in real estate as a broker? A. Since the spring of 1962.

Q. Has all of that time been here in Charlotte? A. It has been.

Q. Have you in your work had an opportunity to purchase property for clients? A. I have.

Q. Have you had an opportunity to sell property for clients? A. I have.

Q. Have you had an opportunity to rent apartments or houses for clients? A. I have.

Q. Have you had an opportunity to know the City of Charlotte residentially? A. I have.

Daniel O. Hennigan—for Plaintiffs—Direct

Q. Have you in your work, Mr. Hennigan, encountered any discrimination in the sale or rental of houses?

Mr. Barkley: I'll object to that. I don't believe—how can you answer a question like that.

Court: What is the pertinence of this, Mr. Chambers?

Mr. Chambers: Your Honor, our contention here is that the residential housing pattern has developed through public and private discrimination and we propose to show through Mr. Hennigan and his experience in real [50] estate that we have had private discrimination in Charlotte in the sale and rental of housing. The Fourth Circuit Court of Appeals in the Norfolk school case indicated this would be a relevant and pertinent inquiry by the Court and we were trying to establish here that we have the housing pattern because of practices that the Court said should be considered by the District Court. I might say further that in the Fourth Circuit opinion that we are referring to, Brewer versus Norfolk City School Board, the Court specifically indicated to the District Court that the inquiry there should be whether the racial housing pattern in the City of Norfolk developed from public or private discrimination or both and that, if so, that the School Board would not be able to utilize the basic boundary lines they were then employing for the assignment of high school students to the school. This is our contention here relevant to the elementary, junior high and senior high schools.

Mr. Waggoner: We have a copy of the Brewer case and I can read the language Mr. Chambers was

referring to in its entirety, if you like. It's about one paragraph.

Court: I'm a little puzzled. You know, it's rough enough on a green judge when you allege what you're complaining about, but when you don't allege what you're [51] complaining about the theory is just a little strange, you make it even harder. You don't say anything in your pleadings about this subject you're now going into.

Mr. Chambers: In the motion for further relief we do, Your Honor.

Court: This is what I've just gotten through reading and I don't find anything in here on that point. That's not the end to inquiry on it, of course, but I just say you're launching off on a mission of your own on uncharted country as far as this case is concerned. Does it make any difference on your theory whether you do or don't prove the motive by which a pattern of living is developed?

Mr. Chamber: Your Honor—

Court: I don't think we can sit here and try the whole community and go into all the forty thousand reasons people build houses where they did as opposed to another over a forty-year period.

Mr. Chambers: We would contend that it should not make any difference. However, the Fourth Circuit said that this should be an inquiry by the District Court.

Court: Let me see the Brewer opinion.

Mr. Waggoner: Yes, sir. This is not very clear.

Court: Here it is. I don't see that an historical [52] study of why people bought, built, sold and rented houses is going to help us any, but if you want to pursue it, I'll hear what he knows about it.

Daniel O. Hennigan—for Plaintiffs—Direct

Q. Mr. Hennigan, have you encountered in your practice any discrimination in the sale, racial discrimination in the sale or rental of houses in Charlotte?

Mr. Barkley: I object to that as to the form of the question. Discrimination, I take it, is a conclusion from facts and not a fact itself.

Mr. Chambers: I'll rephrase the question.

Court: I think the objection is well taken. I don't know the history of Charlotte thoroughly but I would figure from what the place looked like twenty-five years ago that there had been mighty little built here from 1930 to about 1947, or '46, '45, and that whatever pattern was established, whatever building was done in these zones you're talking about had already been done in 1927 when he moved to town. This is a theory you're developing by an incompetent witness, I think. What he could testify about what happened after 1962 in the way of discrimination probably wouldn't be of any pertinence because you had a situation existing at that time in which the present school system operated. Am I wrong about that?

Mr. Chambers: Your Honor, I think we can establish [53] some practices of discrimination that further perpetuated the housing pattern subsequent to '62. In addition, I think that from 1929 when he moved to Charlotte until the time that he actually became involved in real estate, he can testify of his own knowledge of practices that existed that contributed to the racial housing pattern. That testimony as well as that subsequent to 1962 would clearly be competent. We have some other matters

that are now in evidence relative to discriminatory practices even prior to 1929. We didn't propose through live witnesses to go back and show exactly how every house was set up or the housing pattern developed prior to the time he came in.

Court: To make this sort of question competent, I think you just probably have to ask him for occasions he knew of that people had refused to buy, sell or rent to people of the Negro race. This is what you're talking about, isn't it?

Mr. Chambers: That's correct, Your Honor.

Court: If he knows of instances of that sort, why he can testify to that.

Q. Mr. Hennigan, do you know of any instances where Negroes have been denied the right to purchase houses in white or predominantly white areas in the City of Charlotte? A. I know of, yes, some instances where this has been true [54] I was not the collaborating broker, however, in instances where Negroes have actually gone to see houses and have offered to buy and did not have the opportunity to do so. I have had personal experience where Negroes—and I have been a part of three groups where we have sought to buy land that we could develop housing for our people or for all people and for various reasons even though signs have been on these properties, either the selling broker would come back and say either we have a contract or I'm sorry, the price has suddenly gone up, and in other instances the property was suddenly taken off the market and reappeared three and four months later.

Mr. Barkley: Your Honor, I move that answer be stricken out on the ground that it states no fact

whatsoever that would tend to show any discrimination.

Court: Motion denied.

Q. Mr. Hennigan, let me ask this; have you followed the Charlotte News & Observer in its advertisement of housing in the City of Charlotte? A. I have.

Mr. Barkley: I object to that.

Court: Objection overruled.

Q. Have you followed the Charlotte News in its advertising of housing in the City of Charlotte? A. I have.

[55] Q. Prior to 1968, Mr. Hennigan, would you state whether they advertised housing for colored and housing for white? A. This has been the pattern of advertising as long as I can remember.

Mr. Barkley: Move that be stricken, the testimony what some third party has done.

Court: Motion denied.

Q. Now, Mr. Hennigan, would you tell us further some of the specific instances you know of where Negroes have been unable to purchase houses in white or predominantly white areas? A. I was involved, I was the broker in one instance where I had a house for sale in a white community and, of course, I had a purchaser. In this instance it was not a case of a non-cooperative owner, the owner was perfectly willing to sell the house to any qualified buyer. However, upon the submission of an application for a mortgage loan, the lending institution refused to get involved on the grounds that it might cause some reprisals on the part of

their patronizing clientele if they should make a loan in this particular area.

Mr. Waggoner: Objection, motion to strike as to what the lending institution did, or reason it did the same.

Court: Motion denied.

Q. Go ahead, Mr. Hennigan. A. I think that completes that story and that was the end of that case. We, of course, could not find a lender that would make [56] a loan to this particular family in this particular instance. I had, of course, another experience where I had a house that was listed. Again, the owner had no compunctions about who bought the house. The house was for sale and the house was, of course, put on the market and was the next day bought off the market. The presumption was . . .

Mr. Waggoner: Objection.

Court: Don't tell us about presumptions. Tell us what you know.

A. All right. The house was bought off the market by a mortgage company who bought it in for a community organization that was formed in this particular community. There was an agreement when these homes were initially sold by this same mortgage company that developed the area with regard to the swimming pool. It was a covenant relationship whereby the initial owner had right to share and use the swimming pool but in the event that the property should be sold and should be sold to a client that was not desirable to this particular association, then the association had the right to buy the property back in, and the house was bought by this particular firm for this as-

sociation, and subsequently sold to a white family.

Q. Are you familiar with the development of Double Oaks? A. I am.

Q. Now what section of Charlotte is that in, Mr. Hennigan? A. Double Oaks is just beyond the Greenville area to the north [57] of Oaklawn Avenue in the northwest section of the City of Charlotte.

Q. Is that presently occupied by Negroes or whites? A. Negroes.

Q. Was there built at the same time that Double Oaks was built an apartment project that is now occupied predominantly by whites? A. In what community, sir?

Q. In the section of Charlotte near Wilkinson Blvd. A. These two projects were built, according to my recollection, about the same time and the one on Wilkinson was for whites and the one called Double Oaks was for Negroes.

Q. Are you familiar with the development of Dalebrook? A. I am.

Q. Will you tell the Court approximately where that section is located in the City of Charlotte? A. Dalebrook is in the northwest section fronting on Newland Road, bound by I-85. Incidentally, I happen to live in that community.

Q. Would you tell the Court whether a similar white section was built in the City of Charlotte at the same time by the same developer? A. Yes, sir. There were several sub-divisions at the same time being built by the same developer and these were for white and the Dalebrook community was for Negroes.

[58] Q. Are you familiar with the development of University Park? A. I am.

Q. Would you tell the Court what section of town that is in? A. Northwest section of town. It's to the west of Beatties Ford Road. LaSalle Street and I-85 and Beatties

Ford Road are the boundaries of this subdivision.

Q. Is that section or subdivision occupied by Negroes or whites? A. Negroes.

Q. Are you familiar with the development of Northwood Estates? A. I am.

Q. Would you tell the Court whether that section is occupied by Negroes or whites? A. It is occupied by Negroes. It's also in the northwest section beyond I-85. Prior to its development it was in the county, the Long Creek community. The developer was able to have it included as a part of the City of Charlotte and I'm sure it's the way it's classified currently. It is the only community outside of the city limits of Charlotte, so far as I know of, for Negroes that is incorporated as a part of the City of Charlotte.

Q. Let's indicate something on the map. Is this the area here, Northwood Estates?

Court: Is that north of I-85?
Mr. Chambers: North of I-85.
Court: And straddling Beatties Ford Road?
[59] Mr. Chambers: Yes.

A. Northwood Estates fronts on Beatties Ford Road and runs west from Beatties Ford Road about a quarter of a mile or maybe half a mile from I-85 going north.

Q. Would this be the section commonly referred to as University Park? A. That's right.

Q. That's tract 46. A. I can't see the tract but from what you say and from what I can see from here, I didn't bring my glasses—I do have an impairment—that is it.

Q. Would this be the section commonly referred to as the Dalebrook section, tract 48? A. To the east of Newland Road, bounded by Newland and I-85.

Q. That's correct? A. Yes.

Q. Mr. Hennigan, had Myers Park been developed at the time you came into the city? A. Yes. It was a developed community. However, it has developed some since that time. Dilworth was budding and the new community at the time I came.

Court: What did you say was the new community?

A. Dilworth.

Court: Dilworth is a much older community than Myers Park, isn't it, Mr. Hennigan?

[60] A. Both of them are old communities. When I say budding community, perhaps it was an expanding community at the time. I am not saying that Dilworth was beginning or a new community at that particular time, but Myers Park basically was developed and has not really developed substantially beyond the point that it was, I think, twenty-five or thirty years ago. However, the Dilworth community has had some substantial numbers of new homes built in that length of time.

Court: I think you've got it confused with business building but I don't think it matters here.

A. Well, of course, you know, we didn't really have much occasion to go into these communities unless we had a specific purpose there and that primarily would have been to perform some service. Most of what we knew is what we heard or read. So I could be in error on a lot of that.

Q. Mr. Hennigan, are you a member of the Charlotte Board of Realtors? A. I am.

Q. How long have you been a member of that organization? A. About a year and a half. October a year ago I was admitted to the Board of Realtors.

Q. Will you tell the Court what the Charlotte Board of Realtors is? A. The Charlotte Board of Realtors is a trade organization composed of persons who are interested in the real estate industry [61] or those who are practicing real estate brokerage and who subscribe to a specific code of ethics.

Q. How many Negroes are members of that Board? A. One, and that's me.

Q. Would you tell the Court your experience in becoming a member of the Board of Realtors? A. I'll be glad to. I went into real estate in 1962. Of course, there is a required state examination.

Mr. Waggoner: If the Court please, it seems this is straying quite far from the inquiry we are about today.

Court: I agree with you. Can you give us any reason for pursuing this, Mr. Chambers?

Mr. Chambers: Yes, sir. We are trying to establish, Your Honor that there was not only private discrimination but institutional discrimination in the sale and rental housing and we think in this testimony we can point out some evidence to substantiate the institutional discrimination.

Court: Now let me see where we're going. How much of your evidence is addressed to this general area, that the present Charlotte school plan is defective because once upon a time and now people practice racial discrimination in the sale and renting of houses? How big a part of your case is this?

Colloquy

Mr. Chambers: We have three witnesses we propose to [62] call to testify about the discrimination in the sale and rental of houses.

Court: Let's try the lawsuit first and then get around to that. I don't think it matters at all for the purpose of the present community problem we're dealing with why people are living now where they are now living. I'll be glad to hear you put all that evidence in but it does not help me in coming to any conclusion nor the School Board as to what we ought to do here.

Mr. Chambers: May I request of the Court whether the Court will take judicial knowledge of that fact.

Court: I'll be glad to hear your testimony on whatever you want to offer. I might take judicial knowledge of more than you can competently prove. I'd like to get to the lawsuit first.

Mr. Chambers: Your Honor, we considered it an important part of the lawsuit. We think that a showing of this further compounds the illegality of the Board's utilizing boundary lines on the pattern. If the Court feels, however, that this evidence would not be necessary, we can, of course, forego that. We would request, however, permission to depose the witnesses that we have.

Court: Well, if you've got them here it's cheaper for everybody, especially your client and including the [63] rest of us, to take the testimony while they're here. But I'm just telling you I don't see where it helps or hurts. I might be more impressed by it if you said more about it in the complaint or motion.

Mr. Chambers: We did refer in the motion, we thought, to the matter but perhaps not as clearly as we should have. We have, in fact, taken a lot for granted in the motion in terms of what the courts were now saying relative to utilization of boundary lines. We had assumed that this evidence would be some evidence that the Court would want to consider. Be that as it may, may we have a five minute recess and regroup our troops and move on to something else?

Court: Well, I'm not going to cut you off. If you want to make out a prima facie case on this theory, go head, but maybe under the circumstances that's the proper thing for you to do, but I think we're all far more interested in other phases of the case.

Mr. Chambers: Would the Court permit me to go ahead and finish with Mr. Hennigan and then go into something else?

Court: Sure.

Q. Now, Mr. Hennigan, would you go ahead and describe the problems you had in becoming a member of that Board? A. Yes. After completing the state examination and, of course, [64] opening up my business I did apply for membership in the Board and I was told that I would have to have at least three years of experience and that I would have to have an office and it would have to meet certain prescribed conditions, and etc. At the end of the third year I applied again and, of course, was told that I was not eligible for membership in that the bylaws had been changed and I would have to attend the Realtors Institute and complete Course 1. I then, of course, applied for admission to the Realtors Institute and found there was an-

other spons could guess thirty appe I did I we the e was by t had had with advi wou for the ant I g gan pa if I c I t ma me sei oth Hi co w vi

which was that I had to have three I was not a member of the Board I ly enroll in the Institute. After, I four months and conversing with some rent real estate brokers in this town or their consideration of this request, ons to sign this application form and ill and, of course, took Course 1. At I then was advised that any enrollment upon evidence that was to be received I learned that a state investigation nd that persons from the state office rlotte and had conducted an inquiry the usiness. And then on Saturday I was amination would be given and that I as a full-fledged student and I asked then take Course 2 [65] while I was eing offered the following week, in e some changes in bylaws by the time tte and I thought I'd get ahead of the and take Course 2. My examination d I did pass Course 1 and was advised ame three endorsers then, of course, hat Monday and enroll in Course 2. harlotte that Saturday afternoon and the three persons who had endorsed ne was out of the City and after a I did make an appointment with the signed it and I went back to Chapel nd was admitted tentatively on the hird person who was out of the city pplication. On Wednesday I was ad- person had sent them a telegram ex-

pressing his desire to sign and that he would do so and so I did complete Course 2. I came back to Charlotte and then went back to apply for membership in the Board and, having completed Course 1 and 2 successfully, I was advised that I could not then enroll or make application unless I got a member of the Charlotte Board of Realtors to get the application form. I could not go to this office to the Board office and myself pick up a form and fill it out and submit it for consideration. I then talked to some, I guess, sixty persons, members of the Board, and all of these declined the invitation to go get an [66] application for me and I had an attorney who worked with me and used his influence to get some of them to do so. After this I wrote the Board a letter and asked the Board of Directors if they would give me an application as a whole, hence eliminating the necessity of some one person either putting himself out in this particular way, just to pick up a form and give it to me. The Board, of course, declined, indicating that this had not been done in the past and saw no reason to break with the tradition to do this for me. I believe some four or five months later some Negroes had raised a concern that no Negro had been admitted to the Board and I believe one such person is present in this room, and this was a meeting with the Board of Realtors and some other interested persons and this group was told that there was no Negro in the City of Charlotte that would qualify for membership in the Board and they then advised the Board that they understood that I was qualified. The following day I was asked to pursue the matter again to see if I couldn't get an application. It so happened that I happened to have been in a governmental office the following day and one of the persons who was a part of this group wanted to know why I had not been admitted.

I recited the story I have just recited here and this governmental agency then turned to one of their real estate practitioners and asked if he was aware of this and in the meanwhile the conversation then ended, that this [67] Real Estate Board member agreed to use his influence to get an application for me. He picked the phone up in our presence and called the Board office and after an hour and a half of conversation by telephone he was advised that if he wanted to do this he would, of course, have to do it and suffer any consequences that may come. He assured the person at the other end of the line that he was willing to assume any responsibility for any of the consequences and if he would leave the application where he could pick it up, he would be down to get it. I got the application in that way and this same person said that he would sign it and he would use his influence to try to get another Board member to do so, and I went to the other Board member and indicated all that I had done in the pursuit of this and this person agreed to sign and then I finally got a third person. I had to have three. In addition to this I got some supplementary references from two banks and from two attorneys that I knew and had worked with down through the years who could attest to my character and this sort of thing. I believe about two months later, after a series of conferences, these conferences centered around the concern that the Board had because my application had registered interest in becoming a full member of the Board to include a member of multiple listing. I was advised that if I pursued this matter of multiple listing that I could do so but that it would go against me and that perhaps I could [68] be hurt seriously if I insisted on this.

Q. Would you tell the Court what multiple listing is?

Mr. Waggoner: If Your Honor please, I'd like to move to strike the last answer. It's based on statements attributed to other people, suppositions, it's hypothetical. It has nothing to do with this lawsuit, it's irrelevant.

Court: I think so, too. Motion denied.

A. Multiple listing is a separate organization of the Board and—

Court: You'll have to admit it's a good story, though.

A. And so is the Charlotte Board of Rental Agencies. These are sub-corporations of the overall corporation. You do have to be a member of the Board before you can become a member of multiple listings. Multiple listing is where all of the brokers who are members of multiple listing pool listings and any member has the right to show any home that has been listed and registered with the multiple listing agency. There is a key, for example, if I were a member of the multiple listing I would have a key and in the event that the house was empty I would not have to say to anybody when I wanted to go see the house or who I was bringing to see it. However, there is a code of ethics and matter of courtesy. If the home is occupied, naturally the brokers work together and in the interest of the owner the appointments are normally made through the listing broker. But all have the right to show [69] it and all have the right to sell it. The agreement is that the commission—and this is how we make our money in this field—the commission is split between the listing broker and the selling broker.

Q. Mr. Hennigan, if you were a member of multiple listing with the Board, you would have the opportunity, would

you not, to show Negroes homes in white areas that might be listed in multiple listing? A. I'd have the opportunity to show anybody a home anywhere in the City of Charlotte if it's listed in multiple listing and I would have the opportunity to take a Negro and to show a home in a white community if I were a member of multiple listing.

Court: You are not now a member of the multiple listing?

A. I am not. We entered into an agreement, sir. I consented that perhaps what they were saying might be real true and, being young in the field and being in an area all alone, I did not see I had much opportunity to wage a battle with this strong body, but I did insist that, well, there is a fee that we have to pay. Currently it's $1,200.00 to become a member and, of course, you have to be approved by the multiple listing committee and I did ask for the privilege of knowing and the privilege of joining prior to any subsequent changes in the rules or in the governing documents governing this [70] particular agency. Primarily if any increase in multiple listing enrollment should occur, I wanted the right to do this and then I also asked for the right to work and I asked the Board of Directors to use their influence among any brokers in the City of Charlotte who happened to be broadminded enough and willing to work with a Negro and I insisted that I did not particularly care for a working relationship or to force a working relationship on any who did not care to work with me. The Board agreed to use their influence to do this and also agreed to give me the privilege to join prior to any subsequent changes in the multiple listing bylaws.

Mr. Chambers: Your Honor, I'd like to mark as Plaintiff's Exhibit 32—

Mr. Barkley: I don't believe we've gotten him on the Board yet, Mr. Chambers.

A. I'm sorry, yes, you're right. After these conferences and these agreements then, of course, I was admitted to the Board membership, October a year ago. Of course, from the time I first pursued this until the time I got in was three and a half to four years.

Court: Are you selling any more houses?

A. I have not had the cooperation I anticipated. I do have some real friends, I think, at least I hope I have, but we have not been able to get down to a working relationship. I am not sure I can say just what the character of the relationship [71] is except we are good friends. We eat together, have dinner occasionally and I am on one committee that meets about twice a year and this has been the extent of my participation thus far.

Q. I show you a document marked Plaintiff's Exhibit 33 and ask you if you will state what this is. A. This is the Code of Ethics and this is published by the National Association of Real Estate Board.

Mr. Barkley: We object to that.

Mr. Waggoner: Could we take a look at this before he reads from it?

Court: Certainly.

Q. Would you state whether or not as a member of the Charlotte Board of Realtors you are governed by that Code of Ethics?

Mr. Barkley: Objection.

A. I am, yes.

Mr. Barkley: That's another third party's interest. I don't see how it's got any business in this court . . . without someone competent to identify it.

Court: He said it's a copy of the regulations under which his trade organization operates and to which he subscribes. Isn't that what he said?

Mr. Barkley: Approximately, but I wonder if I would be competent to sit on the witness stand to testify to the Code of Ethics of the American Bar Association.

[72] Court: I think you would, Mr. Barkley, as well as anybody I know.

Mr. Barkley: Well, I'll try that on Your Honor some day.

Q. I will show you another document marked Plaintiff's Exhibit 34 and ask you to state what that is. A. This is a circular that, of course, came to all members of the Board of Realtors. The date is March 8, 1968, and I did receive a copy of this and it has to do with the concern for the legislature to abolish the practice of allowing real estate brokers to list properties honoring the prerogative of the owner to say to whom this house may be sold and to whom it may not be sold.

Q. Was that sent out by—

Court: Now, what you said probably made good English but I got lost in it. That circular is in favor of—

A. To have the option to say this. As perhaps most you know, the Real Estate Board nationally objected to the recent legislature which made it unlawful for an owner to restrict in his listing agreement to whom the house may be sold and this has been one of the practices, I think nationally and certainly here in Charlotte, if an owner listed property with a real estate agent, the owner had the right to say it may be sold to whites and not to Negroes and many of these listings were accepted under this arrangement. Of course, when this [73] open housing legislation came up, then of course the real estate industry nationally was a lobbying agency against the enactment of open housing legislation. This circular, of course, came from our Board. I received a copy of it and have one in my file, asking that we use our support to write our legislators and ask them to vote against this particular bill and that the inherent right of the owner should be supported and that this should be a continuing practice.

Q. I show you a document marked Plaintiff's Exhibit 35 and if that is a circular also from the Charlotte Board of Realtors. A. This is.

Q. Did you receive such a document in the mail? A. I did.

Q. As a member of the Board of Realtors? A. That's right. Might I say this, I don't know what the record would indicate but I did respond to this circular and I wrote to our Congressmen and I did ask them to use their influence to support the bill and I think at one of our meetings it was indicated that perhaps I was the only Board member that did this.

Court: What is the date of that circular?

A. March 25, 1968.

Daniel O. Hennigan—for Plaintiffs—Direct

Court: What did they ask you to do?

A. This comes from the Board of Realtors and Home Builders Association of Charlotte. The subject is: Forced Housing. [74] It indicates that the Directors of the Board of Realtors and the Directors of the Home Builders Association hereby reassert their support of the principle of equal opportunity in the acquisition or employment of real property . . . enjoyment, rather, of real property, and the right of individuals to determine the disposition of that property, and of course it goes on to say how they feel about it and they also indicate on this letter that the forced housing measure is supposed to remove discrimination in housing and, of course, the contention at that time was that they were taking the right away from the owner and giving it to a minority group and to take one right and to give it to another was discriminatory. This is the essence of this letter.

Q. Mr. Hennigan, the section of the Code of Ethics that dealt with the right of the owner to direct how his property should be sold or rented is what section? A. This is Part 2, Article 2, and the heading is Relationship to Client, and of course this is the article that, according to the Code of Ethics, gave to the real estate broker the real tie with an owner and indicated that his first responsibility, of course, was to the owner or the person who lists property with him and his rights should be protected above all else and that this was the moral responsibility of the realtor, to uphold and protect the private interests of the owner of the property, and of course this is the article that primarily [75] gave to the realtor the strength in his claim that the right of the owner was, of course, inherent and that he then as an agent for the owner should have his first

loyalty to the owner and the request of the owner. So then the owner had the right when the property was listed with a broker to spell out how this property would be disposed of and realtor, then, of course, was bound contractually to an agreement with this owner in terms of a listing agreement.

Q. Would one be in violation of the Code of Ethics as a real estate agent if one sought to sell a house to a person of a race other than the one indicated by the owner? A. Today that is true. This, of course, in our national association and in our state association last September all of this, of course, has been legally clarified. The real estate industry has been advised that it is no longer constitutional for this to be done and any broker now listing property is in violation to list it indicating that it must be sold to a white or to a Negro or to some other ethnic group. So the listing agreements today do not carry along with it these built-in prerequisites that the owner has spelled out.

Q. You have had an opportunity to look at Plaintiff's Exhibit 4, which is this overlay here, indicating the racial composition of the census tracts of the City of Charlotte and the County of Mecklenburg, have you not? A. I have.

[76] Q. You've also had an opportunity to observe the various neighborhoods in the City of Charlotte—

> Mr. Barkley: I object to his leading now.
>
> Court: That's the poorest objection you made yet, Mr. Barkley. That's the only one you made that hasn't bothered me.

Q. Have you, Mr. Hennigan, had an opportunity to observe the various racial housing situations in Charlotte? A. Yes, I have.

Q. In other words, you know where the blacks stay and where the whites stay generally? A. Yes, I do.

Q. In your opinion does this map, overlay Exhibit 4, fairly and accurately depict where the blacks and whites stay in the City of Charlotte and County of Mecklenburg? A. It is a fair and relatively accurate picture of the housing situation today in the City of Charlotte.

Mr. Chambers: Your witness.

Mr. Waggoner: We have no questions.

Mr. Barkley: We move all the testimony be stricken out.

Court: The motion is denied but, although tremendously interesting, I'm still not sure it helps me to decide the case. Motion is denied.

Mr. Chambers: Thank you very much, Mr. Hennigan. May I approach the bench with opposing counsel?

[77] Court: Yes, sir.

(Conference is had out of the hearing of the Court Reporter.)

SHORT RECESS

PAUL R. LEONARD, a witness for the plaintiffs, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Chambers:

Q. State your name, please. A. Paul R. Leonard.

Q. What is your occupation? A. I am a Minister, ordained Presbyterian Minister.

Q. How long have you been a resident of Charlotte? A. Since June of 1964.

Q. Have you had occasion, Rev. Leonard, to study the housing patterns and practices in the City of Charlotte? A. Yes, I have.

Q. What has been your occasion to make that study? A. I made it in relation to a class in Urban Sociology that I was taking at the University of North Carolina at Charlotte and I chose the topic of Housing Patterns in Charlotte because of my relationship to the Charlotte Fair Housing Association as its President.

Q. What is the Charlotte Fair Housing Association? A. This is a voluntary association of a membership of about [78] sixty-five citizens that was formed in February of 1968 to work for an end to discrimination in the sale and rental of housing in Charlotte and Mecklenburg County.

Q. Under whom were you studying at the time that you did this paper? A. Dr. Barbara Goodnight.

Q. And would you tell the Court how you proceeded with your studies?

Court: Was that here or in Chapel Hill?

A. It was here. From work with the Fair Housing Association we had compiled by the help of the Redevelopment Commission, primarily depending upon them, we had compiled a map, drawn up a map which showed the racial patterns in housing as they existed in Charlotte in the summer of 1968. My main attempt in the paper was to see what changes had taken place and how fast over the last eight years. I had really wanted to go back further than 1960 but the census material prior to 1960 was not broken down by tracts as it is now and as it was in 1960. So the paper was primarily an attempt to compare what had happened in Charlotte in the last eight years and to ask the

question of why, what were the factors involved in the changing neighborhoods and in the racial patterns as they existed.

Q. In your work did you use census figures? A. I used census material; I used a good bit of material furnished by the Charlotte-Mecklenburg Planning Commission, one [79] report in particular. I can't quite remember the title but I think it was entitled Blight September 1962, and this report the Planning Commission had, by census tract, broken the census tracts into blocks, indicated which areas of the city were occupied by blacks and which areas were occupied by whites. So it became a relatively simple matter to use this as a basis of comparison with the present racial patterns.

Q. Did you consider any data supplied you by the Redevelopment Commission of the City of Charlotte? A. Yes, I did. I considered this in relation to the question of what had happened in those eight years.

Q. Did you consider any data supplied you by the Charlotte Public Housing Authority? A. Yes, primarily data concerning the existing housing projects and those that were planned and the racial makeup.

Q. Did you reach any conclusions? A. Yes. The major conclusion was that Charlotte is rapidly dividing . . .

Mr. Waggoner: Your Honor, we object to his giving a conclusion which is in effect an opinion. He is not qualified as an expert.

Court: Well, without couching it in terms of conclusions or estimates, tell us what you observed about the housing patterns or situations of last summer compared [80] with whatever the other time was you started with.

A. Yes, sir. I observed that the city was divided and rapidly the division was increasing between blacks and whites living . . . with whites living in the east and blacks predominantly in the west and kind of taking a line from North Tryon to the Plaza to Independence Blvd., coming south on the map following those streets I found that, according to my figures, 96% of the Negro population in Charlotte lived west of that line. There appeared to be to me, if you consider the areas that were in transition, only one area in the west that still remained predominantly white and where transition had not taken place. So I found the city divided and the division increasing.

Q. Did you have an opportunity to see any data from the Redevelopment Commission of the City of Charlotte relative to relocation of families from the urban renewal areas? A. Yes, I did.

Q. I show you an exhibit marked Plaintiff's Exhibit 14 and ask if you had a chance to see that document. A. Yes.

Q. Does that document show that families in the redevelopment areas involved have been relocated in primarily Negro areas?

Mr. Barkley: He's telling us what some other document says. Wouldn't that document be the best evidence of that?

[81] Court: It would, but if it shows that and enables me to put a label on that document while he's going at it—

A. I found that more than 50% of the families had been moved into areas which, according to the 1960 census, were high density black.

Court: What percentage?

A. 50%, and the others had been moved into areas that since 1960 had changed from predominantly white areas of residence to high density black today.

Q. You referred to a document that you used in your study a moment ago called Residential Blight. Is this a copy of the document you referred to? A. Yes, it is.

Q. And that's Plaintiff's Exhibit 15. A. Yes.

Q. Did you observe anything else relative to the public housing in the City of Charlotte? A. As I began to try to answer the question of why the racial patterns existed as they did, in looking at the makeup of the public housing racially and in a conversation with Mr. Cock, who is the assistant to Mr. Dillehay, he indicated that approximately 95% of the occupants of public housing were Negroes.

Mr. Barkley: Move to strike Mr. Cock's testimony.

Court: That testimony is technically incompetent. The [82] motion is sustained. Have you got some other way of proving those figures, whatever they are.

Q. Were you given any figures, statistics, Rev. Leonard, about the occupation of public housing racially?

Court: Consistent with my ruling, he can't testify what those figures are? Have you got them in some official publication?

Mr. Chambers: We'll have them in the morning, Your Honor. The Public Housing Authority is giving them to us this afternoon.

Court: This is a valid objection he's making and I guess I ought to sustain it as to competency of the witness to testify about what he's saying.

Mr. Chambers: That's correct.

Paul R. Leonard—for Plaintiffs—Cross

Q. Rev. Leonard, I show you a document which has been marked as Plaintiff's Exhibit 36 and ask if you will state what that document is. A. This document is a mimeographed copy of the paper I did on the housing pattern in Charlotte.

Mr. Chambers: We have no further questions.

Court: You can review that if you wish and make objection to it later. The use I would make of such a study is simply as a convenient way of having collected whatever the figures are on which he's making his conclusions. You can make your objection now and I'll rule [83] on it after I read it and find out what parts of it are really incompetent and what parts are not.

Mr. Waggoner: We noted a difference in the exhibit we have and the one introduced and by agreement of counsel we are going to substitute our Page 3 in the official exhibit.

Court: All right. 36 is the one you're talking about?

Mr. Chambers: 14, Your Honor, the list showing the relocation of families in urban renewal. We have to duplicate his copy of Page 3 and insert that in the morning.

Court: Take it away now so we can be sure we've got it right in the morning.

Mr. Chambers: All right.

Cross Examination:

Q. With reference to your study on housing patterns, did you pay any particular attention to school districts as such? A. No, I didn't. In one particular instance involved

in the paper which I reported about, this was concerning the Barringer Woods elementary school where there had been a rapid turnover of population from white to black in the year 1967-68 and, as President of the Fair Housing Association, I was involved in two community meetings in the Burringer Woods community prior to the opening of school in September of 1968 in which one black family had moved into the neighborhood and the [84] residents were coming together to ask what shall we do. In the meetings prior to the opening of the school they were pretty much in agreement to stay and not flee. They had been approached by realtors indicating that blacks would be moving in and their property values would be going down, but the day school opened the racial balance in Barringer Woods school had shifted because of the change in the other community from a predominantly white school to where there were now, according to the people, 75% black. And the—

Q. With reference to the Barringer—

Mr. Chambers: Your Honor, we request that the witness be permitted to finish his answer.

Court: Finish the rest of that statement.

A. And the day the school opened seven more houses went up for sale.

Q. Barringer Woods is a subdivision in itself, is it not? A. Yes, fifty-six homes, right.

Q. Are there any other subdivisions in that school district? A. I don't know the makeup of that district. I think that the children from Clanton Park, which is the area that had gone from all white to black, I feel the children from this must be filtering into the Barringer Woods school. I don't know.

Paul R. Leonard—for Plaintiffs—Cross

Q. Are you familiar with Rolling Wood? A. Are you talking about the school?

Q. No, Rolling Wood subdivision. [85] A. Yes, next to Clanton Park.

Q. All of these areas were all white within the past several years, were they not? A. That's correct.

Q. And now they are practically all black, is that correct? A. Right.

Q. The white people sold their homes to the colored people, is that right? A. Yes.

Q. Your study was based primarily on the census tracts as we see them on the overlay, is that correct? A. That's right.

Court: Have you talked to any members of the School Board about these problems that you were studying?

A. I have on occasion talked to one, yes, sir.

Q. Who was the one School Board member you talked to? A. Mrs. Kelley.

Mr. Waggoner: I have no further questions.

Mr. Chambers: I have nothing further. Rev. Leonard has indicated he would like to be excused unless the defendant needs him.

Mr. Waggoner: We have no objection.

Court: Thank you, Mr. Leonard.

Dr. William C. Self—for Defendant—Direct

[352] • • •

DR. WILLIAM C. SELF, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Waggoner:

Q. Would you state your name and residence address, please? A. William C. Self, 6137 Devern Drive.

Q. What is your official position with the Board of Education? A. I am Superintendent.

Q. Dr. Self, what is your training in the field of education? A. I had my undergraduate degree at Catawba College; Masters Degree and Doctorate at the University of North Carolina at Chapel Hill.

Q. What is your educational experience from a work standpoint? A. I was a teacher and assistant principal, a principal in the elementary field at Winstom-Salem; I moved from the principalship to Directorship in Instruction in the central office capacity; I was Assistant Superintendent in Instruction in Winston-Salem City Schools; moved to Charlotte as the [353] Associate Superintendent prior to becoming Superintendent. This is the second year.

Q. Dr. Self, what is the size of the staff at the Board offices at the present time? A. In terms of the professional staff I think the number is 3558 teachers.

Court: Are there any exhibits that have these figures in them?

A. I can furnish a fact sheet which has these figures in it. I have only one copy right at the moment. I mentioned the teaching staff, 3553 is the exact figure. To this you add 404 other members of the staff. You begin to get into the non-professional people, the clerical, cafeterial, custodial, maintenance, transportation, television station, and

the grand total would be slightly in excess of 5800 employees total.

Q. Dr. Self, how does this compare with other employers in the school district? A. I understand that the Charlotte-Mecklenburg School System is the largest employer in the County.

Q. With reference to the dimensions of the school district, have they always been the entire County of Mecklenburg? A. No. They have this size since 1960, the year of the consolidation of the two existing school systems. That was the Mecklenburg County System and the Charlotte City System.

[354] Q. Were these two systems autonomous of each other? A. Yes, they were.

Q. As I understand it, you came here in 1962, is that correct? A. That's correct.

Q. Were there any problems that flowed from the merger of the two systems? A. Yes, very definitely.

Q. Has this been a time consuming problem that your staff has had to meet through the years? A. Yes.

Q. With reference to the composition of the City system of schools as against the County system of schools—

> Court: Are you going to leave it right there? You say the merger created a lot of problems and I just wondered what they were.
>
> Mr. Waggoner: Judge, I don't want to stir up some things that have been buried. I wanted to show the Board has been occupied.
>
> Court: Go ahead.

Q. With reference to the racial composition of the City at the time of the merger as against racial composition of the County, do you have an opinion as to whether there were more whites percentagewise in the County than in

the City? A. I have no facts to go on. I do understand that the changing ratio of Negro to white was one of the factors that entered [355] into the deliberations about consolidation.

Q. Has this merger of the two systems facilitated integration of the student population?

Mr. Chambers: Isn't that a conclusion of law?
Court: Is that an objection?
Mr. Chambers: Objection.
Court: Overruled.

A. Would you repeat the question?

Q. Has the fact of merger of the two school systems facilitated the integration of the student population in the schools? A. I think I would answer that in the affirmative because it relieved the problem I referred to previously, at least it made it a problem of the entire county, and it also solved the problem of the tax base, the diminished tax base behind the pupils that resided in the Mecklenburg County School System.

Court: Now you're beginning to make me think it was a pretty good idea after all.

Q. With reference to the size of the present school system, do you know the approximate number of square miles in the system? A. Yes. The county is right at 550 square miles, I believe.

Q. How far is it from north to south, do you know? A. The length is approximately 35 miles and width about 23 miles.

Q. Do you have some general facts about the educational system that we have in this county that you can give to the Court? [356] A. Do I have—again, please.

Q. As I understand it, your office has distributive information sheets about the public school system and this is what I have reference to. Could you tell the Court some of the major points that may be of interest with reference to this system?

Court: Have you got that information sheet with you?

A. Yes. Are you referring to this paper, Facts about the Charlotte-Mecklenburg Schools?

Q. Yes.

Court: Let me look at that. Can I just get Mrs. Wentz to duplicate this and let you render any objection to it that you want to?

Mr. Chambers: That would be fine.

Court: It will save me taking notes. Go ahead, Dr. Self.

A. I really think what Mr. Waggoner was getting at was some indication of the size of the school system once again. If that's not what he wished, he can ask subsequent questions to get at it. The consolidation of the Mecklenburg County System and the Charlotte City System was the consolidation of the #1 and #2 systems in the State and, of course, when you combine two large school systems, as they were, you get a mammoth school system which is what we have today. At the time of the consolidation I understand that the student enrollment was right at 58,000. That was in 1960. Our size today is [357] 83,000, which indicates a prodigious growth over a relatively short period of time. There have been years when the pupil population increased by 3600 pupils. The low point in the terms of our increase

was 2000. At the present time we feel that the pace of increase in terms of our pupil enrollment has slackened off slightly and we will probably be a school system increasing by about 2500 pupils per year from this point on.

Court: Is that about 100 classrooms a year or 90?

A. If we take 2500 pupils and if we figured arbitrarily on 25 per classroom for ease of division, you'd get your 100 classrooms. We are not fortunate enough to have that 25 pupils per classroom so you would assume that's 85 or 90 classrooms that would be required. This growth has produced some terrific problems for us in terms of being able to house youngsters. At the same time that we have tried to gear construction programs to meet the increased enrollment, we have been faced with the problems of trying to update facilities that went through the war years with very little money spent on them and with very little maintenance. So it has presented something of a problem for the Board of Education to deal with.

Q. With reference to the School Board which administers this district, how are the Board members selected? A. They are selected by an election process, bi-partisan [358] election. It occurs every two years and three of the nine members of the Board of Education are elected every two years.

Q. Have you had any vacancies created by moving from the County or any other reasons on the Board of Education in the past two years? A. Yes, sir. We had a resignation by reason of a move out of the City on the part of Mr. Tom Braden.

Q. Did the Board of Education appoint someone in his place? A. Yes.

Q. What is his name? A. Rev. Coleman Carey.

Q. Will you state whether or not he is a Negro? A. Yes, he is.

Q. Has he been a candidate for the School Board in prior years? A. Yes.

Q. With reference to an elementary school, what procedure does the Board follow in deciding, or what does it do to reach the point of construction of a new school? What facts give rise to the location and selection of this particular location? A. Well, I'm sure that our studies would have revealed that this elementary school that you're talking about would have encountered housing problems for a number of years, its enrollment would have exceeded its rated capacity, and the excess of youngsters would be accommodated in existing facilities through the use of what we have called sub-standard spaces. [359] These may be basement classrooms, a classroom on a stage in an auditorium, partitioning of a larger classroom into two sections, things of this nature. In other words, there would be crowding within the elementary school. In all likelihood the neighboring schools would also be crowded. This would reflect a general tendency within the neighborhood of inability to house the youngsters in the neighborhood in the existing facilities. In all probability we would reach the point where mobile units would need to be brought into play to house the yougsters of these schools. I would have hoped that in the earliest stages we would have recognized the problem and might have acquired a site, at least, before homes were built on it, so that we would have a site available for that school. We have in the past employed architects to draw up plans and develop them to the stage of working drawings so that the moment the money becomes available we can build a school in that area. We eventually will reach the point where we must have a new facility and then we put that school down

on that particular site. We are not able to afford the luxury of overbuilding which will mean that it is quite likely that everyone of the classes would be filled the first year. As a matter of fact, it is not an infrequent occurrence that a new school may have a mobile unit. As the elementary school nears completion, Mr. John Phillips, who is the Assistant Superintendent for Elementary Education, will have called in [360] to conference the principals of these surrounding schools and enlisted their aid and the aid of the principal of the new school, too, if we are fortunate enough to have appointed him, and ask these people to join him in designating the attendance area that will be served by this school. The starting point in their deliberations will be the capacity, the number of pupils that that school will house, and in essence their problem is carve out of the surrounding school areas enough territory to give us the required number of pupils so that that school may open at capacity when it's ready.

Q. Now, these principals make recommendations to the Assistant Superintendent in charge of that? A. Yes, they do. They are encouraged also to discuss this matter with the School Committees—there is a School Committee at every school—so that there will be communication with the lay public regarding the location of these attendance lines.

Q. Now, the final act of establishing the school lines is performed by whom? A. By the Board of Education.

Q. Is this on your recommendation? A. Yes, it is.

Q. With reference to Independence High School how did it become located at its particular location? Could you give us the history of that? [361] A. Of course, the problems of overcrowding that I spoke of appeared in the neighboring high schools, Garringer and East Mecklenburg. A site was selected. We used principles of triangulation in terms of

selecting sites with a school located at each of the angles in the triangle. A piece of property was located by a real estate consultant employed by the Board of Education and negotiations were entered into to acquire the property. That deal was consummated, the property was available, the Board elected an architect and the school was built.

Court: Where is Independence High?

A. Independence High School is in the eastern section. It is off Wilson Grove Road.

Court: Wilgrove?

A. Wilgrove, I beg your pardon.

Q. Dr. Self, would you come to the large map and point that out, please. (The witness does so.)

Court: I believe that's off your map, Mr. Waggoner.

Mr. Waggoner: My map is a little dated.

Court: Is that between Central Avenue and Independence or is it above Central Avenue? It's south of Albemarle Road, isn't it?

(Conference is had out of the hearing of the Court Reporter.)

Q. Dr. Self, did the School Board own property adjacent to York Road Junior High for the purpose of constructing a high school nearby? [362] A. Yes, sir.

Q. Has a high school been constructed over in that site? A. No, it has not.

Q. What action was taken with reference to that project? A. The Board of Education had employed an architect and

the architect had developed plans up to a particular point. The Board decided that to locate the school there would be to assure that it would be totally black from then on. They abandoned the plans, instructed the architect to alter his work, acquired a site, which we now know as the Olympic site, and built the school in that area.

Q. For the purpose of the record, what area is Olympic located in? A. Southwest section, off Sandy Porter Road.

Q. Now, with reference to Randolph Junior High School, could you tell us the considerations that went into the location of that school? A. The same pattern was repeated here. There was a site available and we referred to it commonly as the Mason Wallace Junior property. It was located off Billingsly Road. Again the same factor entered into the decision of the Board of Education. That site was abandoned and another site was acquired. This was the Wagner property off of McAlway Road and Randolph Junior High School was constructed there.

Court: Is that to the south of McAlway?

[363] A. It's actually to the east, where McAlway meets—I'm sorry, the name of the other road escapes me.

Q. Dr. Self, what kind of school population does Randolph Junior High serve? A. An integrated student population. Also one that I would judge varies in socio-economic level.

Q. What action, if any, did your office take with reference to freedom of choice at that school? A. Probably you are referring to the section of the Pupil Assignment Plan which prohibits transfers out of a newly established school. The reason for that, of course, is that the Board of Education has felt that there ought not to be freedom of transfer that first year, that the school ought to have an opportunity to

establish itself. In this particular circumstance pressure was brought to bear to try to get the Board of Education to relax this particular policy. They did stand firm on it and the policy helped.

Q. With reference to Olympic, was the same rule enforced there? A. Yes.

Q. Is this also an integrated school? A. Yes, it is.

Q. With reference to the pupil assignment policy of the Board, have there been any changes in the operation of this policy since 1965? A. Yes.

[364] Q. In what way? A. It's quite difficult. Could I use an exhibit to explain it?

Q. Certainly.

> Mr. Waggoner: We have a document entitled Charlotte-Mecklenburg Elementary Schools 1968-69 and we'd like it marked Defendant's Exhibit #1.

A. Mr. Waggoner, do you have the junior high and senior high document to go along with that?

Q. This is just the elementary. A. There is another group that was with it.

Q. I don't seem to have the senior high. A. It's stapled to the junior high.

> Mr. Waggoner: Your Honor, we would offer the junior high and senior high as a composite part of Exhibit 1 for identification.

Q. Dr. Self, would you first tell the Court what Defendant's Exhibit for identification #1 is? A. In the first place, the title is quite misleading. It just says Charlotte-Mecklenburg Elementary Schools. What it is is an administrative work sheet which was used in making the recommenda-

tion to the Board of Education regarding the capacity of schools.

Court: Do you have a copy of high and junior high.

Mr. Waggoner: Yes, sir, I'm sorry.

Q. Dr. Self, if you will, identify Defendant's Exhibit for [365] identification #1. A. It's headed Charlotte-Mecklenburg Elementary Schools. As I said, the title tells you nothing and I had sought to elaborate upon it by saying that this is a work sheet that was used by the administration in making a recommendation to the Board of Education preliminarily to their setting the capacities of all of our schools. Capacity, of course, is directly related to pupil assignment and to freedom of choice because the only thing that determines whether or not a request for change of transfer is granted is whether the receiving school has space to accommodate these youngsters. It stands to reason that if you have a school capacity that is set on rather generous terms that you have a more liberal freedom of choice. With that in mind, I think we can get the gist of the paper by looking across the column headings. The name of the school is in the first column, of course; the total teaching spaces is next. That's an actual count of the number of classrooms. In this case at Albemarle Road Elementary there were sixteen classrooms. We next multiply that number of classrooms, 16, by 28, 28 being the approximate average for the elementary school grades of the system. That gives us a rated capacity for Albemarle Road Elementary of 448 students. We are not always able to have 28 per classroom. Depending upon our [366] fortunes with the General Assembly, we have gone to 30

and up. So we next get the figure in the third column, maximum capacity, by multiplying the 16 teaching spaces by 30. That would run the housing capacity of the school up to 480. We next take a look at the projected enrollment for the entire school system, Elementary, junior and senior high school youngsters, and we find that the projected enrollment invariably will exceed our rated capacity. We try to determine the percentage by which the anticipated enrollment exceeds our housing capacity and we use that percentage to multiply the maximum capacity to get an adjusted maximum capacity for the school. In this case Albemarle Road Elementary adjusted maximum capacity is 518. This is the figure which is used in terms of making a final judgment as to whether or not Albemarle Road can receive transfers by freedom of choice and the judgment is made by comparing that 518 by the projected enrollment, 431. You would judge from this that Albemarle Road can receive transfers. If you look on down to the third school, Allenbrook, the same computation gives you 518 as a maximum adjusted capacity and the projected enrollment is 530. This is in the spring of the year. If the projected enrollment exceeds the maximum capacity, we close the school immediately and will accept no pupils in there by way of transfer.

Q. It's closed to transfers is what closed means here. A. Right. The process which I have just described closed 32 [367] schools last year to freedom of choice. The reason I said there has been a change is that this computation was not done in a similar way in previous years. Let me tell you how it varied. In the first place, the teaching spaces included any sub-standard facilities like partitioned classrooms, mobile units, and the like, so it in effect inflated the number of teaching spaces. Then when you get over

to the fourth column instead of comparing the projected enrollment with the maximum capacity, we looked at the number of pupils that were actually assigned and compared it with the maximum capacity and if it did not exceed the maximum capacity we permitted transfers. Of course, the flaw in this is that the number of pupils assigned in the spring does not allow for that increase in your student population that you're sure to get during the summer months. The projected enrollment is always a larger figure than would be the number of pupils assigned. So the net difference between the operation in 67-68 and 68-69 was to close more schools to freedom of transfer. The figure in the first year was 10 schools and the figure for 68-69 was 32; 19 elementary, 10 junior high and 3 senior high.

Q. Dr. Self, where are most of these closed schools located or a reasonable percentage of them? A. I think that you'd find that the majority of them are in the white neighborhoods. The word "closed" in the righthand column indicates the exact schools that were closed, Allenbrook, [368] Ashley Park, Bain, and so forth.

Q. Was there any particular concentration of closed schools? A. I think that the majority of them were at the junior high school level.

Q. Has the Pupil Assignment Act been administered without discrimination on account of race? A. Yes, it has.

Mr. Chambers: Objection.

Court: Yes, that's a legal conclusion that has to be drawn from the evidence. Objection sustained.

Q. Dr. Self, has freedom of choice to your knowledge, or the Pupil Assignment Act permitted substantially wholesale transfers of students from one school to another?

A. That might have been the case before the tightening up process on freedom of choice. I do not think that is the case now.

Court: What is the number of the exhibit that has a listing in it of the assignments or transfers that were requested in various years, 66, 67, 68?

Mr. Chambers: Table 7 in the interrogatory, Exhibit 1; Table 7 in Exhibit #2.

Court: Dr. Self, let me ask the question about the accumulative effects of some of this. I'm looking at the table that shows 66, 67 and 68 for assignment and, for example, take Berryhill, which is about the eighth or ninth one down from the top. It shows that in '66 [369] there were 212 requests for transfers, in '67, 43; and in '68, 45. Are the requests listed for the later year duplicates of previous years or are they accumulative, in addition to those of previous years?

A. I believe they would be in addition to, Your Honor.

Court: Derita, for example, you have requests for those three years totaling 64 and those also are accumulative, I take it.

A. Yes, sir, they would be.

Court: Do you have data available from which you can determine how many school children of particular ages live within particular districts? By districts I mean the area served by a particular school.

A. I could tell you what we do have. I noticed that Your Honor was examining the grid system that is on the map. This is a school system device for locating children. We work with the various utility companies planning department in developing it. What it was was the basis for computerizing the pupil census. The county was laid out, as you see by the map, in these grid sections. There is a heavy larger grid and the larger grid is divided into four smaller grids. Each one of four small grids is a 2500 foot square. So that if you think of the larger grid you have slightly less than one mile, 5000 feet instead of 5280.

Court: On that map there it's two miles.

[370] Q. Dr. Self, would you come down to the map and demonstrate the grid you're talking about.

Court: Are you telling me that you do not have figures which develop the number of children in a particular school zone?

A. We do have figures but this was to give us a map code. Our school secretaries will take the address of each child and will code it according to the grid on the map. They can tell that the child lives in census tract 19, square #208, subsection A, and this of course is all computerized and the information can be regurgitated from the computer so that we can then go to our map and say in this one particular 2500 foot square there live 100 children. Of these 100 children so many of them are first grade, so many 2nd and 3rd and so on. We are able also to tell how many of those first grade children are white and how many are Negro.

Dr. William C. Self—for Defendant—Direct

Q. Dr. Self, do the mobile units that are utilized by the school system furnish an educational need? A. Yes, they do.

Q. Would you tell in what way you use these mobile units? A. Well, we accommodate problems of crowding. The most visible evidence of this, I think, is present at a school where you find a large number of mobile units clustered. Had we looked at McClintock Junior High School last year you would have found 17 mobile units. These mobile units were housing the [371] children who ultimately were assigned to Randolph Junior High School. They were housed there until their school was completed. The same situation was repeated at Landsdowne Elementary School—I think we had about 15 there—housing the children until the completion of the Old Providence School. As we get more and more in our construction program and deal with renovations of facilities instead of replacements or instead of additional classrooms, you will probably find the mobile units used to house the children who are displaced while the workmen are renovating the building.

Q. Are mobile units inferior classrooms? A. We have two types. The first unit that we bought was a smaller one, approximately 450 square feet. This unit is not as good as a comparable classroom that would be built in a new school. The second purchase was a larger unit. It's twice that size, approximately right at 750 square feet. This unit in a number of ways is superior to some of the classrooms in the regular building itself.

Court: What do these cost, the big ones?

A. Approximately $5,000.00.

Q. Will you describe for the Court the procedure followed in the employment of personnel?

Court: I expect we better deploy for about a ten minute break before we get to that.

SHORT RECESS

[372] Q. Dr. Self, I believe I just completed asking you about the employment policies of your office. A. The employment of personnel, the responsibility, is vested with the Assistant Superintendent for Personnel, Mr. William Anderson. The first stages of the employment are handled by his offices. There is a recruitment stage which involves a team of people from the school system, usually made up of directors and coordinators from the central office staff, principals from the schools, visiting on college campuses. We visit the college campuses of this state and surrounding states. The attempt here, of course, is to induce as many people as possible to submit an application to the Charlotte-Mecklenburg School System. Upon receiving the application the central office's responsibility is to reference each applicant, get a record of the student teaching of the candidate and make an assessment as to the potential of the person for employment in the Charlotte-Mecklenburg schools. The applications are reviewed again generally by the principal, sub-area director, if one is available, and a judgment is made as to whether or not the person will be employed. Generally speaking the person is employed on an unassigned basis. This is quite important to our employment process because we must employ people before we know whether vacancies occur. We will have the majority of our employment completed by the end of the school year.

Assignments are made later on [373] as principals review the assigned contracts of the teachers and make a judgment as to whether or not they would fit into a vacancy at their particular school.

Q. Does your office direct a principal to accept a particular teacher? A. Direct a principal to accept a particular teacher?

Q. Yes. A. No, we do not.

Q. What are the considerations on employing a teacher? . . . with reference to race being a factor. A. We are instructed by Board of Education policy to disregard race as factor in employment.

Q. What is the primary factor of employment? A. Qualifications of the candidate as best they can be determined.

Q. Are there teachers in the system who are required to have several skills or several areas of proficiency? A. Yes.

Q. Could you give us an example? A. The first example that comes to my mind are the teachers at the secondary level who would certified to teach, perhaps, in two areas, English and history, or who might teach a full teaching load and accept responsibilities in extracurricular assignments such as directing the work of the drama or newspaper activities, school annual or perhaps even coach an athletic team.

[374] Q. Do these specialties of teachers sometimes lead to problems in filling a vacancy at a particular school? A. Yes, they do. In employment of a coach, for example, you are required to fill a teaching position first and to assess his coaching competency second and he must fit into both categories.

Q. We have seen some mention of learning academies in the answers to interrogatories. Could you tell the Court

what the learning academies are? A. I can in general. If detailed information is desired, I think Dr. Hanes can testify in detail. Learning academy is an innovative educational program supported by Title 3 funds of ESEA. It was referred to in previous testimony as a PACE project.

Court: What does PACE mean?

A. I'm sorry, I do not know.

Court: Does anybody know what those letters mean?

A. The program at the learning academy is designed to help underachieving boys at the junior high school level. The program is a resident school. By that we mean that youngsters are taken out of their home environment and stay for varying periods of time at the school. The staff there uses all of their skill in trying to reinforce the youngster, get him ready to re-enter the regular academic program.

Q. What determines eligibility for a student as a member of the [375] learning academy? A. The fact that he is underachieving. By that we mean that he has ability to achieve and yet all evidence seems to indicate that he is not working up to his potential.

Court: Is that a 24-hour thing?

A. Yes, sir.

Court: Where is it conducted?

A. It's at the Huntersville community in the facility known

originally as Torrence Lytle School, one of the closed schools.

Q. With reference to the teaching personnel, how is compensation for a teacher determined? A. On the basis of teaching experience, measured in numbers of years, and the certificate held. The A certificate is awarded for the Bachelor's Degree work and the G certificate for the graduate credit based on a Masters Degree.

Q. What is the source of funds for paying teachers? A. Well, the prime source is the state. Teachers are supplemented in the Charlotte-Mecklenburg community through the aid of a local supplement.

Q. Since 1965 have any schools been closed in the system? A. You mean closed, not closed to transfer.

Q. Right. The doors are closed to students. A. Yes, sir. There have been schools closed.

Q. How many schools have been involved? A. Well, it depends on how you count them. Can I explain?

[376] Q. Yes, if you will. A. Ada Jenkins School in the far north, Torrence Lytle School referred to a moment ago, Crestdale in the Matthews community, Sterling in the extreme southern section, Plato Price which is near the airport, Woodland is in the northwestern section, the Moores Chapel community; and J. H. Gunn, the present location of the education center headquarters. They were 7 schools that were closed. In addition to that there were some school closings like the York Road Senior High School relocated at Olympic, Second Ward Junior High School, Bain Junior High School, Matthews Junior High School. The reason it's confusing to count is that Bain still exists, for example, as an elementary school, as does Matthews. York Road still exists as a junior high school and Second Ward continues to exist as a senior high school although

the junior high school grades were closed out. But in terms of total schools there were 7 schools closed in that round of school closings. The most recent one was last year and at this time Morgan and Seversville, Biddleville, Wesley Heights and Woodlawn. There is one other, Myers Street Elementary School.

Q. Has the closing of these schools had any effect on integration, Dr. Self? A. Yes.

Q. In what way? A. The children were reassigned to other schools.

[377] Q. With reference to the schools they were assigned to, were they roughly put into schools in their former attendance area within the new school? Perhaps that question is not clear. A. I think the answer is yes. For example, the Ada Jenkins students are going either to Cornelius or Davidson; Torrence Lytle students by and large are at North Mecklenburg and the junior high students are at Alexander Junior High and the elementary youngsters would be located for the most part at Huntersville, and I think similar circumstances prevail with the other school closings.

Q. Were the ones that you just mentioned integrated schools? A. The schools to which the children were transferred would be integrated. The schools that were closed would be classified all black.

Q. Now, with reference to the athletic facilities at the schools, what criteria are used in determining athletic facilities at the junior high level? A. The criteria for the program are set forth in what the educator calls an educational program which is a document setting forth the square foot requirements and that sort of thing, which is given to the architect who uses it in drawing up plans for the building.

Q. With reference to equipment at junior high schools, do you have equivalent or similar equipment at each of the schools? A. Yes. The athletic equipment is provided by a Board of [378] Education fund.

Q. With reference to high schools, are they similarly set up from an athletic program standpoint? A. Yes, with the exception of Second Ward. I couldn't say that about Second Ward facilities. I think they must be upgraded in terms of the completion of the Metropolitan High School. In terms of the equipment, a new school for example which is just formed is provided with an outlay of money to purchase the equipment but the athletic program is supported through gate receipts and it is anticipated that the school will repay the Board of Education fund in terms of equipment allotted.

Q. Are the inter-school athletic programs arranged on a non-racial basis? A. You mean the competition of games?

Q. Yes. A. Yes.

Q. Any school in the system can play any other one, is that correct? A. In terms of football they are divided into two leagues and they play within the two leagues.

Q. These are biracial groupings in the school? A. Yes, they are.

Mr. Waggoner: If the Court please, we have four exhibits we would like to have this witness identify. The first is Defendant's Exhibit #2 for identification, [379] Summation of Integration 1965 (March) and 1968-69 (Oct. 1, 1968); Defendant's Exhibit 3 for identification entitled payroll by Schools; Defendant's Exhibit 4 is captioned Table 3, Library Department, Books per child; Defendant's Exhibit 5

for identification is entitled 1968 Per Pupil Value of Facilities.

Q. Dr. Self, I hand you Defendant's Exhibit # 2. Do you have a document similar to this? A. Yes, I do.

Q. With reference to Defendant's Exhibit 2, Dr. Self, I direct your attention to Page 3. This is the page with a heading Pupils and Professional Staff by Race March 6, 1965, and 1968-69. Would you tell the Court what appears upon this page with reference to the writing thereon? A. There are statistics here. The statistics are grouped together under four major columns. The first two columns are statistics dealing with numbers of pupils. The last two columns deal with professional staff. Each of these is subheaded the pupils, for example, into two years, 1965 and the second column 1968-69, and a similar pattern prevails in terms of professional staff. The next sub-head is a Negro and white column under each of these years. The far left column lists the names of all of the schools in the school system and the statistics reflect the number of Negro and white pupils in a particular school in 1965 and, if the school were [380] not one of the closed ones, the number of Negro and white pupils in 1968-69. The same sort of analysis holds true as far as the professional staff is concerned.

Q. For instance, looking at the school called Bain, what information is disclosed for that school? A. The statistics reflect here that in 1965 Bain had 674 children and all of them were white; that in 68-69 Bain had 25 Negro pupils and 699 white. As far as staff is concerned, Bain had 28 2/10 white teachers and '68-'69 they had one Negro and 28 white.

Court: How do you get 2/10 of a teacher?

A. It's a statistical way of dealing with a traveling teacher who will spend two days a week in a particular school or one day per week or something of that nature.

Q. Dr. Self, with reference to 1968-69 I do not note any fractional teachers. Is there an explanation for this? A. Yes. I think that's attributable to a different technique for computing the statistics. The figures, of course, are made to comply with HEW reports and in the 1965 school year it was permissable to note these itinerant teachers, who are logged in terms of tenths. It was suggested that it would give a better picture of the degree of staff integration if these people were eliminated from the count in '68-'69. They were and therefore the statistics in '68-'69 do not reflect itinerant teacher assignment.

[381] Q. Did the '67-'68 school year reflect the itinerant teachers? A. I'm sorry, I do not know.

Court: How many floating teachers did you have in the system that you know of?

A. There would be quite a few. I don't know the exact number, but to give some idea as to the size it would be 35 elementary music teachers, a comparable number of physical education teachers, and that would be up to 70. There would be 20 corrective reading teachers. That's the bulk of them.

Court: Something less than an average of one per school.

A. Yes, sir.

Q. Dr. Self, the information appearing on Defendant's Exhibit 2, was this prepared under your direction and supervision? A. Yes, sir, it was prepared by the Research

Department. The actual information was contained in the interrogatories, the first column, of course, coming from the interrogatories of the court case of 1965, Table 1, and the statistics for the 68-69 column came from the Table 1 of this year's response to interrogatories.

Q. Does this exhibit correctly reflect the changes within the schools with reference to numbers of students and professional staff by race?

Mr. Chambers: Objection.

Court: What is the basis of the objection?

Mr. Chambers: The witness did not prepare this matter [382] and he is asking a witness to give, as one might say, hearsay evidence.

Court: These statistics were prepared in your office under your supervision?

A. Not in my direct office but in an office which is a part of the central office administration.

Court: Prepared by the people who prepare statistics for the school system?

A. Yes, sir.

Court: Objection is overruled. Do you reckon you could get them to prepare some more statistics for the Court?

A. Yes, sir.

Court: That is, just take every other one of these columns, either N or W, whichever is easiest, and run a percentage on that to show what those abso-

lute numbers are in terms of percentage of the totals. For example, Albemarle Road 68-69, you've got 4 out of 489. That would be roughly 1%.

A. Yes, sir, we could do that.

Court: I'd appreciate it.

Mr. Waggoner: Would you like that for the professional staff also?

Court: Yes. Since this is all here together this can be done with one run of the calculator, can't it?

[383] A. Yes, sir.

Q. Let's refer to Page 2 of Defendant's Exhibit #2 for identification, will you tell the Court what this sheet indicates? A. This sheet is headed Racial Distribution of Pupils and Professional Staff for 1965 and for 68-69.

Q. I'll ask you if this isn't similar information as that contained on Pages 3, 4, 5, 6, 7 of Defendant's Exhibit #2 except it relates to elementary schools, junior high schools and high schools by category. A. Yes. I think in reality, as the document is stapled together, the top sheet is a summary sheet and the attached sheets offer details in support of the summary sheet.

Q. Now, for instance, on Page 2 I notice that in 1968 there are listed 23,601 Negro students. A. That is correct.

Q. And 58,599 white students. A. That is correct.

Q. And then there are other students within the system. A. Yes, sir. Those other students, I believe, are special education.

Q. And those totals are added down on the bottom lines, is that correct? A. Yes.

Q. Now, with reference to Page 1 of the Defendant's Ex-

hibit #2, would you explain the meaning of the information contained [384] thereon? A. I'll do my best. When you try to determine the degree of integration or the incident of integration you must determine are you trying to speak from the standpoint of the schools in which there is integration or from the number of pupils who are involved in the integration or the number of teachers and this sheet attempts to do that. At the top of the sheet the section headed Schools Having Integration is an attempt to see the integration, incident of integration from the standpoint of the number of schools involved. and again we have the two year comparison. For example, in 1965 there was one Negro and 22 white schools in which there was integration. I think it must be pointed out that we termed the presence of one member of a minority race in the school to classify a school in this manner. That meant that 23 out of the 109 existing schools were experiencing integration, or 21%. Comparable figures in 1968, 84 out of 112 or 75% are experiencing integration in terms of pupils. As far as staff people are concerned, 3% of the schools, 3 out of 109, were experiencing some degree of staff integration in 1965. The comparable figure in 1968 is 98 out of 112. The reason that that 112 does not agree with the total we have used frequently in our testimony is that it includes the child development centers and the learning academy. The central section of the page picks up the number of students and faculty members involved [385] for both of these years. You have to read the page actually horizontally from top to bottom; that one Negro school back in 1965 had 9 white youngsters, 343 Negro youngsters, making a total of 352 pupils experiencing some degree of integration. That, of course, was Bethune school. The 22 white schools had 469 Negro youngsters. 16,446 whites, or a total

of 16,922 youngsters. Adding the total number of Negro pupils to the total number of white pupils gives us the total found at the bottom of the page, 17,274 or 24% of our student body. Without going through the whole process for 1968, comparable percentage is 77.

Q. 77%? A. 77% of the student body. In like manner you can come up with two comparable percentages for staff. 5% of our staff were experiencing some degrees of integration in 1965; 91% are experiencing some degree of integration in 1968.

Q. Dr. Self, I next direct your attention to Defendant's Exhibit #3 headed Payrolls and ask if this was prepared under your direction and supervision. A. Prepared by the same Research Department, yes, sir.

Q. Would you describe for the Court the information contained on Defendant's Exhibit #3? A. Again we have a listing of the schools and in the columns the payrolls of the third school month and the fourth school month for each of these schools. Actual payroll data includes [386] the salary of the Principal, assistant principal, the teacher, secretary and teacher aides for all of the schools. The total salary for each school for both months is listed. That total salary is divided by the number of persons served by that total salary and an average salary is computed. I feel compelled to point out to the Court that in examining this document I found what is an obvious error which should be pointed out. It's on the second page and it pertains to East Mecklenburg High School where in the third school month you see 112 teachers listed, and the fourth school month 102. It's obvious that we didn't dismiss ten teachers. In looking for the error I think I fond it at Eastway Junior High School, two schools down, where the number in the third month is listed as 61 and the fourth month as 71.

I believe somehow we got the names Eastway and East Mecklenburg confused.

Court: What would you do to straighten it out?

A. Given a bit of time. I didn't find it until I got here today.

Q. Now, with reference to Defendant's Exhibit #3, taking at random Albemarle Elementary School. This is a new school, as I understand it, is that correct? A. Yes.

Q. What is the average salary per teacher for the fourth month? A. $610.98.

Q. Would you tell us what the similar figure for Alexander Street would be? [387] A. Alexander Street is $711.19.

Q. Would you give us Barringer? A. Barringer is $669.30.

Q. Would you give us Devonshire? A. Devonshire is $584.86.

Q. Would you give us Double Oaks? A. $717.54.

Q. Druid Hills. A. $703.57.

Q. Huntingtowne Farms. A. $638.08.

Q. Erwin Avenue Junior High.

Court: I can read the rest of this, Mr. Waggoner.

Mr. Waggoner: If the Court please, I wanted to touch on some of these. Some of these schools are predominantly white, some are predominantly colored.

Court: I am familiar with the widely known fact that your colored teachers as a group have higher salaries than the white because they stay at it longer and have more graduate education. Is this the point you're making?

Mr. Waggoner: Yes, sir.

Q. Dr. Self, I next direct your attention to Defendant's Exhibit #4 for identification entitled Table 3 and ask if this was prepared under your direction and supervision. [388] A. Yes, it was. It was prepared in the Library Department.

Q. Would you explain to the Court the information appearing thereon? A. It's a tabulation of the number of books per child in the libraries of the schools listed.

Mr. Waggoner: If the Court please, I would like to ask Dr. Self if you are able to detect that predominantly Negro schools have less library books per student.

A. I don't think I could make that generalization.

Q. All right, sir, would you look at Albemarle Road?

Court: It looks like the poor people at Quail Hollow are in bad shape—7½ books per student.

Q. Dr. Self, do you detect a pattern of discrimination in favor of either of the races with reference to library books?

Mr. Chambers: I object to that, Your Honor.

Court: Objection is overruled.

A. No.

Court: Let me ask about this thing. Is it generally true that the older the school the more books they've got regardless of the race of the students? This would appear to be a pattern looking at this.

A. I think that would be generally true, Your Honor.

Court: Zeb Vance, for example, with 15.8 and Quail Hollow with 7.6. Do they illustrate that proposition?

[389] A. Probably would. I think the only thing that might cause it to vary from that pattern is the vigor with which the librarian purges the shelves . . . of old books.

Court: West Charlotte 10½; West Mecklenburg 7½.

Would that be illustration of the same proposition?

A. Yes, sir. Also it would account for the fact that Albemarle Elementary is 6.6. It's a new school just getting started.

Court: OK, you want to get to something else? Had you finished with that?

Mr. Waggoner: Yes, sir, I had finished with it. There has been an allegation that inferior facilities have been furnished and I was seeking to establish there has been something in the nature of equality subject to the problems of a big School Board.

Q. Dr. Self, I direct your attention to Defendant's Exhibit #5 for identification and ask if you can identify it. A. I believe you are referring to the one headed 1968 Per Pupil Value of Facilities.

Q. That is correct. A. This is a tabulation of the amount of money, the per pupil amount of money that the facility is worth. It was obtained by taking the value of the facility

from the principal's final report, which is a part of the interrogatories, and dividing that by the number of pupils housed in the facility. Again, there are wide disparities in terms of the dollar amount. [390] Generally speaking the average is a more valid figure than is an individual figure. The average shows that the per pupil facility value for elementary schools is $861.00; the per pupil value of facilities in the junior high school is $1,229.00; and the per pupil value in the senior high schools is $1,567.00.

Q. Dr. Self, these values, as I understand it, are probably cost values of that particular school plant? A. Yes, sir.

Court: Are they in fact cost figures or are they in fact current appraisals?

A. I think they would reflect the insurance values of the building.

Court: This is not land value but simply buildings and equipment, or can you tell about that?

Mr. Chambers: That is one reason we objected to these documents. As I understand it, the principal sits down and says a building and land is worth X-number of dollars and he files his report and sends it to Raleigh.

There is, I submit, no real expertise at all on the part of the principal to determine what the building is actually worth and this is the way they get the figure to make the contention here that the per pupil value of, for instance, Fairview is $1,000.00. The value of Myers Park Elementary School is $830.00.

[391] A. May I explain?

Mr. Waggoner: If the Court please, this does include the site evaluation.

Court: What comment do you have on that?

A. The distortion in the case Mr. Chambers mentioned would be produced by the enrollment. Fairview is a community in which the pupil population is decreasing. The quotient, then, in this arithmetic problem is rather small. It would produce a higher per pupil value. Myers Park Elementary is relatively filled so your quotient here divided into the value of the building would produce less value per pupil.

Court: Mr. Chambers, I believe I'll admit this as nothing but the opinion of the principals as to the value of the facility without any feeling that it has any material bearing on the case.

Mr. Chambers: We didn't object, really, because we thought it might be admissable for whatever it's worth but we think these matters should be brought to the attention of the Court.

Court: If you find, Dr. Self, that this does not include the value of the land, which I assumed it did from the size of the figures, let me know. I assume this includes an estimate as to the value of everything that's there.

A. All right, sir.

[392] Q. Dr. Self, could you give us the senior high average evaluation? A. Reading from the list, East Mecklenburg $1,249.00. . . .

Court: I can read the rest of the figures.

Mr. Waggoner: I want to get the average.

A. $1,567.00.

Q. Dr. Self, there has been a great deal said in the past three days with reference to Metropolitan High School to be located on Second Ward. When was the plan formulated to commit for this location of this type of school? A. I believe the plans have been underway since prior to Dr. Philips departure which would mean it's at least two years.

Q. Would you describe to the Court the type of curriculum that would be offered at this school? A. It's anticipated that the school would offer the courses usually found in a comprehensive high school and that the vocational offerings of the school system would be heavily supplemented, that we would have here what we call one of a kind courses, meaning by that that they would not be offered in any other school in the system—this sort of thing.

Q. I've heard this school described as a magnet type sort of school. Is that proper terminology? A. I would class it as a magnet type school. That certainly is our hope.

Q. This means that it would attract students from all over the school district, is that correct? [393] A. That is our anticipation.

Q. What were the considerations that led to deciding on this particular location for this type school? A. There is certainly a need for offering a secondary program in this area. The program itself needs to be unique in terms of the ultimate goal of the pupils served. It is housed in close proximity to what will be the educational center headquarters for the whole school system. We will have in that educational center some of the outstanding curriculum people in the whole southeast who will be most anxious to work in this Metropolitan High School, offering support and reinforcement for the types of programs undertaken there.

Dr. William C. Self—for Defendant—Direct

Q. Was there any community participation in developing this type school? A. Yes, sir. The Second Ward School Committee, I recall, met with Dr. Philips at which time they talked the whole thing through and came to some conclusions in terms of the type of school that would be offered there and the fact that it would be located there.

Q. Do you have an opinion satisfactory to yourself as to whether or not this is a good location for this type of school?

Mr. Chambers: Objection.

A. Yes.

Q. What is your opinion? [394] A. I think it's a good location.

Court: Dr. Self, from the corner of Independence Blvd. to McDowell Street how far is it to the nearest high school, which I would believe would be Myers Park High School? Do you know?

A. No, sir, I do not.

Court: Is it between four and five miles, about four miles?

A. I was going to guess between three and a half and four.

Court: How far is it to East High School?

A. A good bit further.

Court: About seven or eight miles?

A. Seven would be a good guess.

Court: And to Garringer what is it?

A. Garringer would be closer.

Court: Around four, maybe more?

A. Three, three and a half.

Court: How far to West Charlotte?

A. About the same distance as to Garringer, about three and a half.

Court: Is there any high school in Charlotte now closer to the center of town than the four that I have just asked you about?

A. The only question would be Harding and I'd say Harding falls in that three or four mile category.

[395] Court: So you have at present, then, a city of over a quarter of million with a hole about eight miles square in the middle without a high school in it.

A. We do have the Second Ward High School there now.

Court: That's not slated to remain, is it?

A. This school will replace the Second Ward High School.

Court: If you don't maintain or build a school there, you will have a space about eight miles square without a high school?

A. That's true.

Dr. William C. Self—for Defendant—Direct

Q. Dr. Self, with reference to the Greenville area of Charlotte, I understand the residents of that area have asked the School Board to construct a school in that particular area, is this correct? A. That's true.

Q. Would you tell the Court the facts and circumstances surrounding the possible location of a school in the Greenville area? A. The Board of Education in its thirty-five million dollar bond program allocated the thirty-five million dollars by sections. In the section that we are speaking of here there was $750,000.00 set aside for the construction of an elementary school. The community was in a state of transition, urban development moving in the area, Model Cities planning for the area, and the Board simply held the money in abeyance until such time as they could plan more definitely. The thing first [396] was brought to the attention of the Board of Education when the representatives of Urban Redevelopment presented a plan for land use in the area. Their plan assumed that you would set aside a certain portion of the redevelopment land for the construction of a school and it was at that time that interested groups petitioned the Board of Education to make the decision to build a school in that area. The Board has delayed its decision in this matter.

Q. Does the Board give any reason for the delay? A. No. I think that they simply indicated that they wanted to delay it.

Court: How long do you want to delay it?

A. The Board hasn't indicated that, Your Honor.

Q. Does the Board have any concern as to the possible racial composition of this school? A. Yes, they do. I think that concern was voiced by Mr. Burch, it being that the

community itself would be housed as an all Negro neighborhood and then that the school population would be all Negro.

Court: Do you know how many folks live in the area that school would serve if it were built?

A. No, sir, I do not and I believe that the more relevant matter would be how many homes it's planned in Urban Redevelopment to put back in the area and the figures we've gotten there is 700 to 1,000.

[397] Court: How do you describe the Greenville area?

A. Graham Street north of the cemetery that's behind Erwin Avenue Junior High School, that sector in there.

Court: Between Graham and Beatties Ford Road?

A. No, sir, between Graham and actually north of Highway 16.

Court: That's Rozzels Ferry Road?

A. Yes, sir.

Court: Aren't there several schools in there now?

A. Fairview is the only school that's in the section under consideration here.

Court: Bethune School is south of there, isn't it, south of that area?

A. It's on the fringe of it, yes, sir.

Dr. William C. Self—for Defendant—Direct

Mr. Waggoner: We have the plaintiff's experts' proposal and we would like to go into this. This may be a convenient time for all to stop. It probably would take a while.

Court: All right. If there is no objection we'll quit until 9:30 in the morning.

OVERNIGHT RECESS

Thursday, March 13, 1969

Q. Dr. Self, I understand there is a point pertaining to the athletic equipment at junior high schools that you would like to clear up at this time based on your testimony of yesterday. A. Yes, sir, Mr. Waggoner. Dr. Hanes spoke to me after court [398] was recessed yesterday afternoon and called my attention to the fact that I had made an error in testimony pertaining to the athletic equipment, the purchase of athletic equipment for the junior high schools. I had stated that the Board of Education provided a fund for the junior high schools with which they purchased their athletic equipment, football uniforms, baseball uniforms, etc. What I failed to add is that this fund is extended as a loan and the school is expected to repay that over a period of years.

Court: That's from the Board of Education?

A. That's right.

Q. You used the term athletic equipment, does this have to do with the entire physical education program at the school? A. No. Mr. Waggoner. In education circles we distinguish between the physical education program in which all pupils are involved and the athletic program which, in effect, involves team sports.

Dr. William C. Self—for Defendant—Direct

Q. These would be the interschool sports you're talking about? A. That's true.

Q. Dr. Self, have you had occasion to review the analysis and recommendations of Drs. Larsen, Finger and Passey that have been referred to in this case? A. I have, not as thoroughly as I would wish but to a degree.

Q. Dr. Self, is there any educational basis for classifying a school as integrated when it has 10% of one race or more? [300] A. I don't believe there would be an educational basis for it.

Court: What does that question and answer mean? What does that mean to me?

Mr. Waggoner: If the Court please, that means to me—I'm not sure it would mean this to you—from an educator's standpoint there is no arbitrary level of mixing races which creates an integrated situation, no educational basis for this. Any basis would be a legal basis which the Court would have to draw.

Q. Dr. Self, with reference to the recommendations of Dr. Larsen, which I understand to be Alternative I Phase 1, have you had an occasion to review this plan, Page 11 of the report? A. Yes, I have.

Q. Would you give the Court your observations, please, sir? A. The plan itself has some prerequisites, as I understand it, and these are that an additional six elementary schools would be closed that are located in the central section of the city. Erwin Avenue Junior High School would eventually be closed. I don't believe that the plan calls that the school be abandoned immediately; that construction at Northwest Junior High School would be stopped; that the Metropolitan High School would be located on the

Hawthorne Junior High site, which would necessitate the relocation of Hawthorne Junior High School. They suggested but didn't hold firm to the suggestion that that location might be Shamrock Gardens [400] Elementary School; that the district lines be redrawn, respecting the fact these schools were closed, and no freedom of choice be allowed. Basically I think the plan is one of transport out of the central city section, an attempt to design a new elementary building program on sites which are not in what was termed the Negro downtown area, then pair or link together elementary schools in such a way as to achieve integration, and then assure the maintenance of this integration as the youngsters progress through the grades through the use of a feeder system which would move the integrated elementary pupils into integrated junior high schools and subsequently to senior high schools. I think that the plan has some weaknesses as any plan would. One that appears to me is that it would assume the ability of the school system to house the youngsters who are moved out of the closed schools. This would be a severe housing problem as far as the school system is concerned. I think another questionable point, at least it's debatable, is that it would almost abandon the center city as far as education is concerned. It would impose the problems of transportation. I am not familiar enough with this technique of pairing to know what account is taken for the growth problems of the schools in such a plan and I think philosophically the plan itself is not a very good respecter of elementary education principles.

Q. Does this particular plan square with Dr. Passey's statement [401] that he favors neighborhood schools for grades 1 through 4? A. I believe that it would conflict in this particular instance.

Dr. William C. Self—for Defendant—Direct

Q. Dr. Self, beginning on Page 14 there are various clusterings or pairing of schools. Could you come down to the map and point out the schools that are involved in these particular groupings? (The witness does so.) A. The three schools of the first cluster are these three, Marie Davis, Collingswood and Sedgfield. Group B is Dilworth and Myers Park and Wilmore.

Q. Dr. Self, do you have an opinion as to the distance between Wilmore and the Myers Park Schools? A. We can get a rough approximation by using our blocks.

Court: Are these blocks a mile square?

A. This block right here is a mile square. This is a two mile section, Your Honor. Using a rough technique, slightly over two miles between Myers Park and Wilmore and slightly less than two miles between Dilworth and Myers Park.

Q. The next grouping, please, sir. A. Group E-1, Bruns Avenue. . . .

Court: I don't know that it matters but I'm curious about the distances. Where is Wilmore? The distance between Wilmore and Myers Park . . . you're talking about Myers Park Elementary?

A. Yes, sir.

Court: That's just under three miles as the crow flies, [402] two and a half miles.

A. Yes, sir. Group E-1 is Bruns Avenue which is here.

Court: What artery is that nearest, Highway 16?

A. Off Highway 16. This is the bypass for Johnson C. Smith and Bruns Avenue branches off of there.

Q. While you are on Bruns Avenue, what schools does it replace? A. Bruns Avenue replaced Wesley Heights and Seversville and Biddleville.

Q. Dr. Self, what was the racial composition of these schools in 1965, if you know? A. Biddleville I feel certain was black. I think that Wesley Heights and Seversville were totally white at the time. I am not sure.

Q. Did Bruns Avenue roughly take on the same school boundaries covered by the other two schools? A. Yes . . . the other three.

Q. If you will, continue with E-1. A. Ashley Park is here; Enderly Park is here; and Westerly Hills is a new school which I do not believe is on the map. It's right behind the Harding High School. They are clustered right here.

Q. The next grouping? A. Group E-2 is Lakeview, which is here, and Thomasboro, which is here.

Court: Lakeview and Thomasboro are on the south and [403] north side of Interstate 85, are they?

A. Interstate 85 will divide them right here.

Q. The next group. A. Group E-3 is Hoskins and University Park, right here.

Q. Are those two schools again separated by Interstate 85? A. They are.

Q. Let's go to the final grouping, Group H. A. Group H is Alexander Street, which is one of the schools which was recommended for closing, and it's right here; Highland is here; Merry Oaks . . .

Court: On Central.

A. Yes, up here. Midwood, again off Central. I believe

that's this. Plaza Road is here; Shamrock Gardens is here and Villa Heights is here.

Q. Dr. Self, do you have an opinion satisfactory to yourself as to the distance between Alexander Street and Merry Oaks? A. If we use the same technique of applying the blocks, it would be in the neighborhood of two and a half miles.

Court: Three miles in a straight line.

Q. Would you go to the next grouping? A. Group K-1 is Hidden Valley and Tryon Hills.

Q. Group M-1. A. Chantilly and Elizabeth.

Q. And the final grouping? A. Billingsville, Cotswald and Eastover, these three.

[404] Court: Mr. Chambers, you feel free to go whenever you wish.

Mr. Chambers: I promised to leave this afternoon at 2:00.

Q. Dr. Self, I direct your attention to Page 16 of the report and as I understand the listing on this page, these schools would not be affected in any way by the recommendations of Dr. Larsen, is that correct? A. I interpret in the same manner, yes.

Q. How many schools are listed on that page, if you know? A. I do not know. Are they to be counted?

Q. Yes, sir. A. At the top of the page there is a grouping which the authors state are already desegregated and they will remain as they are. There are 13 schools in that category. At the bottom of the page there is a grouping of schools that the author states would remain segregated and they categorized into two sections, predominantly

black—and in this section there are 12 schools—and another section labeled predominantly white 24, if my counting is correct.

Q. As I understand, out of the 76 elementary schools this plan would not affect 49 of the schools, is that correct? A. I believe that's correct.

Court: Those have a school population of roughly what? It looks like about 8000 in that top pair, 6500, that's [405] 14,500—29 or 30,000.

A. That's correct.

Q. Dr. Self, do you know approximately how many students you have in your elementary school system? I direct your attention to Defendant's Exhibit 2 which contains—this is a sheet with a summation of integration, the second page. A. The elementary population is 13,290 Negro, 31,545 white, and to this you would need to add probably several hundred youngsters in special education who appear in that other figure down at the bottom.

Q. Mr. Self, does the Charlotte-Mecklenburg School System employ a feeder system? A. Not a pure feeder system.

Q. Would you explain what is meant by a feeder system? A. As I understand the rigid concept of the feeder system it is determined that all of the pupils in a particular elementary school will feed into a single junior high school and that all of the students in this junior high school will feed into a single senior high school. Our system is not pure in that we have circumstances in which two-thirds of an elementary school will feed into one junior high school and the other one-third will feed into another junior high school and then the junior high school population might be similarly divided.

Q. Dr. Self, referring to Page 17 of the analysis and recommendations, did you have occasion to review the assignment [406] areas for the junior and senior high schools under Dr. Larsen's recommendations? A. I have not studied this in any detail.

Q. Turning to Page 25, Alternative 1, Phase 2, Desegregation Plan based on Districts and Transportation, have you had occasion to review these recommendations? A. Yes, I have.

Q. Would you tell us what you find? A. As I understand the recommendation again this proposal would divide the county into four racially balanced districts. The best I can understand, Highway 74 and 77 are used to pretty much determine what these districts would be. Within those racially balanced districts desegregated elementary schools are established, again by pairing or linking or clustering, and by drawing attendance zones around these schools in such a way as to achieve desegregated elementary schools. Again I believe that a feeder pattern is established which would assure the continuance of the integration to the junior high school and the senior high school level. The plan again assumes that no freedom of choice would be allowed and I believe differs from the first phase in that it calls for extensive bussing.

Q. Dr. Self, do you furnish bus service for the Charlotte City schools or the schools located primarily within the City? A. No, we do not, with one exception. The law which was passed, [407] I believe, in 1957 said that county residents who had been provided transportation and who were annexed into the City may not be deprived of their transportation. In effect, with annexation or with extension of City limit lines, we do have some children in the City limits who are furnished transportation.

Court: How big a group of students is in that fringe area now?

A. I do not know. I assume it would be a fairly small group.

Q. Dr. Self, is it true that roughly one-fourth of the student population is furnished bus service, some 23,000?

A. I believe that that's a pretty accurate figure.

Mr. Chambers: I object to that and move to strike. There is the transportation officer who has the information and the question, first of all, was leading and, secondly, Dr. Self has not stated he knows definitely or approximately that that is the figure.

Court: You have a copy of the dope sheet, don't you, that Dr. Self handed in when he first started to testify? This says that 23,000 students were furnished busses this year at a cost of $19.00 per student. That's on Page 4 near the bottom. 271 busses, 23,000 children, cost per year per child $19.00.

Mr. Chambers: I have a copy here.

Court: Motion denied. Go ahead.

[408] Q. Dr. Self, with reference to Alternative 1, Phase 2, have you had occasion to consider this plan from an educator's standpoint? A. I have.

Q. Is this proposed plan a feasible plan for operating the school system in this county?

Mr. Chambers: I object. That calls for a conclusion of law on the part of the witness. I think the witness can state whether or not he has some objection, some specific defects.

Court: I think that's correct.

Mr. Waggoner: If the Court please, this question related to his opinion as an educator.

Court: Give your comments on it from the standpoint of educational advantages or disadvantages. I believe that would be a competent question.

A. I think that the same problems posed by the first Alternative 1, Phase 1, would be posed by Alternative 1, Phase 2, and I listed those as the fact that it requires that the schools in the central city be closed and the students be transported out, thereby imposing a housing problem on the school system. I stated that it would mean the virtual abandonment of education in the central part of the city; that transportation problems would be imposed and that it again does not respect to a degree the principles of elementary education.

[409] Court: As far as the theory of education is concerned, you say the two plans have substantially the same objections as you see them.

A. Yes, sir.

Q. Dr. Self, if you will, referring to Page 42 of the report, captioned Alternative 2, a Desegregation Plan Based on Districts and Transportation, have you had occasion to examine these recommendations? A. Yes, I have.

Q. Give the Court the benefit of your observations.

Court: Is this the plan that Dr. Passey described?

Mr. Waggoner: Yes, sir, as I understand it, it is.

Dr. Passey: No, it's a combination of two.

Mr. Chambers: Are you talking about Alternative

Mr. Waggoner: Alternative 2, beginning Page 42.

Dr. Passey: This second one is a combination of the four sectors that Dr. Finger delineated.

Court: A plan was described by Dr. Larsen, a plan was described by Dr. Finger, a plan was described by Dr. Passey. My question is is this the one that Dr. Passey described?

Dr. Passey: No.

Mr. Waggoner: I believe Dr. Passey's begins on Page 46, which is Alternative 3. There are four plans really that they presented.

[410] A. As I understand Alternative #2, this is a desegregation plan which is based on districts and transportation. The uniqueness of this plan is that it asked for a reorganization of the school system itself from a 6-3-3 pattern to a primary, middle grade and senior high school pattern.

Q. Would you explain the 6-3-3? A. This means that six elementary grades are housed together, three junior high school grades are housed together and three senior high school grades are housed together. The other organizational plan calls for the first four grades, or kindergartens, if kindergartens are there, to be housed in the primary school; for grades 5 through 8 to be housed in the middle school—this is the usual pattern of operation—and for grades 9 to 12 to be housed in the senior high school building. As I understand Alternative #2, it calls for no abandonment of schools in the central section of the city and I believe it assumes that they would continue to be used. I believe that the basic difference between that and Alternative #3, as I was able to detect it, was that Alternative #2 is geographically based and Alterna-

tive #3 is not geographically based, if I understand it correctly.

Q. With reference to Alternative 3 beginning on Page 46, you stated that it is not geographically based. By what means would students be assigned under this? A. Again, as I understand it, the primary school would be [411] neighborhood oriented. I understand Dr. Passey was attempting to respect these principles of elementary education that we alluded to earlier and this sort of an organization; that a feeder system would be established that would assure the continuation of integration in the junior and senior high schools.

Q. Would there be substantial transportation under Alternative 3? A. Yes, there would.

Court: Does anyone of these plans contain any proposals about changes in the county schools as such, or what we used to call the county schools?

A. Yes, I believe that the outlying schools are incorporated in the plans, on Page 47, for example. The schools that would be contained in learning complex A are identified as being East Mecklenburg. . . .

Court: That's in the city.

A. Well, it was formerly a Mecklenburg County School. The community has grown up around it. If you look at Page 48, learning complex B, you can see a mixture of former city, former county, South Mecklenburg being county oriented, Smith Junior High School county oriented, Erwin Junior High School central city, Collingswood and Pinewood are right on the periphery, Shamrock Gardens is in the inner limits of the city; Bethune is central city.

So there is a mixture of what would be termed former city and former county in this plan.

[412] Q. Dr. Self, on Page 47 dealing with learning complex A, I notice that the students at Williams Junior High School would be going to high school at East Mecklenburg High. Where is the Williams Junior High School located? A. Williams Junior High School is near the intersection of I-85 and Statesville Road.

Q. Where is East Mecklenburg High School? A. Eastern section of the city off of Old Monroe Road, just beyond the point where Old Monroe Road intersects Rama Road.

Q. Do you have an opinion as to the distance between these two schools? A. It would be in excess of five miles.

Court: Does the area served by Williams Junior High School extend north of I-85?

A. I'm not certain, Your Honor, we could look at the map to determine it, if we had a junior high school map.

Mr. Waggoner: Are the junior highs located on this map?

Mr. Chambers: There is a junior high school map.

Q. Come down to the map, Dr. Self. (The witness does so.)

(Conference out of the hearing of the Court Reporter.)

Court: Dr. Self, in this dope sheet that you gave me yesterday you indicated that transportation cost per pupil is $19.00 a year. Does that include the cost of the busses, maintenance? What does that $19.00 include?

A. I think that would include the operating costs, the gas, oil, [413] tires, upkeep and probably the salary of the driver. It would not include the capital outlay expenditure for buying the bus.

Court: Are there some figures on the total cost of bus transportation?

A. Yes, sir. If they are not available in the deposition, we can make them available.

Court: How many of the first three or four grades in the county ride busses to school?

A. Again I could only approximate. There are 42,000 elementary youngsters. Of that 23,000, 22,000 will be primary —10,000 would be a very rough guess.

Court: Is the school bus operation in the county, generally speaking do they haul as many of the first four grades on busses as they do the other grades?

A. I wouldn't think that would be true because of our attempt to locate the elementary schools in closer proximity to the youngsters than we do the secondary schools.

Court: Is there any information on that subject?

A. I'm sure there is.

Q. Dr. Self, with reference to establishing boundaries of an elementary school, is there any rough guide that you attempt to use insofar as establishing distance of the school boundary to the school itself? A. A very rough guide is a mile but, of course, you will vary [414] that radius that

you would use to draw circles around the elementary school depending on the section in which you were locating it. In the central section of the city or in densely populated areas you may have a radius much less than that and in the sparsely populated sections a radius in excess of that mile.

Q. In the city section how far will a school ordinarily be located at a maximum from the boundary of the school district? A. It's an approximation—I'd say ¾ of a mile to a mile, and again you will have exceptions to that.

Q. Dr. Self, with reference to these four recommendations, or do you have an opinion as to whether or not any one of these or any two or any three or any four of them could be applied to Mecklenburg County on an educationally sound basis?

Mr. Chambers: We object to that.

Mr. Waggoner: I'll withdraw the question.

Court: That's a fairly pertinent inquiry.

Mr. Chambers: I would think that the witness ought to say what objections he might have to the plans rather than to say definitely they cannot be worked. I understood when he started off that he hasn't had a chance to study the plans in detail.

Mr. Waggoner: If the Court please, I will take each plan separately.

Q. Dr. Self, referring to Page 11, Alternative 1, Phase 1, a [415] Desegregation plan based on Elementary School Pairing and Elementary-Secondary Feeder Systems. Do you have an opinion satisfactory to yourself as to whether or not this plan from an educational standpoint could be feasibly implemented in this school district?

Mr. Chambers: Objection.

Court: Well, I believe I'll overrule the objection.

Q. Do you have an opinion? A. Yes.

Q. What is your opinion? A. I think the plan would cause considerable problems for the school system in terms of housing. It would impose rather sizeable burdens of transportation upon the school system.

Q. Would it have any effect on the neighborhood concept of schools?

Mr. Chambers: Objection, leading.

Court: Overruled.

A. Yes.

Q. In what way?

Mr. Chambers: Your Honor, my objection now, the question is would it have any effect on the neighborhood school concept, what neighborhood school concept?

Mr. Waggoner: The one that Dr. Self has testified to.

Mr. Chambers: I haven't heard any testimony about a neighborhood school concept.

[416] Court: I heard Dr. Passey talking about it and another witness talked about it a day or two ago.

Mr. Chambers: I understand but we have different ideas of what neighborhood schools are.

Court: Let's go at it the quickest way. You go ahead and answer the question and I'll overrule the leading element in it.

A. When you asked the question I was thinking about the youngsters from the central city area that would be bussed

out to surrounding schools. If the youngsters are taken out of their home community in this way, in my thinking it does violate the neighborhood school concept.

Court: How far would you say children in the county travel the first three or four grades to get to school? I know this is like asking how far is it to a star, but can you give me some idea how far the average county child has to go to get to his first, second, third grade school.

A. As I recall in one response to a question in a deposition Mr. Harrison indicated that the average round trip mile for school bus was 30. I don't know whether he has any breakdown between elementary and secondary youngsters from that general figure or not, Your Honor.

Court: Is there any limit on how short a trip you'll haul folks on a bus?

[417] A. The rules and regulations state that we transport children who live beyond a mile and a half radius of that school.

Court: So everybody who rides the bus is supposed to ride at least a mile and a half.

A. Yes, sir.

Q. Dr. Self, could Alternative 1, Phase 1, be accomplished by the Charlotte-Mecklenburg School System on your present budget?

Mr. Chambers: Objection.
Court: Overruled.

A. No. I believe that Plan 1 would impose additional demands in terms of transportation expenses. It might also cause some financial problems in terms of housing the youngsters.

Mr. Chambers: Your Honor, I hate to keep objecting but the witness still hasn't gotten to anything, I submit, that is relevant or competent here. He said would the plan pose some problem within the present budget. How can he state that? The witness doesn't even know what it's going to cost in terms of transportation and the budget, as I understand it, is submitted for 1968-69. Now, how would a 68-69 budget apply to 69-70 in terms of this plan?

Court: I just hear him saying that he thinks it would cost more money, that's all it means. Do you get any more than that out of his answer, Mr. Waggoner?

Mr. Waggoner: No, sir, we haven't had a chance to cost [418] this out. It is more expensive is what he testified to.

A. If I might explain, Your Honor. I certainly know that I can come up with no concrete figure. I make my deduction on the basis of the fact that I feel that transportation would be required for youngsters who are not now getting transportation. So you're led to believe that this would be an additional expense.

Court: I am aware of all the infirmities which your objection suggests. Go ahead with the next question.

Dr. William C. Self—for Defendant—Direct

Q. With reference to Alternative 1, Phase 2, beginning on Page 23, do you have an opinion from an educational standpoint as to whether or not this particular recommendation could be feasibly initiated in the Charlotte-Mecklenburg School System?

Court: Where does that start?

Mr. Waggoner: Page 23, Your Honor.

Court: Hasn't he already answered that question about all of these things?

Mr. Waggoner: If the Court please, it may very well be.

Court: This is the one Dr. Finger proposed, is it?

Mr. Waggoner: Yes, sir, as I understand it.

Court: And as I remember what he said, he said this does violence to his view of the community school system and abandons the center of the city and raises questions of capacity to house the students, raises questions of transportation, doesn't allow for growth [419] and doesn't comply with the elementary educational principles. Are you just asking for a repeat of that?

Mr. Waggoner: No, sir, I'll withdraw the question.

Court: Ask another question.

Q. Dr. Self, with reference to the Alexander Street School, do you know approximately how far the school is located from the school boundary of the most distant point? A. No, I don't.

Court: Has the boundary got some black lines around it up here?

A. Yes, sir.

Q. Would you come over to the map and take a look, if you would.

Court: I'll make a guess of half to three-quarters of a mile, but I'd like to hear what he says.

Mr. Waggoner: We'll accept the Court's guess.

A. The school is within a block of the attendance line at one point.

Court: Which street is that?

A. 11th Street.

Court: So that district extends north from 11th Street.

A. Yes, sir.

Court: What is the western boundary of it?

A. North Tryon and 16th Street.

Court: What about on the east? Is it Seigle Avenue?

A. McAden Street I believe is that boundary.

[420] Court: That particular district is about five blocks deep and ten blocks wide, isn't it?

A. That's about right, yes, sir.

Q. Dr. Self, do you have an opinion how far a student residing in that school district would have to travel if he

were assigned to Plaza Road? A. As the crow flies distance again is approximately two miles.

Court: Dr. Self, are the buses supplied by the State or County?

A. The buses are purchased by the local school system initially. The operating costs are paid by State funds. Then that bus is replaced by State funds when it is traded in.

Court: That's the way the transportation in what used to be the county schools is now provided.

A. That's true.

Court: And the local unit buys the equipment.

A. Initially.

Court: And they replace it from time to time by State funds.

A. Yes, sir.

Court: And the gas and oil and maintenance are provided by. . . . ?

A. The State.

Court: And the drivers are hired by. . . . ?

A. By the State.

[421] Court: So the expense to the local unit of transportation is the initial purchase of the equipment?

A. That's correct.

Court: What do school buses cost now?

A. Approximately $4,500.00, depending upon the size.

Cross Examination by Mr. Chambers:

Q. Dr. Self, you're reasonably familiar with the racial housing pattern in the City of Charlotte, aren't you? A. Reasonably so.

Q. In your opinion would that map there with the purple, green and orange reasonably depict where the minorities are residing in the City of Charlotte? A. I believe so.

Q. I believe within that cluster of schools in what we refer to as the inner city you have several elementary schools, do you not? A. Yes.

Q. I count something there of approximately 17 elementary schools. How would you integrate those schools, Dr. Self? A. I don't know.

Q. Some of those schools are relatively new, aren't they? A. Yes.

Q. I call your attention to your exhibit in answers to [422] interrogatories, Table #4, which gives you the dates that the schools were constructed and additions made to the schools. I think University Park is in this section, this area right here.

Court: Is that between Beatties Ford Road and I-85?

Mr. Chambers: I-85 is north of it and Beatties Ford on the eastern boundary.

Q. I believe that school was built about 1957. A. That's correct.

Q. And you made additions in 1958 and 1968. A. 1964, yes, sir.

Q. All of this took place subsequent to the Supreme Court's decision in 1954. A. That's correct.

Q. The school is all black. A. Yes, it is.

Q. I think also in this district is Lincoln Heights.

Court: Locate that for me, if you will.

Mr. Chambers: Lincoln Heights is off Lasalle and Newcastle.

Court: It's also west of Beatties Ford Road and below 85.

Mr. Chambers: East of Beatties Ford Road and below 85, between Beatties Ford and Newland Road.

Q. That school was built in 1956. [423] A. That's correct.

Q. Addition in 1958. A. That's right.

Q. Also subsequent to the Supreme Court decision in 1954. A. That's right.

Q. It's all black. A. Right.

Q. I believe also in this district is Oaklawn, is that correct? A. Yes.

Q. That school was built in 1964. A. Correct.

Q. All black. A. Yes.

Q. Also in this district is Bruns Avenue. A. Yes.

Q. That school was built in 1968. A. That's correct.

Q. All black. A. I'm not absolutely certain about that. There were one or two children at one time.

Q. I call your attention to Table #1, also in the answers to interrogatories. Bruns Avenue shows a population of 740 Negro and 4 white. A. That's right.

Q. Now, I think you were testifying a moment ago that in 1955 or [424] sometime that two of those schools in the

Bruns Avenue district were all white, is that correct? A. I believe I said either all white or nearly all white.

Q. I believe that Seversville formerly covered students on Summitt Avenue? A. I think that's true.

Q. I believe that when you started constructing Bruns Avenue that that was a racially transitional area. A. Yes.

Q. In fact, before Bruns Avenue was actually constructed Seversville and Westerly Heights had become almost all Negro. A. That's true.

Q. Didn't you know, Dr. Self, that when you opened Bruns Avenue that it was going to be all black? A. We could have deduced that.

Q. I believe also in this district is Fairview Elementary School, is that correct? A. That's true.

Court: Fairview, I saw it on the map a while ago but I've forgotten.

Mr. Chambers: In the Greenville area we were talking about. I think it's on or somewhere near Oliver Street—near on Oliver Street.

Mr. Barkley: In the Model Cities area.

Mr. Chambers: It's one block north of Oliver Street.

[425] That school was built in what year, Dr. Self? A. Fairview?

Q. Fairview. A. Built in 1925.

Q. And you had one addition in 1937. A. That's correct.

Q. I think you now plan to close that school, or that's what is proposed in your five year plan. A. That's true.

Q. I think also in that district is Bethune. A. That's right.

Q. That school was built in 1912. A. That's right.

Q. No additions since that date. A. No.

Q. I think also in your five year plan you plan to phase out that school. A. That's correct.

Q. I believe also in that district is Zeb Vance. A. That's true.

Q. That school was built in 19 . . . . A. 18.

Q. 1918, no additions since that date. A. That's right.

Q. I believe that in your five year plan you plan to phase that [426] out also. A. Yes.

Q. Does it have a cafeteria? A. No.

Q. Is it the only school in the system without a cafeteria? A. I believe it is.

Q. How do you feed the children? A. Transport the food in.

Q. Where do they eat? A. They eat in the open space. I assume it's part of an auditorium.

Q. I believe also in that district is First Ward. A. Yes, First Ward is in the district.

Q. And I take it it was replaced in 1968. A. Yes.

Q. All black. A. Yes.

Q. Dr. Self, couldn't you reasonably surmise hereto that when you opened that school it would be all black? A. Yes.

Q. I believe in 1964 you also built Devonshire. A. Yes.

Court: Devonshire is one I don't have in mind. Where is it? Is it pretty far south?

A. No, sir, it's in the northeastern section.

[427] Court: I see Devonshire. It's out off Hickory Grove Road. Is that on the same lot with Cochran at the end of the Plaza?

A. Yes, sir, on the back side of that lot.

Dr. William C. Self—for Defendant—Cross

Q. That's all white, isn't it, Dr. Self? A. Yes, it is.

Q. Didn't you reasonably believe when you opened that school that it would be all white? A. I don't know that you could reasonably believe that that school would be totally white.

Q. Did you reasonably believe it would be predominantly white? A. Yes.

Q. I believe you had a few Negroes assigned there, didn't you? A. I believe at one time there were.

Q. And under the freedom of choice they transferred out. A. I do not know the circumstances.

Q. I call your attention to Table 7 in your second answers to interrogatories. Devonshire shows that for the three years under the freedom of choice you had no Negroes to transfer out of Devonshire. A. That's right.

Q. And Table 1 in your first answers to interrogatories shows that you had 889 white and no Negroes in Devenshire. A. That's correct.

Q. And for 67-68 you didn't have any Negroes in the school. [428] A. That's true.

Q. You apparently didn't have any Negroes in the district. A. Evidently.

Q. I believe you also built Albemarle Road in 1968. A. That's right.

Q. Didn't you reasonably believe, Dr. Self, that when you opened that school it would be predominantly or all white? A. Predominantly white, yes.

Q. I believe its enrollment right now is 499 white and 4 Negroes. A. That's true.

Q. In 1969 you built Beverly Woods. A. That's correct.

Q. Did you reasonably believe when you opened that school it would be predominantly white? A. Yes.

Court: Where is Beverly Woods?

A. Southern section, near the Huntingtowne Farms section, below Sharon School, off of Sharon Road.

Court: I see it now. It's right at the tip end of the city limits off Sharon Road.

A. Yes, sir.

Q. Your Table 1 figures show that Beverly Woods has 286 white and no Negroes in 1968-69. A. That's correct.

Q. Now, Dr. Self, despite your change in the construction plans [429] for Olympic and Independence you have built several all white schools and several all black schools since 1954, have you not? A. As it has turned out, yes.

Q. And I think that on your drawing board right now are plans to build more schools that are going to be all white and some that will be all black. A. I'm sure that the enrollment in the schools will be affected by the neighborhood served.

Q. You know, Dr. Self, that if you use geographic boundaries and build another school in this area now colored pink that you're going to end up with an all black school, is that correct? A. I think that's the apprehension that the Board of Education was expressing when they held up on the Greenville School.

Q. You know also, Dr. Self, that if you build Second Ward right here in the green it's going to end up all black. A. I do not know that.

Q. How would you change it, Dr. Self? A. By offering a program at that school that would induce enrollment from outside the area.

Q. I believe you testified in deposition that in your opinion it would probably end up all black even with those programs. A. I admit there is an element of risk in the location of the school there.

[430] Q. I think, Dr. Self, that you are talking about building a magnet school that would draw people from all over the area because of the special programs you're going to have? A. Yes.

Q. Would you tell the Court, Dr. Self, approximately what it would cost to build such a school? A. An estimate in the neighborhood of three and a half million dollars.

Q. In your opinion you can build a school that would serve as a magnet for the whole county for three and a half million dollars? A. I think that a more relevant fact is not how much you're going to put in the building but how much you're going to put in terms of current expense to continue to operate the school year after year.

Q. I meant to include that in the question. In your opinion what would it cost to build and equip such a school? A. That would be the three and a half million.

Q. To build and equip? A. Yes, sir.

Q. How about to institute an operating program for one year? A. I think that the only way I can give you an opinion on that is to assume that a number of the course offerings would require a more favorable pupil-teacher ratio than we now know. That is, instead of having 1 to 30, you're talking about 1 to 15 [431] or 20 in terms of some of the vocational programs. This would mean a higher per pupil expenditure. The present level of expenditure is $536.00 so a horseback guess would be that the per pupil expenditure would rise to $700.00, $750.00.

Q. Overall how much are we talking about? A. It depends upon the number of students you had there then.

Q. Let's estimate that we have the projection that you have projected for that school. A. Let's say that we have 800 pupils there and assume it would cost $150.00 more per pupil to provide the type of program. If you could

multiply these—and I doubt my own ability to do it—you'd come out with an approximation.

Q. Would it be approximately a million dollars or two million dollars?

Court: I'm not following this question. Are you asking questions about the annual operating cost?

Mr. Chambers: I'm trying to show, Your Honor, that they don't even have the money to build what they're talking about putting there.

Court: As I have heard his testimony he says that the estimated cost of construction is about three and a half million dollars and for 800 pupils the possible additional cost of tuition and operation would be about $200.00 per pupil which would be 150 or $200,000.00 a year extra for that school. Is that a [432] correct interpretation of what you said?

A. That is a correct interpretation.

Mr. Chambers: He says $150.00 over and above the regular rate.

Court: This is what I'm saying. This is what I thought he said.

Mr. Chambers: I thought he was saying that if you got $650.00 average per teacher, you now need $800.00 per teacher.

A. That's true. If you would offer at this school the type of program that would attract youngsters there, you would have to do something above what we're presently doing.

Q. Dr. Self, just taking the construction cost itself, I think you estimated three and a half million dollars. A. That's correct.

Q. How much money have you allocated for that school? A. If my memory serves me right, it's about 2.2 million.

Q. When do you plan to allocate the other? A. The rest of it would have to come in a subsequent bond issue.

Q. Right now you don't even have the money to build the school you're talking about. A. Not the total school. However, we are accustomed to building our schools a piece at a time. Practically every school we build goes through this period.

Q. Dr. Self, when you built schools since 1954, what efforts did [433] you make, other than what you have testified to yesterday, to locate the schools in an area that would effect the greatest maximum integration of students in the system? A. The schools were located in such a way as to house the youngsters, Mr. Chambers, not to effect a maximum amount of integration.

Q. You did not attempt to do it. A. We made an attempt to house the youngsters in the neighborhood.

> Court: Have you had any expression of opinion which you can recognize as representative from the people in these communities that you have been talking about, that is, Greenville and Second Ward, as to what they think about building schools in those places, the people who live there?

A. Your Honor, I think the presentation which the Board of Education received from a delegation in the Greenville community, petitioning the Board to locate the school there, could be regarded as such an example.

Q. Several Negroes in the area have approached the Board and asked them to build schools in the Greenville and Second Ward areas. A. I believe it's more than several,

Mr. Chambers. It seems to be a pretty well organized effort. I do believe there is difference of opinion within the community whether the school should be located there or not.

[434] Q. Is that any different, though, Dr. Self, from some of the white groups who have appeared before the Board and asked for schools in their community? I call your attention to Old Providence. A. I didn't get the first part of your question.

Q. Is that any different from some of the white groups that have appeared before the Board and asked for schools to be located in their communities? A. Oh, no.

Q. Now, Dr. Self, I think you indicated yesterday that the Board had instructed you to employ and assign teachers without consideration of race. A. That's correct.

Q. First of all, in 1965 when you closed the seven schools you indicated yesterday, how many of the black principals were assigned to schools as principals? A. None of the seven.

Q. I think they were all assigned as Assistant Principals with the same salary. A. That is correct.

Q. And I think that at Villa Heights right now you have continued with the Negro assistant principal at the same salary. A. That's true.

Q. This isn't in line with your regular pay scale, is it? A. No, it isn't.

[435] Q. I think that the only assignment of a person of the opposite race to a school where the race is in the minority are two cases that were effected this year, one at Albemarle Road and one at another elementary school.

Court: Will you be going on for a little while longer with Dr. Self?

Mr. Chambers: Yes, sir.

Court: Maybe we better take a recess until 11:15.

SHORT RECESS

Q. Dr. Self, do you have today any white principal assigned to a predominantly or all Negro school? A. No. I beg your pardon, hold on just a second. I believe Barringer would fall in that category .

Q. Would Tryon Hills be another example? A. Yes, it would.

Q. Would Hawthorne be another example? A. Yes.

Q. Would Piedmont be another example? A. No.

Q. Those three schools we just named, I believe, are all in transitional areas, Negroes moving in and whites are moving out. A. They are transitional.

Q. I believe that when these white principals were assigned there the schools were predominantly or all white. [436] A. Yes.

Q. I believe that Piedmont was another example of a transitional area that started off with a white principal and a white student body that became all Negro in student body and you assigned a Negro principal. A. The school has a Negro principal but it's not all Negro.

Q. It's predominantly Negro. A. It's predominantly Negro.

Q. He was assigned there after the student body became predominantly Negro, was he? A. He was assigned there during the transitional period.

Q. Have you really changed your policy, Dr. Self, of assigning white principals to white schools and Negro principals to Negro schools? A. I don't believe that we had a policy of assigning principals according to race related to the composition of the school, Mr. Chambers.

Q. I believe, Dr. Self, that before 1954 you had such a policy, didn't you? A. I would call it custom rather than policy. Policy, to my way of thinking, is the word that we have in a policy notebook, which is direction by the Board of Education.

Q. I believe it was constitutionally required then? A. I'm sorry, I don't understand that.

Q. Well, we'll use your word custom. Have you really changed [437] your custom of assigning Negro principals to Negro schools or white principals to white schools? A. I believe we have altered the pattern, yes, sir.

Q. Your statistics don't quite show that, do they? A. If you're talking about overwhelming numbers in terms of statistics, they may not, but there is still a white principal at Hawthorne Junior High School. It's been transitional for a number of years.

Q. I believe this year it just became predominantly Negro, didn't it? A. I believe this year was the turning point in terms of percentage ratio.

Q. That's about the same as the other three schools that we talked about, isn't it? A. We do have a white principal at Cornelius and the ratio is about 50-50 there.

Q. Now, you hired several new teachers in 1966-67, 67-68 and 68-69, did you not? A. I'm sure we did.

Q. I call your attention to Table #10 contained in your first answers to interrogatories, which is Plaintiff's Exhibit #1. Do you have that? A. Yes, I do.

Q. Would you look at Page 5 of that table 10? A. Yes.

[438] Q. I believe for the 1966-67 school year you hired 34 Negro teachers and 279 white teachers new to the system in the elementary schools? A. That's correct.

Q. And I believe you hired 64 Negro teachers and 304

white teachers new to the system in 1967-68. A. That's right.

Q. And 39 Negro and 291 white teachers for 1968-69. A. That's true.

Q. What accounts for the disparity of the number of Negro and white teachers hired? A. I think that one of the conditions behind the circumstance is the fact that this is new teacher only, that there have been increased opportunities for employment by young Negro graduates during this period of years. I know specifically that northern school systems have recruited our campuses very heavily. This means, of course, that ultimately the number of teachers that are available for employment are reduced. I think that opportunities other than teaching are beginning to open up for young Negro graduates as well, so that he might have some choice in terms of his employment. We are beginning to see for the first time that we are beginning to lose good candidates in terms of employment to fields other than the teaching field and to other school systems.

Q. Are you saying that you don't have any Negro applications? [439] A. I am saying that the number of Negro applications is decreasing.

Q. I believe, Dr. Self, that you indicated your policy for employing teachers that you had an interview with the teacher after you received the application? A. Well, we will interview if we possibly can even prior to receiving the application. The purpose of the interview here is more to disseminate information about the school system in an effort to interest the prospective applicant in coming to Charlotte-Mecklenburg.

Q. Does the principal of the school play a part in the selection of the applicant? A. Yes, they do.

Q. And would the principal of the school know whether the applicant was white or Negro? A. In terms of the intervew or the application blank?

Q. At any stage in the process? A. He would not deduce this from the application blank unless he looked at the experience of the person or the training college attended and made such a deduction.

Q. He could do that relatively easily from the college that the applicant had attended, could he not? A. He could, yes, sir.

Q. I believe you have a policy of requiring teachers to have a score of 500 on the National Teachers Exam. [440] A. That's a State policy I believe, yes, sir.

Q. Is it the State policy or the local Board policy? Isn't the State policy 450? A. Yes, that's right.

Q. Is the City Board policy 500? A. I believe that's true.

Q. When did you institute that policy? A. I don't know.

Q. Dr. Self, does every teacher in this system have a 500 score in the National Teachers Exam? A. I would assume so. I do not know for sure.

Q. Does every teacher in this school system have a Class A certificate or above? A. I am fairly certain that we would have a handful, probably less than five, without a Class A certificate.

Q. Would they be Negro or white, Dr. Self? A. I don't know.

Q. How does the Board justify its policy of 500 or above on the National Teachers Exam with some teachers with less than a Class A certificate? A. I don't know.

Court: Does this relate to anything pertinent to the case?

Colloquy

Mr. Chambers: We think so, Your Honor, we think it relates to the matter of discrimination in the employment [441] and assignment of teachers.

The Court: The requirement that the teacher have a certain proficiency?

Mr. Chambers: Our contention is that, although we haven't given you all the evidence you probably want in order to find a fact of employment less Negro teachers than white, we were bringing that out only to show the next thing we're getting to and that's how the teachers are assigned after they are employed.

Court: Have you got some figures on the number of black and white teachers in the school system?

Mr. Chambers: Yes. That's included in Tables 9 and 10 and in Table 1.

Court: It's not in 10.

Mr. Chambers: Also in the defendant's exhibit that was introduced yesterday. I think it's Defendant's Exhibit #2. Table 1 also has the number of teachers in the system. I think it's by school rather than total.

Court: Is there a total on hand?

Mr. Chambers: Defendant's Exhibit 2.

Mr. Waggoner: Page 2.

Court: Let me see what that is so I'll know where we're starting here.

Mr. Chambers: 907 Negroes, 2706 white.

Court: 25% of the teachers are Negro and the other is [442] white. What does this prove?

Mr. Chambers: I'm talking about the way the teachers are assigned after they get in the system and that's why I was going to Table #9.

Court: Is that the one you had out a while ago or is that another one?

Mr. Chambers: We had out Table 10. Table 9 is what we have now.

Court: Mr. Chambers, as you probably know, I haven't read all the law on this subject. Has the Fourth Circuit Court or the Supreme Court said anything definitive on the subject you are pursuing now?

Mr. Chambers: The Fourth Circuit said something and the Supreme Court rather definitively in Bradley vs. the City of Richmond which was the first Supreme Court decision with respect to teachers. It said that teacher desegregation was one of the requirements of the Supreme Court decision in Brown.

Court: The Charles City case, is that the latest one the Fourth Circuit actually wrote an opinion in?

Mr. Chambers: The latest Fourth Circuit opinion was Brewer.

Court: That's not an opinion.

Mr. Chambers: It says something on teachers and that's the thing we were getting into here. Brewer says [443] and Bowman also says something on teachers.

Court: Brewer and Bowman are both one or two paragraph per curiam opinions, aren't they?

Mr. Chambers: No. Bowman sets out the requirement that the School Board present to the Court a time table for desegregation of teachers.

Court: In the context where you had all black teachers in black schools and all white teachers in white schools.

Colloquy

Mr. Chambers: I'm not certain whether there had been some integration or not.

Court: I'm asking this question as purely practical matter. If you've got between 25 and 30% of the student body Negro and between 24 and 25% of the teachers Negro and some assignment of both races to both types of schools, I just wonder as a practical matter if the teacher problem isn't something that we could just spin our wheels over from now on without getting to anything worth having spent the time on.

Mr. Chambers: I think it's relatively clear now that the school system has to take some steps to completely desegregate teachers in the school system.

Court: You think the Charles City case did not reflect the law in what Judge Haynsworth said?

Mr. Chambers: I think it did. I think the Charles [444] City case requires that this School Board present a plan for complete desegregation of teachers. I think that Bowman required it. I think that Brewer required it.

Court: You've got a different factual situation here than you had in those cases.

Mr. Chambers: I submit not, Your Honor.

Court: Where there had been no pretense at breaking down the line.

Mr. Chambers: What about Brewer. Brewer is Norfolk City and Norfolk City had taken steps to desegregate teachers. The court said that it simply had not done enough.

Court: I don't know the cases well enough to stand you down on it but I'm puzzled about the state of the law and I'm also puzzled about the practicalities of

it in Charlotte for us to worry about this subject when we've got more fundamental things to worry about.

Mr. Chambers: Your Honor, I think this is very fundamental and really we hadn't pursued it that much because we felt the statistics here were clear enough to show something had to be done. The Table 1 sets out the amount of integration of teachers in the system and, although I am sure Mr. Barkley would probably disagree, I submit that they haven't done what the court [445] required. I submit further that contrary to their table, their Exhibit #2, that rather than have the increase in teacher desegregation here, they have had decrease in teacher desegregation and the courts have clearly pointed out and this was required in 1965. The HEW requirements said in 1966 specifically that you should have two teachers of the opposite race in each school.

Court: You're not citing HEW requirements, whoever they help, as being the law in the case, are you?

Mr. Chambers: This has been one of the standards that the courts have required and there have been several cases where the courts in 1966-67 were requiring at least two teachers of the opposite race to each school. Now the courts are requiring complete desegregation of teachers for 1969-70 and that certainly means more than one or two teachers of the opposite race to each school.

Court: What's a case where I could look and read some law on that point?

Mr. Chambers: Again, Bowman is one case. United States vs. Jefferson is another case and I think that Bradley vs. City of Richmond is another

case. I think that two cases out of Arkansas are other cases. I was just trying to think of the names of them offhand. Kemp vs. Beasley and Kelley vs. Altheimer.

[446] Court: The Fourth Circuit cases were Charles City and Brewer and Bowman.

Mr. Chambers: The Fourth Circuit cases are Brewer vs. Norfolk City, Bowman versus New Kent County. These are the more recent cases.

Court: Where in this file is the motion or pleading in which you cited several of these cases? I've forgotten. Was this in the motion filed last fall?

Mr. Chambers: We filed a motion but I don't know what paragraph it is.

Mr. Waggoner: If the Court please, the motion for further relief, in Paragraph 2 are a list of the cases.

Court: I found them. Go ahead.

Q. Dr. Self, would you look at Table 9 containing Plaintiff's Exhibit 1? A. Yes.

Q. I note that in 1965-66, for example, you hired 12 new teachers all Negro and assigned them to the Alexander Street Elementary School. A. Mr. Chambers, I believe this table reflects all of the staff people assgined to Alexander Street Elementary School and other schools. They would not necessarily be newly employed.

Q. Well, all staff assigned for 1965-66 would be 12 Negroes? A. That's correct.

Q. And 13 for 66-67? [447] A. That's correct.

Q. And looking at Table 10 for Alexander Street I think for 67-68 you hired two new teachers, all Negro. A. That's true.

Q. This pattern seems to follow throughout for 67-68 and 68-69. A. Yes.

Q. Would you explain to the Court, Dr. Self, why the substantial majority of the new Negro teachers hired would be assigned to Negro or predominantly Negro schools? A. I'll say that it's probably because of the role of the principal in the employment of staff.

Q. Would that same thing be true for the white teachers hired for 67-68 and 68-69? A. It's probably true.

Q. And your present teacher compositions in the school are set out in Table 1 in answers to interrogatories. A. That's correct.

Q. And I think also, Dr. Self, you have testified at one time that you have had and allowed for 1967-68 and 68-69 freedom of choice among teachers. A. I don't believe it could quite be called freedom of choice. There are three parties to a transfer of a teacher in the school system, the sending principal, the receiving principal and the teacher herself and there must be concurrance along the way on the part of all three for a transfer to be effected.

[448] Q. Do you give some consideration to the choice expressed by the teachers? A. Yes.

Q. In most instances the white teachers have preferred white schools and the Negro teachers Negro schools. A. Yes.

Q. I think also, Dr. Self, that after '65 and the court order where you were required to assign some Negro teachers across racial lines and white teachers across racial lines that some teachers so assigned have gone back to schools of their race. A. I did not know of the circumstances but I would suspect that's true.

Q. Finally with respect to teachers, how much integration of coaching staff do you have in the City? A. Very

little of that at the present time. I think there was some integration at Quail Hollow but I don't believe that that's true this year.

Q. You don't have a Negro on the coaching staff of Myers Park, do you? A. I don't believe so.

Q. You don't have a white coach on the coaching staff at West Charlotte, do you? A. No.

Q. I believe this is about true of the other high schools in the system, isn't it? [449] A. Yes.

Q. It's also true of your junior high schools, too, isn't it? A. Yes.

Q. Why, Dr. Self, would you not have any integration of coaching staff? A. I would say because of the role again of the principal and the athletic director that they play in the selection of coaches and because of the fact that there is very little change in these positions from one year to the next.

Q. Dr. Self, if you have assigned teachers in the past on the basis of race and if this has been reflected in your statistics, what have you done to disestablish the old effect of past racial discrimination? A. We have attempted to influence the principal's judgment in selection of his staff. When the schools that were referred to in previous testimony were closed we insisted these teachers be reassigned to existing vacancies before a newly employed teacher could be assigned.

Q. Is that the extent of it? A. Our work with the principals has been to use what I would term serious persuasion.

Q. The success of your work thus far is reflected now in Table 1 in answers to interrogatories? A. That's correct.

Q. Do you have, Dr. Self, any plans now for complete desegregation [450] of teachers in the school system? A.

We plan to continue to attempt to desegregate staff in the way we have in the past.

Q. Do you have any time schedule for when you will complete it? A. No, sir.

Court: What do you call complete desegregation, Mr. Chambers?

Mr. Chambers: Now pending before the United States Supreme Court is a case that challenges the requirement that the percentage of teachers at each school reflect the percentage of the race of the teachers in the system as a whole. Since the record here indicates that there are 25% Negro teachers in the system, we contend that the complete desegregation of teachers in the system would require 25% of the Negro teachers in each school in the system. There are several decisions now so holding and have said that there should be no greater variation than 10% either way.

Court: What is the closest to this that the Supreme Court has ever come?

Mr. Chambers: The Supreme Court itself has not, as I understand it, yet defined exactly what complete desegregation would mean in terms of teachers. That decision won't even be argued until the fall term, but there are decisions in the Fourth Circuit, decisions [451] in the Fifth Circuit and there are decisions in the Sixth Circuit that set out what they hold to be complete desegregation and that is that the percentage of Negro teachers in each school reflect the percentage of teachers in the whole system. It has been held in this circuit.

Mr. Barkley: What case?

Colloquy

Mr. Chambers: Brewer vs. Norfolk School System. Check the citation in the case of Kier.

Court: I didn't read anything like that in Brewer.

Mr. Chambers: Brewer cites the case of Kier. Kier holds specifically that that is the standard that is required. That's in the Fourth Circuit out of Virginia. It is a District Court case. The Fourth Circuit cited it with approval.

Court: Well, you've answered my question as to what you mean when you're talking about complete desegregation. For convenience of description you just take the mathematical approach towards the racial composition of the community.

Mr. Chambers: Your Honor, I think there has to be some beginning point.

Court: I'm not fussing about the approach you're taking, I'm trying to get in my head what you're saying. Now I understand what you mean when you use the words. [452] This makes it a purely accidental figure which is dependent on where the school lines happen to lie at the particular time.

Mr. Chambers: Not with respect to teachers, Your Honor. Teachers are assigned by the Superintendent and they can be assigned by contract to any school in the system.

Court: It means, for example, that if the county north of Interstate 85 were one district and if First Ward were another, each of those would have a totally different kind of constitutional obligation.

Mr. Chambers: No, Your Honor, we are talking about the school system as a whole and not a district within a school system.

Dr. William C. Self—for Defendant—Cross

Court: You say the Constitution requires that we apply a mathematical rule to the ratio of the people who live in the particular political subdivision that constitutes the school system.

Mr. Chambers: I'm saying this, Your Honor, the school system could have 50% Negro teachers in the system. If it did, each school in the system should have 50% Negro teachers. It could have 10% Negro teachers in the system. If so, each school should have 10% Negro teachers. The approach of the courts has been that once they reach this situation, it then proceeds to [453] employ and assign teachers without any consideration of race and then in one year, two years you might have a situation where a system has 10 or 15%.

Court: Go ahead.

Q. Dr. Self, yesterday you indicated that you had approximately 5800 professional and non-professional staff in the system. A. That's correct.

Q. I assume this non-professional staff would also include janitors. A. Yes.

Q. Excluding janitors in the system, approximately how many of your total professional and non-professional staff would be Negroes? A. I think the 25% figure you find in the professional staff would probably be true in the non-professional.

Q. That's your best approximation? A. It's an approximation only.

Q. Now, I think you indicated that you have approximately 25 new students per year in the system. A. 2500, yes.

Q. Which means that you are building approximately

how many schools a year, Dr. Self? A. Well, I think at one time we reduced that to a classroom figure of about 80 or 90 and that, I think, represents the amount of building that you'd need to house the additional [454] enrollment. But at the same time you need to try to catch up in terms of the older buildings, replace some of the outmoded facilities, that sort of thing, so that the amount of building will exceed the number of classrooms that you need to house your new pupils. Last year, for example, we opened 256 classrooms.

Q. Do you average approximately 250 classrooms a year? A. No, sir, that was an unusual year.

Q. What would your average be, approximately 200? A. No. I'd say a probable average would be maybe 130 for the past three or four years.

Q. 130 new classrooms a year? A. I believe so.

Q. Now, how many, classrooms do you average per school, Dr. Self? . . . or try to average for elementary schools. A. Elementary schools I think would be around 24.

Q. For high schools it would be what? A. We go by housing capacity here. Usually you think in terms of an optimum size of 750 for junior high schools and somewhere around 1250 and up for senior high schools.

Q. What is your preferable land acreage for junior and senior high schools? A. We have a rule of thumb figure of 15 acres for elementary, about 25 for junior high and around 40 for senior high.

Q. How many do you project for Second Ward? [455] A. I believe that with the acquisition of surrounding land from urban redevelopment we will have somewhere around 10 to 12 acres.

Q. Now, Dr. Self, you introduced several exhibits yes-

terday. #2 was a summation of integration. Do you have that exhibit before you? A. Yes, I do.

Q. Now, you give a figure in your total down here that pupils in 1965 you had approximately 24% attending integrated schools. A. That's correct.

Q. And in 1968 you have approximately 77%? A. That's correct.

Q. How do you figure this, Dr. Self? A. I believe I stated in my testimony, Mr. Chambers, that where there was any incident of integration we counted the school. For example, at Bethune in 1965 there were 9 white pupils and 343 Negro pupils, producing a total of 352 pupils who were encountering integration in one form or another. That 352 was contained in the ultimate total of 17,274 and counted in the percentage of 24%.

Q. So that if your school has just one student of the opposite race you count that as an integrated school. A. That's right.

Q. And I think you were doing the same thing with respect to teachers. [456] A. That's right.

Q. So in the situation where you have one Negro teacher and 32 white teachers you count this as an integrated school. A. As an integrated staff, yes.

Q. And you say that 33 teachers are in an integrated situation. A. Yes.

Q. Dr. Self, you said the other day that you stopped counting percentages of teachers like 32.2 or 32.3 pursuant to the regulations of HEW for 1968-69. A. That's right.

Q. Did HEW have a regulation relative to how you count an integrated school situation? A. I don't believe that they did initially but I believe that the forms now require, you are now instructed not to count the floating teacher or the teacher who serves more than one school.

Q. What about students? A. There are no regulations in regard to the students as I know of.

Q. Dr. Self, isn't it true that HEW itself says that if you have just one Negro student in a school with three hundred and some white students that you do not have an integrated school?

Mr. Waggoner: If the Court please, we object to that, what HEW has to say about this. These are matters that will speak from the record if they are competent in any [457] way.

Mr. Chambers: He certainly testified what HEW required about teachers.

Court: Objection overruled.

A. I do not know the answer to your question.

Q. You are now required, are you not, Dr. Self, to submit a report to HEW on the racial composition of students in the school system? A. Yes.

Q. Did you file such a report? A. Yes.

Q. In your computation are you required to indicate those schools that are integrated and those that are not? A. We are required to list the number of pupils in the student body according to race but I do not know that you are required by the form to indicate whether the school is thereby integrated.

Q. Now, Pages 3 and following on your Exhibit 1 would indicate the racial breakdown by schools. A. Yes.

Q. Dr. Self, would you call Second Ward integrated with 1139 Negro and 3 white students? A. I wasn't attempting to define, Mr. Chambers, whether the school was integrated. I would say, though, that those pupils were experiencing some degree of integration.

Dr. William C. Self—for Defendant—Cross

[458] Q. Would Second Ward be racially identifiable? A. I'm sure that it would be.

Q. Now, looking at your Exhibit #3, this shows all the money paid to each school for salaries. A. That's correct.

Q. And you get your average by dividing the total number of employees into the amount paid. A. That's right.

Q. Would you say that the average student at Bethune was receiving $671.05 per pupil? A. Yes, in terms of payroll.

Q. What about in terms of the actual amount paid per pupil?

Court: What exhibit are you looking at now?
Mr. Chambers: Defendant's Exhibit #3.

Q. Dr. Self, what I'm getting at, you have to show more than the total salary paid to the school, don't you? A. In terms of coming up with a per pupil expenditure, yes.

Q. This doesn't reflect very much, does it? A. It reflects only the salary.

Q. Now, going back to Exhibit #3, I believe this also includes the Federal moneys that are appropriated to each school to be included in salaries. A. You would find some Federal moneys in this, I'm sure. For example, Bruns Avenue has a teacher employed to implement the IPI, Individually Prescribed Instruction Program, so that her [459] salary would be reflected there.

Court: These averages are per month payments to teachers?

A. Yes, Your Honor.

Court: Is that twelve months or eight?

Nine and a quarter months for teachers.

Q. Looking at your Table 3, this shows the total or average number of books per pupil at each school in the system A. Yes.

Q. It doesn't show how many of these books were purchased by Federal funds. A. It does not. It would show the number of books purchased with all funds.

Q. This document also doesn't show very much either, does it, Dr. Self? A. It shows the number of books per child in each of the libraries in the school system.

Q. This estimate was made by the Director of Library Services? A. That's correct.

Q. Does it include magazines? A. No, it does not.

Q. Does it include supplementary reading material? A. No, sir.

Q. It doesn't indicate the kind of books that are there. A. No.

[460] It doesn't indicate whether all the books are encyclopedias or some other texts. A. Encyclopedias I don't believe would be counted in this.

Q. It doesn't include textbooks. A. No.

Q. Now, going to your Exhibit 5, which shows the per pupil value of facilities. A. Yes.

Q. This doesn't show very much either, does it? A. It shows just what it claims to, Mr. Chambers, the facilities value per pupil.

Q. Based on the estimate given by the principal of each school. A. And I don't think there is a great deal of fault in that figure. We did admit yesterday, however, that the number of pupils in the school might influence the assessed valuation per pupil since that was used in the computation.

Q. Would you think, Dr. Self, would you state for the

record that the average per pupil value of the facilities at Fairview is $61,000.00? A. Yes, at the present circumstance, but it's because of the diminishing enrollment at Fairview Elementary School.

Q. While the average per pupil value at Myers Park is $650.00? A. That's correct.

Q. Now, are you saying that the pupil at Billingsville has a much better facility than the pupil at Myers Park Elementary? [461] A. The table simply shows the per pupil value.

Q. Would you say, Dr. Self, that the pupil at Fairview has that much better school than the pupil at Myers Park Elementary? A. I don't make that claim.

Q. Dr. Self, do you charge fees in the school system? A. Yes.

Q. What are they for? A. For instructional supplies at the elementary level; for the rental of textbooks at the secondary level.

Q. How much are the fees for elementary students? A. I believe it's $1.50 . . . $1.00, Mr. Philips corrected me on that.

Q. $1.00 for the elementary students? A. That's correct.

Q. How much for the high school students? A. These will vary. I'm sorry, I can't recall that figure.

Q. Are they $5.00, $20.00? A. It's $7.50, if I'm not mistaken.

Q. Does anyone know the facts? A. Dr. Hanes would know, I believe.

Q. Dr. Self, what is the percentage of the collection of these fees of the schools in the inner city? A. I would estimate 50%.

Q. What is the percentage of the collection of these fees of the schools in the outer city? [462] A. Near 100%.

Dr. William C. Self—for Defendant—Cross

Q. So your white or predominantly white schools would collect nearly 100% of the fees and your Negro schools or predominantly Negro schools would collect 50%? A. That's correct.

Q. Does that reduce, Dr. Self, the instructional supplies for the Negro schools? A. It does.

Q. Does it reduce it rather substantially, Dr. Self? A. It would in terms of those schools that have that 50% collection factor.

Q. Have you seen this document over here, Dr. Self, that gives the income percentage by census tract for 1960? A. Not close. From a distance, yes.

Q. If the white would represent income from 2,000 to 399 or zero to 399 would your opinion be that the residents would be concentrated in this area? A. Yes.

Q. And this area here, 37, would be Marie G. Davis? A. Yes.

Q. And this area here, 23, would be Billingsville. A. Yes.

Q. So the schools in these areas would collect about one-half of the fee? A. As an estimate, yes.

[463] Q. Does the School Board supplement the programs, Dr. Self, in order that they may get the instructional supplies? A. No, they do not.

Court: What are we talking about in instructional supplies?

A. We're talking about art materials, paints. We're talking about papers of all sorts. We're talking about work books, if these are used, the expendable supplies.

Court: Are these items which the State supplies to the School System or which it does not supply?

A. They do not supply them.

Q. I believe you would consider these instructional supplies necessary or helpful in an educational program, wouldn't you? A. Yes.

Q. Dr. Self, we have received some test results in answer to interrogatories showing that students in grades 3 in some schools are reading at a level or achieving at a level of a student in grade 1 or grade 2. That situation exists in the system, does it? A. Yes, it does.

Q. I believe, Dr. Self, that the State of North Carolina supplies the basic curriculum textbook. A. That's true.

Q. What happens when a student in grade 3, or take other examples, a student in grade 6 is reading at a level of grade 3 and gets [464] a 6th grade textbook, can he read it? A. He cannot. You try to put in his hands a book that he can read.

Q. Now, how does he get it? A. From the supplementary reader collection. Hopefully in the future, with our move from a single adoption at the State level to a multiple adoption, through one of the basic reading programs which does take into account this variance in grade level, the program is to be implemented next year.

Q. Who supplies the supplementary material? A. The school purchases its supplementary material.

Q. The individual school? A. Yes.

Q. The individual school would have to take some of the money which it could do something else with and buy supplementary material for the students in these schools? A. That's true.

Q. And thereby reduces its average per pupil expenditure even more, does it not? A. It reduces it, the amount of money available, yes.

Q. So not only would the schools in the more affluent

areas collect their fees 100%, they would also have students reading at a higher level and could use the textbooks actually furnished free by the State, could they not? A. Would you mind repeating that?

[465]Q. The schools in the more affluent areas would collect the school fees? A. Yes.

Q. They would also have, according to your test results, students reading at the grade level and would therefore be able to read the textbooks furnished free by the State. A. Yes.

Q. Your schools in the inner city collect only 50% of the school fees. A. Yes.

Q. And their students read lower than the grade in which they are enrolled. A. Yes.

Q. And they cannot use the free textbooks furnished by the State. A. To a lesser degree, yes.

Q. And they have to use what funds they do have to purchase supplementary material. A. That's right. The only thing that your analogy overlooks is that the privileged school may have a problem of supplying books for the children above the grade level.

Q. So your student in the inner city gets on an average, do they not, Dr. Self, less per pupil expenditure than the student in the more affluent areas. A. There would be less money behind the pupil for the provision of these supplies, yes.

[466] Court: When you put it altogether is there less State money expended for the children in the inner city area?

A. No, sir.

Court: Is there less local money expended for them?

A. No, sir.

Court: Is there more money expended for them?

A. Under certain circumstances, yes.

Court: The difference is the amount of the fees that aren't collected.

A. That's one of the differences, yes.

Court: Are there other differences?

A. This matter explored in other testimony about the participation of PTA's in terms of financial support.

Q. Would there also be the difference, Dr. Self, of the inability of these students to use the free textbooks and having to use the money to buy supplementary material? A. That is a problem but it is not a problem that is confined to the center city schools.

Court: I may not have been listening too well, but if the textbooks are free, they can't use them because they are too advanced for them, is this the point?

A. This would be the point, yes. The textbook is meant to accommodate a child at a particular level. You seldom will find a classroom where there are not variations from that particular level. These youngsters must be accommodated [467] through provision of other material.

Q. Dr. Self, in your opinion should the school system attempt to supplement the moneys available for the schools in the inner city or lower economic areas to compensate the schools for the loss of funds to be collected from the fees and the inability to use the free State textbooks? A. I would answer that yes and I think the school system has

attempted to do something about it. It falls under the heading of elimination of school fees. We have had this item inserted in our budget in the past and have had it taken out of the budget.

Q. Do you presently require school fees? A. Yes, we do.

Q. And you don't know when, if ever, you'll be able to eliminate them. A. I don't know when but I would hope to be a little more optomistic than the last part of your statement.

Q. Now, I believe that a substantial portion of the money appropriated to the schools is also based on a per pupil basis A. Yes.

Q. In other words, you appropriate $500.00 per pupil in each school, as an example. A. As an example, yes.

Q. Dr. Self, what is the average daily attendance of the students in the inner city schools? [468] A. I don't know.

Q. Is it lower, Dr. Self, than the average daily attendance of the students in the outer city? A. I'm sure that it would be.

Q. Isn't it more substantially lower than the students in the more affluent areas?

Court: Are there some figures on this subject?

Mr. Chambers: They are in the principals' final reports contained in our Exhibit 1 and in the principal's preliminary reports.

Court: Show me what you're talking about.

Mr. Chambers: This is Exhibit 8.

Court: You pick out an example of what you're talking about so I'll know what it is.

Mr. Chambers: All right. Look at Alexander Junior High School. The total enrollment is 1115,

total withdrawal 79, total membership 1036. This shows, as I understand it, the basic average daily attendance.

Q. Is that correct, Dr. Self? A. Yes.

Court: What, the total membership?

A. No, the membership is different from the attendance. The membership, in layman's terms, is a figure which reflects the true enrollment of the school. When you are talking about total enrollment, that figure is confused by immigration and [469] outmigration.

Q. What is the average daily attendance here? A. Which sheet were you on, please?

Q. Alexander Junior High School. A. I can't detect from this which is the figure. I can offer this statement which might clarify it. If you're talking about per capita distribution, do you base the per capita on the attendance figure or the membership figure. The answer is membership and October 1 of the year is the day on which the membership is taken for each school. This allows the schools time to get all of their pupils in and it is the official day for logging that membership figure.

Q. That's the membership. A. That's correct.

Q. That's shown in the principals' preliminary reports. A. It would be, yes.

Court: Mr. Chambers, that sheet, if I read it right, shows an almost incredibly high attendance.

Mr. Chambers: That's Alexander Junior High School.

Court: This is the one you were calling my attention to. This shows that out of 1030 membership

the average—well, I won't try to interpolate it now, but it looks like pretty high attendance.

Mr. Chambers: I know, but look at Elizabeth.

Court: Do you continue to make the point that average [470] daily attendance is used in a discriminatory fashion?

Mr. Chambers: I'm saying it's used in a way that deprives the Negro student, the student in the lower income areas of equal distribution of funds.

Court: I thought I heard Dr. Self's answer to be that the figures on the distribution per capita of funds are based upon the membership in the school rather than upon the average daily attendance. If that's an admitted fact, I'll forget about this and go to something else. Is that something that you take as a fact?

Q. Are you saying that the schools on the 10th day of October would indicate the membership and that was the basis you use for the per capita distribution? A. That is. Let's take, for example, library allocations. The library allocation which comes from the State will come to this school system in terms of last year's figures. It will not be enough, you see, to give the required amount on a per capita basis. We will take local funds and add to that amount of money that comes from the State and then on October 1st we check our membership and we will allocate, on a per pupil basis, to every school, on the basis of membership figure, not attendance. The money allocated at the beginning of the year is spent and presumably the supplies, whatever it is that is bought, is available to the youngsters for the entire school year.

[471] Q. That's for your capital outlay. Are all your

expenditures based on per pupil determined that way? A. Anything that's on a per capita basis.

Q. What about State aid, Dr. Self, is it based on the same? A. It is based on average daily membership as well. It always lags behind because the figure that is available to the State authority is last year's figure. In the meanwhile we grow by our 2500 pupils and we must take care of the 2500 pupils through the use of local funds.

Q. State aid, really, is based on average daily attendance, isn't it? Your teachers are allotted on that basis, aren't they? A. The teacher allotment formula is extremely complicated. I can't explain it.

Q. Dr. Self, you talked about some of the weaknesses in the plans that were presented by Drs. Larsen and Finger and Passey. I think you also indicated that you didn't know how you would integrate the Charlotte-Mecklenburg School System. A. That's true.

Q. Would you anticipate any plan that desegregated this system to be easy? A. No, I would not.

Q. Would you anticipate that it would have some difficulty for the School Board? A. I would.

[472] Q. Would you anticipate that it would require some busing of students, Dr. Self? A. In all probability.

Q. Dr. Self, you talk about the mileage from one school to another. How far does the student in Northwood Estates have to travel to go to senior high school? A. Northwood Estates to senior high school?

Q. Going to North Mecklenburg. A. A good five miles, more probably.

Q. Could it be 13 miles, Dr. Self? A. I'm sorry, I don't know, but it certainly would be a good distance.

Court: Where is Northwood?

A. Just across I-85.

Court: Out Highway 16?
Mr. Chambers: No, Beatties Ford Road.

Q. Where is your high school, on up here a bit, isn't it? A. On the other side of the map.

Mr. Chambers: Do they go to North High School?
Mr. Chambers: North Mecklenburg.

Q. Dr. Self, how far do the students living in this district have to travel to get to Independence High School? A. Again, that's a considerable distance. It's, I'd say, 7 miles.

Q. How far do the students living in the southern part of the county have to travel to South? [473] A. A long distance.

Q. In fact, Dr. Self, wouldn't your average mileage in your districts for high schools be between 7 and 10 miles? A. Well, in that area, yes.

Q. Now, coming into the city, what is the average mileage for the student in the Garringer district? A. I don't know.

Q. Would it be about 5 miles, Dr. Self? A. The preponderance of Garringer students live in close proximity to it. However, the Garringer area does run out to the county line so there would be some students that would travel a considerable distance.

Q. I believe, Dr. Self, it runs from the inner city, the Second Ward boundary, out to the county line, doesn't it? A. Yes, I just stated that.

Q. That's about how far? A. That's a good 7 miles.

Q. Could it be about 20, Dr. Self, from the inner city to the line? A. I don't know about the inner city.

Q. Now, if Second Ward were not located here and the students in this area were assigned to other schools, would they be going any further than the student out here going to Garringer? A. No.

Q. Would they be going any further than the student out here [474] going to Independence? A. No.

Q. Would they be going any further than the student living up here in Northwood going to North Mecklenburg? A. No.

Q. We talked, Dr. Self, about the schools of Lakeview and Hoskins being separated by Interstate 85. I believe that the boundary line for the student in the elementary district of Tuckaseegee Road crosses 85, doesn't it? A. Yes.

Q. I believe the boundary line for the students in the Newell District crosses 85, doesn't it? A. I believe so.

Q. It isn't unusual, then, for the boundary lines to cross 85, I mean it happens. A. It happens, yes. We don't like it but it does happen.

Q. I believe that the boundary line for the school district of Myers Park Elementary School crosses Morehead Street, doesn't it? A. I believe so.

Q. We have several examples, don't we, in this district of boundary lines going across major highways? A. Yes. Where we find evidence of these, it's evidence of the fact that we must get our children to fill the classrooms irrespective of the highway arteries.

[475] Q. Now, do you know of any studies that differ with you on the elementary principles that you were referring to a moment ago, that is, that the student ought to attend school near his home? A. I know of no studies.

Q. Do you know of any authorities that would differ with you on that? A. I'm sure there are plenty of authorities that would differ.

Dr. William C. Self—for Defendant—Cross

Q. You indicated, I think, that your elementary schools are located approximately three-fourths of a mile of the outer boundaries of the district line? A. I did but I also indicated that density of population would effect changes in this.

Q. What is your opinion, Dr. Self, about students in junior high and senior high schools being transported to school? A. Transportation at that level is more acceptable in my own opinion than is transportation of elementary youngsters.

Q. Dr. Self, are several of your students in the inner city being transported by city bus line to high school? A. I don't know. I'm sure that some of them do use the city transportation.

Q. I think that several buses go out to several of the high schools to pick up and carry students, don't they? A. I'm sure they do.

Q. It's not unusual, then, in the district for the students to [476] ride city buses to school as distinguished from State buses? A. It's not unusual.

Q. I think that the Head-Start students are also bused, are they not? A. Yes, they are.

Q. They are elementary or below elementary students? A. Yes.

Q. They are sent quite a few miles to school? A. Yes.

Q. You project about six schools for this summer for Head-Start? A. Five or six.

Q. To service the whole county system? A. That's true.

Q. They are going to be bused several miles to school, aren't they? Yes, they are.

Q. These are young children? A. Yes, they are.

Q. Dr. Self, one specific, would it violate your elementary principles to pair Billingsville with one or two of those

adjacent schools? A. It wouldn't violate my principles. It would cause a lot of problems that I would be most anxious to try to deal with.

Q. Would it violate your elementary principles to pair Marie Davis with one of the adjacent white schools? [477] A. If you could do it in such a way as to allow the ungradedness within the school it would not.

Q. You said ungradedness. A. I object to the Princeton plan. As I understand the Princeton plan it is more or less an arbitrary determination that this school will house grades 1 and 2 and another school will house 3 and 4. The present thought in elementary education is to move away from gradedness and the Princeton plan binds you to it.

Q. Would you talk about extending the boundary line of Marie Davis to cover the white school and then assign the students to it? A. If they were paired, I would prefer that technique.

Court: Do you want to play that over again so I'll know what you're saying? You say you don't like gradedness as the Princeton plan suggests. Is the Princeton plan the idea of taking an entire grade from one location and moving it bodily to another?

A. As I understand it, the Princeton plan is used for bringing together schools that are far apart geographically and the idea is to transpose grade sections with school A housing grades 1 and 2 and school B housing grades 3 and 4 and school C housing grades 5 and 6, that sort of thing.

Court: And you would prefer, if that had to be done, to do it how?

[478] A. To locate your school in such a way that you have grades 1 through 4 or 1 through 6.

Dr. William C. Self—for Defendant—Redirect

Mr. Chambers: I have nothing further.
Court: Any more questions?
Mr. Waggoner: Yes, sir.
Court: Let me see the lawyers for just a minute.

(Conference out of the hearing of the Court Reporter.)

Court: I guess it's late enough to eat so let's eat. Take a recess until 2:00 o'clock.

RECESS FOR LUNCH

Court: Defendant's Exhibit 6 received in evidence is a five-page double-spaced typewritten writing entitled Facts about Charlotte-Mecklenburg schools.
Mr. Waggoner: If the Court please, Exhibit 7 is the same as Exhibit 2 except it contains percentages as you requested yesterday.
Court: Good. I thank you for preparing that.
Mr. Waggoner: If the Court please, we have one additional tabulation which we will offer as Exhibit #8 and it is entitled Tabulation of Percent Negro of Total for Schools Enrolling Predominantly White Pupils March 1965 and October 1968. This is a percentage of schools having varying degrees of integration. I'll have Dr. Self explain this.
Court: Have you got a copy of that that I can look at?
[479] Mr. Waggoner: Yes, sir.

Redirect Examination by Mr. Waggoner:

Q. Dr. Self, have you had an opportunity to review the Defendant's Exhibit #8 dealing with the tabulation of per-

cent of total for schools enrolling various numbers of pupils percentagewise? A. Yes, I have.

Q. Could you explain to the Court the information contained on this exhibit? A. This statistic presentation shows the percent of the pupil population and the professional staff which are Negro in terms of various percentage catagories ranging from zero % up to 100%. It's actually a summation of the percentages that Your Honor asked us to do on Exhibit #2, pulling them out for easier understanding.

Q. Is this based on 5% gradations? A. Yes, it is.

Mr. Waggoner: If the Court please, I believe the statement is self-explanatory unless you want to go further into this.

Court: I don't want to put you to a lot of further unnecessary work but if you have or could develop without a lot of trouble the absolute figures that would fit each one of these lines, it might have some useful purpose now or later. This is very helpful and I [480] appreciate it.

Mr. Waggoner: We would like to substitute a typed copy, this is rough draft.

Q. Dr. Self, will you take the columns entitled Pupils 965 and 1968 and explain the meaning of the figures in hose columns? A. Well, at the top of the lefthand column the 100% Negro figure. Going down from that column ou go to zero % at the bottom of the page. The first entry the column that you referred to is 30, indicating that 1965 there were 30 schools that were 100% Negro. If ou move over to your right the comparable figure for 968 is 17. In the 95 to 99% there was one such school in

'65 and there are 5 in '68, and so on down through that column to right at the bottom where you have zero % Negro. That, of course, is an all white school, and in 1965 there were 63 such schools and in 1968 there are 22 such schools.

Q. So this indicates that the number of all white schools decreased from 63 to 22.

Mr. Lanning: Objection, the table is quite clear on what it reflects.

Court: Objection overruled.

A. Yes.

Q. Would you take the two columns under Professional Staff and explain the meaning of those figures? A. Comparable data is given here, comparison between 1965 and '68 [481] except that the statistics are based on the number of teachers rather than numbers of pupils. It indicates that in 1965 there were 28 all Negro schools as measured by faculty. In 1968 the comparable figure is 14. Then going to the other extreme end of the chart zero % Negro or all white, in 1965 there were 78, in 1968 there are none.

Q. Dr. Self, I direct your attention to Page 16 of the recommendations and analysis of the plaintiff's experts. As I recall, Mr. Chambers in his cross examination inquired of you as to how you might desegregate the schools located in what is called central city and listed the number of schools which indicated being nearly all black or all black. A. I recall.

Q. I'll ask you if University Park School is listed as one of the schools that the plaintiff's experts would permit to remain segregated. A. Yes.

Q. I'll ask you if Lincoln Heights is such a school. A. Yes.

Q. I'll ask you if Oaklawn is such a school. A. Yes.

Q. I'll ask you if Fairview is such a school. A. Yes.

Q. I'll ask you if Bethune is such a school. A. Yes.

[482] Q. I'll ask you if Zeb Vance is such a school. A. Yes.

Q. I'll ask you if First Ward is such a school. A. Yes.

Q. Now, referring to the schools to remain segregated predominantly white I'll ask you if Devonshire school is listed. A. Yes.

Q. Albemarle Road? A. Yes.

Q. And Beverly Woods. A. Yes.

Q. As I recall, the only other school he mentioned was Bruns Ave. and I believe you previously testified that this school encompassed an area that would have had an integrated pupil population as of 1965. A. Yes.

Q. Dr. Self, there was some discussion about the custom with reference to employment of teachers. What has been the custom with reference to once a teacher identifies in a particular school faculty with reference to moving to another school? How would that be initiated? A. Generally the move is a request to transfer on the part of the faculty member and the request, as I indicated earlier, is subject to approval by the principal of the school the teacher would be leaving and subject to the approval of the principal [483] to whom the transfer is requested.

Q. So then it is your custom if a teacher does not request moving she is normally reassigned to that same school. A. Yes, it is.

Q. With reference to principals, how does a principal ordinarily or how would a principal be transferred from one school to another? A. He would usually be transferred upon the recommendation of the Assistant Superintendent of Elementary Education if he were elementary

or the Assistant Superintendent of Secondary Education if he were secondary. In general he would probably initiate the request for a change of assignment although it is quite possible for an Assistant Superintendent who is opening a new school to cast about for a person that he feels is competent to do the job and make the initiation himself.

Q. Is it the custom in this school system to employ a person just out of school as a principal of one of your schools? A. No, it is not.

Q. Where do you ordinarily find new principals? A. They ordinarily come from within the system although we are not absolutely prohibited from doing so and we have on occasion employed some principals from outside the school system.

Q. Would they be principals with teaching experience? A. Yes.

Q. Dr. Self, is the teaching assignment or principal assignment [484] normally one of long tenure barring resignation at the same location year after year? A. I'd say yes it is but it's becoming less so. I think more and more teachers are beginning to think in terms of teaching assignments that are different, recognizing the value of some change in terms of their own professional growth and development. We do encourage some change in principalships, thinking again that a new assignment, a new role, different people to deal with, brings personal and professional renewal to the person.

Q. Dr. Self, you previously mentioned that there was integration on the staff at Quail Hollow Junior High last year, is this correct? A. Yes. I think that had to do with the coaching staff.

Q. Now as I understand there were two assistant Negro

coaches assigned to the school, is that correct? A. That's correct.

Q. Are they still at this school? A. No, they are not.

Q. Do you know the reasons for their leaving the school? A. One of the gentlemen is deceased and the other gentleman requested a change of transfer.

Q. Did he request transfer to some other school in the system? A. Yes, I believe so.

Q. Did he request assignment to a predominantly Negro staff school? [485] A. I do not know.

Q. Dr. Self, with reference to the high school attendance areas do you attempt to achieve a neighborhood attendance area for your high schools? A. I don't think it could be called a strict neighborhood in the concept that a neighborhood is a small, closely knit community. It is a section of the county very definitely, however.

Q. It would be referred to more as a geographic area, is that correct? A. Yes.

Q. With reference to collection of half of the school fees and absence of PTA contributions for the central schools, do you know approximately how much money is involved per pupil in losses that the center city may have as against the so-called affluent schools? A. At the elementary school it would be that $1.00 fee, $1.00 per pupil. When you get up to the junior high school your loss would be the amount of the fee that was called out by Dr. Hanes this morning.

Court: You're talking about the losses from not receiving the full fees from the students?

A. From non-collection, yes, sir.

Court: How far up do you get before you exceed the dollar?

A. At the 7th grade level.

[486] Q. In the elementary schools how much loss are you talking about? A. Well, a 600 pupil elementary school would have collected $600 and with 50% collection they would have $300.

Q. So that would amount to 50 cents per pupil per year, is that correct? A. In terms of funds available, yes.

Q. In funds not available. A. It would be true equally either way you approach it.

Q. There was some mention of busing Head-Start students during the summertime. How many students have been involved in this program? A. I believe it's 1500.

Q. Were your school busses being then utilized in the other operations of the school system? A. Not in terms of a regular school program. Where child development centers were in operation some busses would be in operation.

Q. So this was not a time when your busses were ordinarily in other use, is that correct? A. That's correct.

Mr. Waggoner: You may examine.

Recross Examination by Mr. Lanning:

Q. Dr. Self, do you recall the age range of the children served by Head-Start? [487] A. These youngsters would have been entering the first grade in the regular school session following the summer program. So they would have been about five years old.

Q. Subsequent to 1965 the Board disestablished and closed several schools, did it not? A. Yes.

Q. And do you recall how many of these schools were at that time either all Negro or predominantly Negro? A. The 7 schools that were closed in the outer periphery of the county were all Negro. The 6 schools that were closed this

past school year, five were either Negro or predominantly Negro and one was predominantly white.

Q. So you since 1965 you have closed approximately 12 all black or predominantly black schools? A. Yes.

Mr. Lanning: No further questions.

Mr. Waggoner: You may come down.

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[544] Monday, March 17, 1969—

Court: I suppose the best thing for us to do is to go ahead with the witness you had left to put on today and then let's talk a little among the lawyers and find out whether I've asked all the questions I should have asked.

Mr. Chambers: Your Honor, we'd like to call Mr. Yale Rabin.

Court: Would you tell me what exhibits he's going to be talking about, if any.

Mr. Chambers: He's going to be talking about Exhibits 10, 11, 16, 6, 7, 14, 8, 17, 13, 12, 15, 9 and 18. In addition we have two maps that he has prepared and some data.

Court: I believe you've got all those exhibits.

Mr. Chambers: I do and I can pass them up to the Court now.

Court: If I was going to have to find them I wanted to start looking.

Mr. Chambers: I'd like to state preliminarily that what we propose to establish by this witness is the effect of city action or activity on the racial housing pattern in the City of Charlotte.

Court: Are you going to let me know what the

effect [545] the Federal Government action on that score is?

Mr. Chambers: We hope to show what Federal programs have been implemented here in the City of Charlotte and how the implementation of those programs has effected the racial housing pattern. We think that all of the activity we're considering here would involve both local action and local action taken in conjunction with Federally funded programs.

Court: Can you separate them?

Mr. Chambers: I don't know how much separation we can do because we're talking about urban renewal and redevelopment under the Federal program.

Mr. Chambers: We would hold that the City, in its practices, has contributed to the creation of the racial housing pattern that exists here and that because of that that the School Board would have to go further than merely establish its boundary lines because the result otherwise would be the making of segregation in the school system. We are not asking for an injunction against the Federal Government.

Court: I just wanted to know what to be on the lookout for.

YALE RABIN, a witness for the plaintiff, having first been duly sworn, was examined and testified as follows:

[546] *Direct Examination by Mr. Chambers*:

Q. Will you state your name, please? A. Yale Rabin.

Q. What is your address, Mr. Rabin? A. 21 W. Tulpehocken Street, Philadelphia, Pennsylvania.

Yale Rabin—for Plaintiff—Direct

Q. What is your occupation? A. I am an urban planning consultant.

Q. Would you explain for the record what that consists of? A. Yes. I work on a private basis for clients, either public or private clients, in activity such as housing, urban renewal, community development, transportation planning and so on. I assist in the preparation of plans or in the evaluation of plans or in the development of alternative plans on behalf of people who are affected by planning programs.

Q. Would you give the Court your educational background? A. Yes. I have a Bachelor of Fine Arts and Bachelor of Science Degree in education. I have a graduate degree in architecture and studied City Planning at the graduate level at the University of Pennsylvania. I have taught both in the public schools following my graduation as a teacher and I have also taught in colleges and universities both here and in England on city planning and urban problems and guest lectured at various colleges both here and abroad.

Q. Do you belong to any professional organizations? [547] A. Yes. I am an associate member of the American Institute of Planners; member of the American Society of Planning Officials; Urban and America; Planners for Equal Opportunity; the Society for College and University Planning; Philadelphia Citizens Council for City Planning; Delaware Valley Regional Housing Association. I think that's about it.

Q. Would you give the Court your work experience? A. Yes. As I indicated at present and since early 1967 I have been engaged in private practice as a planning consultant, and prior to that I was on the staff of the University of Pennsylvania from 1963 to 1967. Prior to that. . . .

Court: Have you got this written down anywhere?
Mr. Chambers: No, we don't have, Your Honor.

A. From 1961 to 1963 I was a planning officer for the London County Council in England where I was responsible for the civic design planning of four of London's twenty-eight burroughs and in addition I taught town planning in the graduate school at the Polytechnique there. Prior to that, from 1959 to 1961, I was the senior planner for the City of Camden, New Jersey, where I was responsible for the preparation of the municipal facilities portion of their comprehensive plan, that portion of the plan including schools and libraries and facilities such as that. Prior to that I was a student, graduate, for three years and before that a public school teacher.

[548] Do you have any publications? A. Yes, an article called Development Control in Great Britain, published in 1966, I believe, Municipal Facilities Portion of the Comprehensive Plan for Camden, New Jersey, and a report entitled the Eviction of Negro Families in the South which was a report of the agenda planning committee of the 1966 White House Conference.

Q. Mr. Rabin, were you requested to come to Charlotte to look at the city activities as they relate to the racial housing pattern in Charlotte? A. Yes, I was.

Q. Were you requested by me to come and make this study? A. Yes, I was.

Q. Did you make this study? A. Yes.

Q. Would you tell the Court how you proceeded in your study? A. Well, I first attempted as well as. . . .

Court: When was it?

A. This was over a period of time.

Court: When was it? When did this take place?

A. The initial request back in the fall of this year.

Court: You started to say what you did. When did you come here first?

A. I first came here in the fall, September, October. The second visit. . . .

[549] Court: Of what year?

A. 1968. My second visit to Charlotte was in February of this year and my most recent visit this one, two days ago. I attempted on these visits to familiarize myself—

Court: How long did you stay the first visit?

A. One day, and on the second visit three days and on this visit three days. I spent a considerable amount of time driving around and familiarizing myself with the city and, in addition, I have assembled quite a bit of documentary material relating to development in Charlotte, both from an historical point of view and from the point of view of demographic data which is produced by the census, the Planning Commission, by the analysis studies which have been done here, and various other materials which I have accumulated. I guess I ought to go through and list all of these data sources. I have gone through the summary of the Model Cities application. I have reviewed the census data for 1940, 1950, 1960. I have reviewed the Greater Charlotte Plan, that is, the document entitled The Next Twenty Years; I have reviewed the Central Area Plan

which is the plan for the downtown business district; I have reviewed the Blight Study prepared by the Planning Commission; I had had a study done under my direction by staff people at the University of North Carolina; I have obtained material from the Housing Authority, from the Relocation Officer; I have reviewed the documents on Urban Renewal, including the [550] Workable Program, and the reports of the Housing Authority to the Department of Housing and Urban Development on occupancy. I have reviewed the reports of the Relocation and highway construction over the entire period of years which that office has been in existence. Quite obviously these studies were not carried out during my visits to Charlotte. These comprised a considerable amount of time in my own office and with people working for me back in Philadelphia. So that I was able to spend as much time as I could during my visits here learning about the visual aspects of the city itself.

Q. From your study, Mr. Rabin, did you have any impressions of the effect of city activities on the racial housing pattern? A. Yes. I think there are some general observations that can be made. I think that I should first note that the activities that I looked at were cerainly not all the activities. They were what we call comprehensive planning.

Mr. Waggoner: We'd like to object at this time and establish some of these documents that they are relying on as being reliable or worthy of consideration. Some we haven't seen. We really don't know what he's going to be testifying from. Can he be more specific as to the pages of these documents so that we can get to the nut of it and know what we're talking about.

Colloquy

Court: The testimony is incompetent as offered unless [551] its got some justification which doesn't appear yet, Mr. Chambers. What you're doing is asking him to review a history of migration and say that it was done for foul purposes and the history of the migration, I take it, is fairly clear. Does a man who never came to Charlotte before October, 1968, have any special way of telling us the motives by which people were moved from 1860 to 1969?

Mr. Chambers: I think he is perfectly competent to testify as an expert in this case about the effect of city planning, city zoning, city activity on the housing patterns in the City of Charlotte. Of course, it is the Court's prerogative to decide whether the city has actually created the housing patterns. We are not attempting to displace the Court's opinion with respect to that. We do think, however, that his testimony as an expert on this would be competent and relevant in this proceeding.

Court: What I'm asking you to do is tell me what kind of questions you aim to put. Are you going to ask him simply to describe the physical results of what these things did?

Mr. Chambers: Basically that's correct.

Court: Because I don't see how he could do anything but say the records I have examined show the relocation of [552] people in the following ways and here's where the statistics show they live now.

Mr. Chambers: That's true, and how they zoned various areas of the city and where the proposed streets are to be placed and where public housing are located, all of this data is taken from material furnished us by the appropriate officials of the City of Charlotte.

Colloquy

Court: Well, the reason I interrupted is this, if we go by any standard of evidentiary competence Mr. Rabin will have to testify not as an expert on the points you are seeking to make but simply making a concensus of a lot of statistical material.

Mr. Chambers: We expect to go further, Your Honor, and ask his opinion on the effect of the zoning on the racial housing pattern, the effect of the city planning on the racial housing pattern, the effect of the relocation on the racial housing pattern, the effect of the location of public housing, the effect of the streets on the racial housing pattern and we think that he is competent to testify to that. This is true although he came here for the first time in October, 1968. That is the purpose for calling Mr. Rabin in rather than calling an ordinary layman in the City of Charlotte.

Court: It may be a play on words, talking about effect and result.

[553] Mr. Chambers: Since the Court is sitting without a jury, would the Court hear us and then decide subsequently whether it wants to consider some of the evidence relevant?

Court: I think that's what I've got to do. Are you seeking to show that the effect of all the money the Federal Government spent on relocating people has been one of racial discrimination?

Mr. Chambers: We are seeking to show that in relocating people the City of Charlotte has further segregated the people in housing and, if necessary, with Federal money.

Court: You jumped the track if that's the case.

Mr. Chambers: Again, Your Honor, we're going to the same point that the court referred to in the Norfolk school case. If this pattern has existed in the City of Charlotte, the School Board is going to have to do something else to desegregate the schools in the system. We are not seeking in this action an injunction against the city zoning.

Court: Mr. Lanning on Thursday didn't want to tell me what that something else was. Are you prepared to tell me what you want the Board to do?

Mr. Chambers: Your Honor, we submitted three plans, any one of which might be modified by the School Board. [554] My preference would be four schools serving all the students in the school system. That's my preference and I don't speak as an educator. That's why we tried to get someone who knew a little more than I did what ought to be done and there is available to the school system the agency under Title 4, and to the Court.

Court: What is that?

Mr. Chambers: An agency that will assist the Court in designing a plan that should be implemented in the City of Charlotte.

Court: You're not making any recommendations to the Court yet, are you?

Mr. Chambers: We made four recommendations with Drs. Larsen, Finger and Passey.

Court: You go ahead. This is only the second case I've ever tried when lawyers never would tell me what they wanted the Court to do.

Mr. Chambers: I'll tell you what we want you to do but I don't presume to be an educational expert and we tried to call some people to show different

alternatives. Really it isn't our responsibility to design the thing, it's the School's Board's. We just drew up some possibilities that could be considered by the Board in designing what plan it ought to bring in.

Court: What I'm going to try to do is to hear whatever [555] he says, not in terms of expert opinions because in my mind recent history is not a matter of expert opinion. But I'm going to try to listen to him for the purpose of trying to get information about what the result of various governmental actions has been. You can ask questions going beyond that if you like but I don't believe I've got any business considering opinion as to why folks did this.

Mr. Chambers: Your Honor, we would tender Mr. Rabin as an expert and maybe in our examination the Court will see why we're talking about recent history. That's why I request you to let us show what we're trying to show and decide whether it ought to be admitted.

Court: Go ahead.

Q. Mr. Rabin, you were giving us your general impressions of the city activities on the housing pattern. A. Yes. I think, as I said, first I should describe what the activities were, what I looked at. I didn't look at all the activities of local government.

Court: I don't want general impressions. I thought we were going to have someone to testify about factual conclusions based upon statistics applied. General impressions, this is just preaching and preaching is good for many purposes but it doesn't help to decide a question of this sort.

[556] Mr. Chambers: Your Honor, I think this could properly be defined as his opinion.

Q. Why don't you give us your opinions, then, Mr. Rabin?

Mr. Waggoner: If the Court please, we object.

Court: This is not the point, Mr. Chambers. The witness can help the Court by describing in detail the history which he has read from the books because it's fairly voluminous, but drawing some olympian opinion why all this was done or what the overall effect of it has done is not something that helps at all.

Mr. Chambers: What we're trying to show at this stage is an outline of the effect of the city activities in the areas he's going to talk about on the racial housing patterns in the City of Charlotte and I submit that he is perfectly competent to testify.

Court: The evidence as solicited by that question is incompetent and I believe I have indicated what I believe is an approach you can follow that will help the Court. Somebody simply giving abstract opinions about this doesn't help me a bit, but if you want him to review these exhibits in detail and indicate that he knows more about them than we do, that will help me. But simply somebody drawing conclusions from the hasty review of the mass of data like this, this doesn't help the Court in any question that the Court's got to decide.

[557] Mr. Chambers: First of all, we would say it wasn't a hasty review that Mr. Rabin made but in view of the Court's feeling that we ought to go into detail about the facts, we will go into detail about the facts. We were just trying to set up a

pattern for how we were examining the witness and trying to set some outline for the Court to follow, but we will go into details on the other matters.

Court: If he can summarize these exhibits, which I hope he can, in a factual manner, this would be helpful, but I don't think impressions or general opinions is going to be helpful at all, in addition to which they are totally incompetent from an evidentiary standpoint.

Q. Mr. Rabin, would you describe for the Court what areas of city activities you considered? A. I looked at city planning, comprehensive planning, zoning, urban renewal, public housing construction and highway planning and construction.

Q. What did city planning consist of? A. As I indicated earlier, in city planning I looked at plans and documents prepared by the Charlotte-Mecklenburg Planning Commission. These consisted of the document entitled The Next Twenty Years, which is the comprehensive development plan; the plan for the greater Charlotte central area, which is the downtown business district development plan; a document [558] which I believe is entitled Blight in Charlotte. Anyway, it is dated September, 1962, and it's one of the exhibits.

Court: What was the title of that?

A. Blight in Charlotte. It's the second document from the top there. I examined these documents, the proposals they made in relation to the distribution of residents by racial groups and the changes that took place in that distribution as revealed by the United States census, the analysis

survey which was taken here during the past year in Charlotte. Now, if I might refer to those . . . . also, Your Honor, may I point out the very specific relationship between these activities and schools?

Q. We'll come into that, Mr. Rabin. First of all, is this document Plaintiff's Exhibit 12 the one you referred to as the city planning for the next twenty years? A. Yes.

Q. Now, does this document contain a map that you also considered? A. Yes, it does.

Q. And what is the map entitled? A. The map is entitled General Development Plan and it summarizes pictorially the recommendations of the plan.

Q. Can you explain for the record the coloring of the map? A. Yes. The yellow areas depict the recommended areas for residential development; the green areas the major public and semi-public uses; the pink areas office-institutional; the deep red area the central business district; the bright red, [559] the general business and the blue areas commercial-industrial; and then there is a designation for flood plain areas.

Q. Now, the document you referred to as Residential Blight is Plaintiff's Exhibit 15. Would you explain for the record what this document shows? A. Yes. This document, which is dated September, 1962, describes each census tract within the City of Charlotte as of the date of the document and contains information each census tract on housing conditions, present and future land use and zoning, the tenure and race of the residents living in each census tract and the existence or non-existence of overcrowding and poor streets within each census tract, and then each one contains also a general description of the character and development of the tract itself.

Yale Rabin—for Plaintiff—Direct

Court: Who prepared this Blight in Charlotte?

A. The Charlotte-Mecklenburg Planning Commission.

Court: That's Exhibit 15?
Mr. Chambers: Exhibit 15.

Q. Looking, for instance, at Census Tract 4 on this exhibit, what is this census tract depicting at the top of the page 12 for Census Tract 4? A. It shows housing conditions as they existed at the time of the publication of this study within that census tract.

Q. What does the bottom census tract show on Page 12 of Census Tract 4? [560] A. Present and future land use.

Q. What does the top census tract on Page 13 of Census Tract 4 show? A. It shows the tenure and race of the residents in the census tract as of the time of the study.

Q. How does this tract show the race of the residents? A. Those residential areas which are predominantly occupied by non-whites are bounded by a red line.

Q. That goes around the streets of the non-white residents? A. It goes around the area which is occupied by non-whites.

Q. What does the bottom census tract on Page 13 of Census Tract 4 show? A. It shows overcrowding within dwellings and shows the location of inadequate streets.

Court: How do they define inadequate streets?

A. The definition is given here as streets of inadequate width.

Court: Like the main streets in Philadelphia?

A. There are some narrow streets downtown.

Court: What's the name of that street that runs along parallel to the big one? What's the name of the big hotel towards the east?

A. Bellview-Stratford.

Court: The one about six blocks east of that?

A. Ben Franklin.

Court: What's the name of that street that runs in [561] front of the Ben Franklin?

A. Chestnut.

Court: That's an inadequate street, I reckon.

A. Not by these standards. This is 30 feet or less. This is very inadequate and that is only a little inadequate.

Court: Is the street in front of the Ben Franklin Hotel 30 feet wide?

A. Oh, yes. When they say width of street they are talking about the distance from property line to property line, not the width of the actual carriageway.

Court: I just wanted to know if you've got one standard for middle-sized cities and one for big cities.

A. This standard is not mine. This standard which I am describing is the standard used by the Charlotte-Mecklenburg Planning Commission which is streets rights of way of 30 feet or less. I don't know whether it would be the standard I would use.

Yale Rabin—for Plaintiff—Direct

Q. In connection with city planning, did you consider any other document? A. Yes. I considered the Greater Charlotte Central Area Plan which is a more detailed version of the section on central area which appears in the plan entitled The Next Twenty Years.

Court: Unfortunately that never rose to the level of government action, did it, Mr. Chambers?

Mr. Chambers: I don't think it did, Your Honor. There were some variations approved in the bond issue of [562] 1967 or '68. We'd like to mark this as Plaintiff's Exhibit 40.

Q. Mr. Rabin, in looking at those documents would you tell the Court what those documents show factually? A. They show the proposals which the Planning Commission had developed for the use of land within the area covered by the plan and, quite obviously, we all recognize that plans have no controlling force, that is, these are recommendations for the use of land in the area. The only elements of the plan which develop any compelling force are those elements which relate to facilities or land uses which are normally provided by government, things such as roads or public building. Quite naturally the development of residential or industrial land is subject to the decision-making of private developers within, of course, whatever the other legal constraints are which the city imposes. But the plan very definitely sets a direction in the recommendations which it develops and it's those recommendations which are particularly significant in this case.

Mr. Waggoner: If the Court please, we object and move to strike his answer. This is an area of

speculation. Various committees meet and make recommendations and they may gather dust on the shelf. If any of the material is pertinent it would be the official action adopted by some governmental body.

[563] Mr. Chambers: Your Honor, first of all I disagree very much with Mr. Waggoner's position, but we would like for the Court to just let us go ahead and develop the case and then decide whether you want to admit the evidence or not. I submit that if the City of Charlotte has an official body called the City Planning Commission and it works, then this is the action of the City of Charlotte. Any agency of the City of Charlotte is an agency of the City of Charlotte and the City of Charlotte is responsible for its activities, and what it plans or what it says is competent with respect to what the city proposes to do or has done.

Mr. Barkley: The city is not responsible unless it adopts it.

Court: What is the legal basis upon which you are contending that the action of unofficial planners for the City of Charlotte or the Federal Government is binding upon the School Board?

Mr. Chambers: I contend that on the basis of the Brewer case and on the basis of Green and on the basis of Rainey and Monroe.

Court: There is some language in Brewer, the second opinion, one of those sort of rush block problems nobody has ever decided to which you have to elaborate rightfully to get to the point you're making here. [564] Has there been any case that ever addressed itself to that subject? I'm not asking you

to tell me how much new ground you're setting out to clear.

Mr. Chambers: Your Honor, the one case that approached it somewhat was the case out of Duval County, Board of Public Instruction of Duval County versus Braxton.

Court: They didn't hold anything that would support this contention, did they?

Mr. Chambers: The question there concerned the use of school district lines in the racial housing pattern situation. The Fifth Circuit has had several cases on that. The Fourth Circuit's most recent opinion was in the Norfolk School case.

Mr. Barkley: In Brewer case, as I recall, they adopted the city precinct plan for their lines.

Mr. Chambers: I submit that if the Court finds there has been public or private discrimination in the development of the housing pattern, something else has to be done. I submit that that was not just thrown into the opinion just to be thrown into the opinion.

Court: It was thrown in just to keep the question open, as I read it. Is that the only authority on this subject. I just wanted to know what you think of your legal position here.

Mr. Chambers: I think our legal position goes back to [565] 1954 when the court was talking about separate but equal. At that time it was clearly talking about compulsory segregation of the students in the schools. In 1968 in the Rainey case and the Green cases the courts are talking about other factors which make for continued segregation of students in the schools and it is binding on the School

Board, whether it is action of the city, action of private individuals or what have you, all of these actions have to be taken into consideration by the Board in designing the plan it tries to implement and it has to establish to the court's satisfaction that the plan it's proposing will eliminate black and white schools in the system.

Court: So what you're really saying is that you want the Court to hold that any predominantly black school in Charlotte is unlawful.

Mr. Chambers: That's correct, and any predominantly white school.

Court: What would be going pretty far, wouldn't it?

Mr. Chambers: I don't think so, Your Honor.

Court: Has anybody ever held that?

Mr. Chambers: The Court might differ with me but that's the way I read Green and that's the way I read Rainey and Brewer. Your Honor, I think really we have to go back and look at the whole history of school [566] desegregation. We started off talking about state constitutional provisions requiring separate schools. We then get into public accommodation and we strike that down because that continues segregated schools and then we get into freedom of choice and we strike that down because that continues segregated schools. We then begin to look at all the other factors.

Court: Why did we strike down freedom of choice?

Mr. Chambers: It has been outlawed where it does not eliminate the all black and all white schools.

Court: There have been statements and opinions, as I read them, where freedom of choice with a view

to perpetuate segregation won't stand. We all agree with that. If there are elements of that result in the freedom of choice plan here, they need to be explored.

Mr. Chambers: It says more than that, Your Honor. Rainey wasn't dealing with freedom of choice necessarily. These cases are looking at what the Board comes in with. Anything that perpetuates a segregated, all black or all white school, is unconstitutional.

Court: Well, is your theory dependent upon some improperly motivated decisions by the city ten or fifteen or twenty years ago?

Mr. Chambers: It would be effected by it, Your Honor, because whatever housing pattern results from the action [567] of the city must be considered by the School Board in designing the plan it proposes to follow.

Court: Is the purity of the motives a factor in your problem?

Mr. Chambers: I'm not questioning the motives, Your Honor, I'm questioning only the results.

Court: So you say that if a thousand black families decided to build a school on an island in the Catawba River the School Board would have to provide for that island a school with 70% white and 30% black students?

Mr. Chambers: Is the Catawba River in Mecklenburg County?

Court: Half of it is.

Mr. Chambers: Your Honor, I'd say that under Griffin and under the recent Supreme Court decisions it would have to do that. And I go further and

say either we're going to do that or provide a separate school system for that island in the Catawba River and let them have their own system.

Court: I don't suggest you start that.

Mr. Chambers: I'm not suggesting that, I'm saying that this is what we're going to unless we are doing something about it.

Court: This would be the easiest way to avoid all responsibility on the part of the citizens of [568] Mecklenburg County.

Mr. Chambers: That's correct, Your Honor.

Court: Well, I think the best way for us to get through with this witness this week is for me to hear whatever you want him to say with your understanding that I don't see very much of what he can say is going to help me nor be competent for me to consider. But if he can provide a road map through these exhibits, which the question suggests that he really can, he can be helpful. I'm just going to tell Mr. Waggoner to let's listen to it all and I'm going to have to listen to it with a very jaundiced ear because I'm having trouble seeing where it can be properly considered except as it marshalls the facts and figures, instead of simply opinions.

Mr. Chambers: We hope to submit a brief to the Court following this hearing where we will try to show the relevance of his testimony to the proceeding.

Court: Mr. Waggoner, if you withhold your objections and I'll withhold mine and we'll find out what Mr. Chambers wants to get from the witness. But you have the right to take objection and exception to the evidence that is incompetent. If you wish, you can make objections as you go and I'll just over-

rule all of them and we'll get along with the testimony.

[569] Q. Mr. Rabin, we were looking at the city planning and you were giving us what the city planners were proposing. A. Yes. This map here, I'd like to refer to the map which is in the back of the plan entitled The Next Twenty Years and which summarizes the proposals made in the plan. This map should actually be looked at in comparison to a map which appears on Page 16 in the document itself because the comparison of these two maps indicates the major kind of change in land uses within the planning areas that are recommended. The map on Page 16 shows existing and proposed industrial land. The existing industrial areas are shown in a deep brown color and the proposed industrial lands are shown in a light brown color. Now, this is the same land which is shown in a deep blue—both of these together—on the large map which is contained in the back of the book. Looking at the small map one immediately sees that the volume of industrial land, which it is proposed to develop, is several times the volume of existing industrial land within the county. Now, I am in no way questioning the decisions which led to the determination of the amount of land needed. I am just pointing out that the amount of industrial land called for is several times, perhaps five times the amount of industrial land now in use within the county. The next things I would point out are the sections of the city from which this proposed industrial land is to be taken. Almost entirely this industrial land is taken out of [570] what might be called the western half of Charlotte. Now, since I am going to refer to this division again I am going to be specific about what I'm using as a line. I am

saying that beginning on North Tryon . . . . do you want me to show this on a map?

Court: No, I can hear it.

A. Running down Tryon into the center to the point near where Tryon Street is near the line of the Southern Railway, south of the very center of town, and then proceeding along the line of the Southern Railway out of the city in that direction, that I have used this line to distinguish between what I shall call the eastern half and the western half of Charlotte. This proposed industrial development does two things. One, it creates a wide belt of industrial land separating the two halves. This belt of land runs entirely through the city, separating the two halves, and the other thing that it does as I indicated earlier, was to take substantial areas of land which are already in use as residential areas from the western portion of the city. Now, it was noted before that this has no compelling force. I want to point out as I go along that this has been formalized by a zoning ordinance, but this precedes the 1962 zoning ordinance. This planning document was developed in 1960 so that this is the major impact. The secondary effect of this document is to outline the proposed interstate highway system and the major [571] arterial streets in the Charlotte area and again one can see that the major north-south route -I-77—tends to reinforce this north-south division by running adjacent to and parallel to the industrial band which runs through the city.

Q. Mr. Rabin, from your study, so that we can keep the record clear, what is the racial composition of this western half that you're talking about? A. Well, in general it is the area in which Negroes live.

Court: What time are you talking about now?
Mr. Chambers: Today, 1968.

A. In 1968 this is the general area of the city in which most or almost all Negroes live.

Q. What is the racial composition of the eastern area? A. The racial composition of the eastern area is predominantly white with the exception of the one area Griertown which is in the 24 census tract.

Q. Did you notice anything about the proposed zoning for the Griertown area? A. Well, yes. I think that within the city the only industrial land proposed on the eastern side is on the northern edge of Griertown.

Q. What is the effect of this industrial zoning on the northern edge of Griertown? A. This is not zoning we're talking about.

Q. Proposed zoning. [572] A. This proposed use of land, if implemented, would create a barrier. It would create a zone of non-residential use, a zone of adverse use certainly adjacent to a residential area between Griertown and the area to the north.

Q. Would those areas to the north be white or Negro? A. They are at present white.

Q. You indicated that the proposed zoning would displace the present residential areas with industrial zoning? A. The land which is proposed to be used for new industrial development consists in large part of land which is presently developed and occupied residentially. That is more clearly shown in this document, which takes on a tract by tract basis the present uses of land and describes this in comparison to their future zoning. If we go to the tract which you referred to just a moment ago, Census Tract #4 which is on Pages 12 and 13, one can see that. . . .

Court: What part of town is Census Tract #4?

A. I have to have a good look at a map.

Court: Can you read the names of some of the streets in it?

A. Most of it is west of Tryon Street.

Mr. Chambers: That's South Graham Street, South Tryon Street, over to. . . .

A. Most of it is on the west side of Tryon and a bit of it. . . .

Court: How far north does this go?

[573] A. A bit of it goes up to Second Street and the southern limits are Summit Avenue and Park Avenue.

Mr. Chambers: Some of it goes up as far as 7th Street, this area here. Down here it's 2nd Street.

Court: This is an area south and west of the Square starting along 2nd Street and running down Morehead?

Court: I just wanted to know what part of town you were talking about.

A. Southwest of the central business district. As this clearly indicates the top map in the upper lefthand corner shows existing housing conditions and the map opposite it at the top on the other page shows that the housing is predominantly non-white occupied, but the map at the bottom of Page 12 indicates that almost none of the area is now zoned for residential. Now we're talking about zoning, not planning. This document indicates the legal use of the

land as defined by the zoning ordinance is now non-residential.

Q. Would the proposed future use also be non-residential? A. The future use is implicit in the zoning laws.

Q. Would you look at Census Tract 52. Would you tell us if you see any proposed changing in the zoning in Census Tract 52?

Court: Tell us the area of 52.

A. That is in the northwest section.

Court: Are there street names?

[574] A. It's completely surrounded by railroad.

Court: Mr. Chambers, where is 52? What's the name of the streets?

A. Between Graham and Tryon.

Mr. Chambers: Up as far as Atando Street, Graham and Tryon.

A. This tract shows the drawing on the left showing existing housing conditions, the shaded areas being the areas in which housing now exists. The second drawing shows those section of the housing districts which are zoned to remain as housing, and the third map shows those areas of the housing which were non-white occupied. Quite clearly comparing the third drawing to the second it is clearly indicated that just the housing occupied by non-whites has now been zoned non-residential.

Q. Would you look at Census Tracts 43 and 44? A. Cen-

sus Tract 43 is on Page 53 and it is also located in the western portion. It's the far western corner, northwestern corner of the city. The streets in there are Thrift Road, Hovis Circle. It's bounded on the north by the P & N Railway and on the west by the city limits and on the east by I-85. Again the maps show the same kind of development that the first map showed, the shaded areas which are occupied by housing, the second map shows the areas which are zoned for housing and in this case all of the undeveloped area is additionally zoned for housing in addition to the areas which [575] were occupied by housing. While the third map clearly indicates that there were at this time no non-whites.

Court: What is the time you're talking about?

A. September, 1962, was the date of the publication of this document.

Q. Does the map show the race of the people who live there? A. Yes. It shows the race of the residents as all white. Census Tract #44, which is just to the east of this tract . . .

Court: The one you've been talking about is 43?

A. Yes. This is just to the east of this tract across the P & N Railway tracks and this is indicated here as a census tract which had both white and Negro residential areas in it, but the proposed zoning eliminates from the residential zoning those areas which were occupied by Negroes. They are now zoned non-residential.

Court: Have there been any areas occupied by white people in 1962 that have been zoned industrial?

A. Only, as I indicated, those areas immediately adjacent to Griertown on the north. This is the only area, this area shown right here, in which proposed industrial development is taking place and also in the census tracts on the east side of the line, which I described earlier, in the areas adjoining the line. There is industrial zoning, some of which may be occupied by white house-owners at the present.

Court: You're testifying what the map shows. What [576] does the map show? Does the map show the areas occupied seven years ago by white people have been zoned industrial or are proposed to be zoned industrial?

A. Predominantly, no. There may be such areas but the discrepancy in the volume is very significant.

Court: Did you just testify that east of Tryon Street there were some areas that you refer to as white that have been recommended for industrial zoning?

A. Adjacent to Griertown.

Court: What about the place which you indicated on the east side of Tryon Street?

A. Census Trace #4. No, that's just about all non-white right now, sir.

Q. Mr. Rabin, how can city planning effect housing patterns?

Mr. Waggoner: Objection.

Court: The objection is sustained. I think that question simply says what are the limits to the kind

of laws that a city council may take a notion to pass.

Mr. Chambers: That's not our position, Your Honor. Your Honor, if we call a doctor in to testify he can testify that a man probably died because he got a blunt instrument hit him beside the head. We only call in another person as an expert to talk about effects of action on housing patterns.

Court: What people can do by city planning is not [577] pertinent here. You asked him what can be the effect of city planning on housing patterns. The objection is sustained.

Mr. Chambers: May I show what the answer would have been had the Court allowed him to answer?

Court: No. I think the question is what he infers from the papers has been the effect, not what might be in some imaginary circumstance.

Q. Mr. Rabin, what in your opinion was the effect of city planning on the housing pattern?

Mr. Waggoner: Objection.

Court: The objection is sustained. If it is shown to have an effect I think this is the duty of the Court to infer or not to infer from whatever competent evidence there is. You have a witness who hasn't the faintest idea about the subject and is speculating upon the same basis as the Court is being invited to speculate.

Mr. Chambers: Your Honor, would the Court again allow me to show what the witness would have answered?

Court: The objection is sustained. You go ahead and answer for the record.

A. I would say that the most telling effect is that the recommendations of the plan were two years later reflected in a zoning ordinance which adopted most of the recommendations of the [578] plan and legalized the restrictions on the use of the land which were only proposals in the plan.

Q. Now, Mr. Rabin, going to zoning, in your study did you look at the zoning ordinance of 1947? A. Yes, I did, the map, not the text of the ordinance itself.

Q. This is Plaintiff's Exhibit #9, is that correct? A. Yes.

Q. Now, would you tell the Court what this map shows? A. This map shows the City of Charlotte as it was bounded and divides the city up into five districts, which are defined as single family residence, business #2, industrial, business #1, and residential #2.

Q. Now, just for illustration did you prepare a document to show the boundary lines of the City of Charlotte for 1947? A. Yes, I did.

Mr. Chambers: We'd like to get this marked as Plaintiff's Exhibit #41.

Court: What kind of map is that, Mr. Chambers?

Mr. Chambers: It's a map of the City of Charlotte downtown.

Court: Who made it?

Mr. Chambers: This was prepared by the Champion Map Corporation, Charlotte, North Carolina.

Q. Mr. Rabin, does the green outline on this map show the city boundaries in 1947? [579] A. The green lines show the boundaries as they are shown on this map.

Q. Now, did you notice anything . . .

Court: Does the green outline show what you read to be 1947 boundaries of the city?

A. On this map they are not described. There is a line which simply encloses the area which is zoned. I assume that it's the city boundary. The title of the map is City Building-Zoning Map for Charlotte, 1947, and I think it's reasonable to assume the line is the city boundary and that is the line I duplicated, but I don't know.

Court: Well, what's the number of the exhibit you copied the lines from?

A. Exhibit #9.

Court: You took #9 and saw something on there you thought was the 1947 city boundary?

A. Yes, sir.

Court: And you put a green line on Exhibit 41 to show on Exhibit 41 what you think the '47 boundary was?

A. Yes, sir.

Q. Mr. Rabin, will you tell the Court what you found on Exhibit 9? A. Well, I compared this map to the map, the census racial distribution—I don't know what the exhibit number is, it's in evidence—and examined the proposed zones in comparison to [580] the then existing uses of land and I found that with the exception of two small areas —one is called Double Oaks which is an area just east of Statesville Road and north of Oaklawn Avenue, a very small area there, and an area just southeast of the central business district which I believe is known as Cherry—with the exception of those two areas, all other Negro residential

areas of the city were zoned industrial by this 1947 zoning map. Those are the only two then Negro residential areas of the city which were zoned residential.

Q. What indications on the map show industrial zoning? A. A dashed line shows industrial zoning; a slanted line shows single family residence—and by the way none of the Negro residential areas are zoned single family residences—the crossed hash lines are business #2; the dotted areas are business #1; the blank areas are residence #2, other than single family.

Q. And the zoning map of 1947 zones basically all of the Negro residential areas as industrial? A. Yes.

Q. What is the effect of that, Mr. Rabin? A. The effect of that is to do several things. First of all, it makes the land on which people live accessible to other uses, even desirable for other uses. It also permits the rapid deterioration of the quality of the land—and this is [581] clearly evident from the amount of industrial development which has taken place in areas of Negro residences. It's quite common. One drives around and finds residences and industry adjacent to each other. It's unquestionably a fact that many of the industries have a blighting effect on the housing which adjoins them. Consequently, there is an effect on the value of housing and although it might be contended that a residential property inside an industrial zone reasonably might be enhanced, it certainly could be contended that the residence which remains across the street from the industrial zone, and if it continues to be zoned residential, is deprived of value by virtue of the zoning of the areas across the street as industrial and the threat of the introduction of blighting or noxious uses into that area.

Q. When was the next change in the zoning in the City

of Charlotte? A. The next change that I examined was in 1962. This was a major change and adoption of a new ordinance. I would assume that in the intervening time between 1947 and 1962 there were amendments to this map which I did not examine.

Court: Our City Council meets every Monday to amend zoning ordinance.

Q. Mr. Rabin, I show you Plaintiff's Exhibit 10 and ask you if this is the 1962 zoning ordinance you were talking about. A. Yes, it is.

[582] Q. I show you also Plaintiff's Exhibit 10 and ask you if this exhibit depicts the zoning as set out in the zoning ordinance? A. No, it doesn't. The large map is a key map to a series of smaller maps which depict the zoning, as the new ordinance is a very detailed kind of thing, and there are sixty sheets each of which outlines the zoning of a single tract and those tracts are numbered according to the designations on this map and they do not correspond to earlier ward lines or census tract lines. They are lines determined in some other way by the Planning Commission. This is the key map to the census sheets.

Q. These small sixty sheets you are referring to are included in this exhibit. Are these the sheets you're talking about? A. Yes, they are.

Court: This is a big map rolled up and sixty little maps, is it? What is the number of that?

Mr. Chambers: It's Exhibit 10.

Court: Are the sixty smaller zoned maps part of Exhibit 10?

Q. Mr. Rabin, will you tell the Court what the 1962 ordi-

nance does? A. The ordinance which we are referring to now deals with an area considerably larger than the area dealt with in the 1947 zoning ordinance. This ordinance zones land, not only within [583] the present boundaries of the City of Charlotte, which are considerably larger than they were in 1947, but also beyond those boundaries out into Mecklenburg County. Of the sixty sheets which comprise the entire zoning map, approximately thirty of them cover the area within the City of Charlotte.

Q. Now, you indicated a moment ago an industrial zone that runs from North Tryon Street to the southwest Charlotte. Did you examine the residential zoning on the east and west side of this? A. Yes. I took the approximately thirty sheets which comprise the city itself and I divided them up into two groups, those falling on the east side of the line I described earlier and those falling on the west side. Only one of the zoning tracts, that is, Tract #18, is bisected by that line. All of the others either fall to one side or the other of the line, and I tabulated these census tracts according to the following characteristics. I noted what the predominant zoned use was; I noted what the subsidiary zoned uses were; and I noted what the overall character and general nature of the residential uses were. I found that the zoning on the east and west side differs very significantly. Zoning on the west side of the line which I described, the residential zoning, is considerably more dense than the zoning on the east side of the line. All of the residential zoning in the thirteen zoning tracts—and they are tracts number, 2, 3, 4, 5, 11, 12, 13, 14, 15, 16, 17, [584] and the western portion of 18. The residential zoning in all of those tracts is either R-6, R-6 multi-family, R-9 or R-9 multi-family. On the east side of the line which I described residential zoning is predominantly R-12 and

R-15, considerably less dense. I think this assumes some significance from a statement which is contained in the comprehensive plan which clearly sets forth the idea on Page 23. It says: The plan proposes that the density of population be held to comparatively low levels to avoid the unfavorable consequences of crowding too many people too close together on too little land. Yards and open spaces, a quiet, restful atmosphere and family privacy result from low population density.

Q. Mr. Rabin, what is meant by R-6? A. R-6 is a single family residential district in which 6000 square feet of land are required to accommodate one family.

Q. What is meant by R-12? A. R-12 is a single family residential family district where 12,000 square feet are required to accommodate one family.

Q. And R-15 would require 15,000 square feet? A. That's correct.

Q. Your testimony is that there is no R-12 or R-15 in the west side or predominantly Negro side of Charlotte? A. That's correct.

Q. And that the zoning in the east side is predominantly R-12 or R-15? [585] A. That's correct.

Q. I think you also testified that your industrial zoning in the City of Charlotte is primarily in the west side, the Negro side. A. Of the thirteen zoning tracts on the west side, all of them have industrial zoning in them and five out of the thirteen range anywhere from ¼ to over ½ industrially zoned. All of the remaining have lesser amounts of industrial zoning in them.

Court: Do these thirteen tracts that you are talking about include all of the city west of Tryon Street and the railroad tracks?

A. Yes, they do. On the east side there are fifteen tracts and their numbers are 6, 7, 8, 9, 10, 18, 19, 20, 21, 22, 23, 24, 26, 27 and 32. I would note that 18 is only part, only the eastern part of that tract. There is no tract on the eastern portion which has a major part of its area industrial. All of the tracts on the eastern portion adjoining the western portion have industrial lands on their western edges and, in addition, the tract which is #22 and which is immediately to the north of Griertown, has industrial uses along its southern boundary which is the northern edge of Griertown. I would say one other difference which I noted is that office zoning, that is, the permitted use of the location of offices generally in residential areas—this is as distinguished from offices in the [586] central business district—twelve of the fifteen zoning tracts on the east side permitted office uses, while four of the thirteen zoning tracts on the west side have permitted office uses.

Q. Mr. Rabin, what effect would the more densely zoning areas have on property values? A. Well, quite obviously where a great amount of land is required to build a house the cost of housing is going to be higher. Where a lesser amount of land is required to build, the cost of housing is going to be lower.

Q. Did you note in the zoning on the west side where there was multi-family zoning? A. Yes, there is a great deal of multi-family zoning. In fact, eleven of the thirteen tracts on the west side have multi-family zoning.

Q. Now, moving to Urban Renewal, did you study documents pertaining to Urban Renewal in the City of Charlotte? A. Yes, I did. There is a document which is an exhibit which displays the extent and location of all of the Urban Renewal projects.

Q. Are you referring to Plaintiff's Exhibit 14? A. Yes.

Yale Rabin—for Plaintiff—Direct

Q. That exhibit shows the present Urban Renewal areas in the City of Charlotte? A. Yes, it does.

[587] Q. Does it also show where the families who were relocated were relocated? A. Yes, it does.

Q. Would you tell the Court what those documents show? A. Well, taking the map of Urban Renewal areas first, all of the Urban Renewal areas and consequently all of the displacement from the Urban Renewal areas took place in what were Negro residential areas at the time of the initiation of those projects. The relocation figures which were furnished. . . .

Court: How do you define a Negro residential area?

A. One which is predominantly occupied by Negroes as shown by the figures given by the census.

Q. One further point, Mr. Rabin on that, do the figures for relocation of people in Urban Renewal appear in the Workable Program submitted by the City of Charlotte? A. Yes, they do.

Q. Go ahead. A. Somewhere under here I have another map.

Mr. Chambers: I'd like to get this exhibit marked as Plaintiff's Exhibit 42.

Court: Is that another Champion map?

Mr. Chambers: Another Champion map.

Q. Mr. Rabin, tell us what this map shows, Plaintiff's Exhibit 42. A. Yes. This map has on it in yellow the areas which appear in blue as industrial on the comprehensive plan. It has on it [588] in red the location of all

of the existing public housing projects. It has on it in blue the locations of proposed public housing projects for which sites have been identified by the Housing Authority. It has on it in green the locations of schools which are predominantly Negro in enrollment. It has on it numbers which represent the number of households relocated by the Relocation Office to the neighborhood or which the number appears.

Court: Say that again.

A. It has on it numbers which indicate the number of households which have been relocated either from Urban Renewal or highway construction to the area on the map.

Court: The number appears where the people now live?

A. Yes, sir. The map identifies the location of several overcrowded schools.

Court: How are they identified?

A. They are identified by numbers which appear next to the school which give the present enrollment over the rated capacity.

Q. What do the figures with respect to Urban Renewal and relocation show, Mr. Rabin? A. As I indicated to start with, all of the original displacement took place from Negro residential areas and all of the relocation, with the exception of 189 families, took place into Negro residential areas. Those 189 families were all relocated into one area which was at the time the relocation process [589] began an area of low income white residence called Villa Heights,

I believe . . . . yes, and this is an area in the vicinity of 20th and Parkwood which has since become a predominantly Negro area. All of the other relocation activities have moved people into what were areas of Negro concentration before.

Q. Mr. Rabin, what was the effect of this relocation on classroom facilities in the schools? A. Well, the map clearly shows. . . .

Mr. Barkley: If the Court please, I believe I'll object to that. This man hasn't been here to get that information himself. All he knows is something he read and we'd like to know what he's read.

Court: Are there figures in the record on which this. . . .

Mr. Chambers: That's correct, defendant's answers to interrogatories, Plaintiff's Exhibit 1, already in evidence.

Court: Well, as I understand it, he's giving me a road map through these exhibits and I'm trying to take some notes on it so I can find the exhibits.

Q. Have you looked at the figures that show how many people were moved into crowded schools or what this did to the schools? A. What I have looked at, Your Honor, is the areas into which people have moved and I have looked at the then enrollment of those schools as it was effected by the number of people [590] who then lived in the area.

Court: Did you look at other areas in town to make any kind of comparison how schools were or were not crowded in other areas?

A. No. I was trying to determine only whether there was a relationship between the movement of people by the relocation office and the overcrowding of the schools into which they had been moved. I did not look at areas to which no one had been moved.

Court: You're not suggesting that crowding in schools is confined to the areas you referred to as Negro areas, are you?

A. No, sir. I am aware of the fact that there is overcrowding in schools which are predominantly white. What I'm trying to show is that some overcrowding is the direct consequences of public action.

Court: And you say that map contains on it your copying of the figures from the statistics showing the comparison of school capacities with students enrolled in several schools in that area.

A. I would say so. The two I would cite are the Northwest Junior High School, which is as the map indicates completly surrounded by relocation figures, and the Barringer School which is similarly surrounded by relocation figures. It's quite clear that a great bulk of the displacements have been [591] moved into the areas served by these two schools.

Mr. Barkley: I believe I'll object to that and move it be stricken out. I believe the evidence will show that the Barringer School, for example, was due to the Negroes themselves voluntarily branching out, as is the custom here.

Mr. Chambers: Your Honor, I don't know where that appears.

Mr. Barkley: It doesn't show it was the result of the zoning plan.

Mr. Chambers: We're talking about relocation.

Court: Mr. Rabin, I'm not asking for you to draw conclusions from this data but I'm simply asking you if you have figures which show the number of relocated people who were moved into the school areas you have talked about here.

A. Yes, sir.

Court: And you do not have figures on how many people moved for other reasons in or out of those areas.

A. No, sir.

Court: Your figures simply reflect the fact that, disregarding mobile classroom units, the schools in those areas on a chart have a rated capacity of so many students and you find more than that enrolled there.

A. Yes, sir.

[592] Court: Let's take a break.

SHORT RECESS

Court: With reference to this Exhibit 42, which is a map of Charlotte, can you tell me the number of the exhibit from which you got the figures as to the crowded conditions in the schools?

A. Not by number, no, sir.

Mr. Chambers: It's Plaintiff's Exhibit #1, Table 1. That's the enrollment in the school, Your Honor, and the student capacity is Table #2.

Mr. Waggoner: These two exhibits don't use the same legends. One is based on census tracts and the other one is based on school districts which do not coincide.

Mr. Chambers: Which map?

Mr. Waggoner: I thought you were talking about this population on this.

A. The material I'm referring to is simply taken from the table furnished by the school which lists the enrollment during the 1968-69 school year and it lists the capacity of that particular school. It's neither zoning tract or census tract, it's just data specifically referring to the school itself. The figures on the relocation were also not related to census tracts or zoning tracts. Those figures, as provided by Exhibit #14, that describes by neighborhood name, such as Brooklyn, Cherry, Clanton Park, and so on, the neighborhood [593] to which a certain number of families—I want to emphasize that. I think Your Honor said before these numbers represent the number of persons. The numbers on this Exhibit #42 represent the number of families who have been relocated, not the number of individuals.

Court: How can one look at this map and see what figure represents families transferred into an area and what figure represents what you say is the excess of school population over the rated capacity?

A. There are only two of those noted, 932 enrolled as com-

pared to 801 capacity for this Northwest Junior High School, and the other one is Barringer which is 799 as opposed to 616 capacity. All of the other figures are relocation figures.

Court: That simplifies that.

Q. Mr. Rabin, moving to public housing, does your Exhibit 42 map show the present public housing in the City of Charlotte? A. Yes, it does.

Q. How are they shown on the exhibit? A. These are designated by red areas at the location of the public housing. These projects also appear on the Exhibit #14 which is the map of Urban Renewal projects and shows those public housing projects shaded in gray existing within the area covered by the map.

Q. Now, does your Exhibit 42 also show the proposed public housing? [594] A. Yes, it does.

Q. How does it show those proposed housings? A. It doesn't show all of the proposed. It shows only those proposed public housing projects for which sites have been identified. It's my understanding that there are authorizations for units in excess of what's represented by these sites but no sites have yet been selected for those. These represent all of the sites which have been designated and they are shaded in light blue on this Exhibit #42.

Q. Mr. Rabin, what does that exhibit show in terms of the racial composition of the area where the public housing is located and where they are projected to be located? A. All of the public housing with the exception of the existing housing for the elderly structure which is adjacent to the central business district, all of the others are located in Negro residential areas and all of the proposed public

housing is also in the western section. Three of the five sites proposed for public housing are quite close to the Barringer School which I referred to before as having been an area into which a good deal of relocation has been carried out by the Relocation Office. As a consequence it's my opinion that school has become overcrowded.

Q. Mr. Rabin, what do your figures show with respect to the racial composition of residents in public housing? A. Well, according to the Workable Program for Charlotte all of [595] the housing projects except the housing for the elderly are predominantly occupied by Negroes. I can site the actual figures for you.

Court: What are the figures?

A. Piedmont Courts has 368 units of which 256 are black occupied, 112 are white occupied; Fairview Homes has 468 units of which 468 units are black occupied; Southside Homes has 400 units of which 400 units are black occupied; Belvedere has 200 units of which 122 are black occupied and 78 white occupied; Earle Village has 409 units of which 409 units are black occupied; and Erwin Towers, which is the housing for the elderly project I just referred to, has 175 units, 2 of which are black occupied and 173 of which are white occupied.

Q. Mr. Rabin, did you also look at the streets and proposed streets and highways for the City of Charlotte? A. I looked at the major thoroughfare plan, that is, primarily those proposals for the construction of highways, U. S. highways and interstate highways, within the city.

Q. Are these also shown on Plaintiff's Exhibit #13? A. Yes, they are.

Q. Would you tell the Court what this exhibit and your study have shown? A. Well, as within Urban Renewal

virtually all of the displacement for the acquisition of the right of way for these roads has involved the movement of non-white families and has been [596] virtually no displacement for the roads which involved white families. The second factor is that the major interstate road which runs through the city—I-77—tends to reinforce this industrial band which runs from north to south through the city, which I referred to before, by running parallel and adjacent to it, thereby adding to the physical barrier which would separate east and west Charlotte.

Mr. Chambers: Your Honor, I have two questions and one question that I proposed to ask Mr. Rabin I think the Court has indicated he considers it incompetent.

Court: Go ahead and ask it and I'll rule it out and let him answer it.

Q. Mr. Rabin, from your study with respect to the five areas that we have discussed do you have any opinion about the effect of the city activities in these areas and the racial housing pattern as it presently exists?

Mr. Waggoner: Objection.

Court: He's making the assumption that if the activities reflected in the exhibits have taken place what is the effect of it.

Mr. Chambers: Is the Court asking plaintiffs—

Court: No, I'm simply thinking about the question. You're asking a question, I suppose, which is too broad. It seems to me, though, that you could ask him that if the Court assumes that all of the activity [597] reflected in these exhibits has taken place,

what, if any, effect would it have upon or has it had upon the housing paterns. I think that would be a competent subject for speculation.

Q. Mr. Rabin, if the Court should find that the matters you have testified to with respect to city activities and actions have, in fact, taken place, what effect, if any, would these activities have on the racial housing patterns in the City of Charlotte?

Mr. Waggoner: Objection.
Court: I believe I'll overrule that objection.

A. First of all, I think these activities have had the effect of perpetuating the separation of racially distinct areas of residence. Some of these things, of course, have in fact taken place and are not, I think, matters of my opinion and those should be separated from what the consequences of what has not yet taken place.

Court: What he is asking you is historically, not speculatively about the future, but what has been, if any, the effect on the racial housing pattern.

A. I think the effect has been to perpetuate the separation of racially distinct residential areas. I think the effect has also been to create physical barriers which did not exist before between those racially distinct residential areas. I think the effect has been to reduce the quality of the [598] residential environment in areas predominantly occupied by black people.

Court: I think I'm going to have to sustain the objection to that because without some personal

knowledge of the residential environment I believe you're going to feel that. Stick to the question.

A. Your Honor, I have some personal knowledge of areas which have been effected by industrial construction.

Court: I'm not asking you to answer that question. I'm instructing you not to continue to answer that part of it. This deals with personal knowledge. It goes beyond the scope, I think, of a proper answer to the question.

Mr. Chambers: That will be all, then, Mr. Rabin.

Cross Examination by Mr. Waggoner:

Q. Mr. Rabin, as I understand, you have based your opinion in part on Plaintiff's Exhibit #4, on the overlay marked Plaintiff's Exhibit 4, is that corect? A. In part, yes.

Q. Let me ask you with reference to Census Tract #51. Do you know the number of people within Census Tract #51? A. No, I do not.

Q. You do not know the racial composition of that? A. I can by referring to my papers.

[599] Q. Do you know the degree of Negroes or percentage of Negroes who live in Census Tract #53? A. If you allow me a minute, I can tell you that, yes.

Q. All right, sir. A. The non-white population of Census Tract 53, the percentage according to the 1960 was 3.6%.

Q. What is this based upon? What information in the record do you base this upon? A. The '60 census. I don't know whether that has been entered in the record or not.

Q. But your information, then, is based on the 1960 census, is that correct? A. Yes.

Yale Rabin—for Plaintiff—Cross

Q. And you do not know whether or not the '60 census is in the record. A. No, I don't.

Q. Now, with reference to the proposed Twenty Year Plan, which is Plaintiff's Exhibit # . . .

Court: Where is Tract 53, Mr. Waggoner?

Mr. Waggoner: Tract 53, Your Honor, is roughly the Hidden Valley area.

A. Exhibit 12 is The Next Twenty Years.

Q. All right, sir, would you come down to the map, please, sir. (The witness does so.) Now, I believe you testified that most of the industrial location will displace Negroes as they [600] are presently situated in the city, is that correct? A. Yes, sir.

Q. All right, sir. I direct your attention to the map attached to Exhibit 14 and ask you to refer to a large area adjoining N. C. 16, the P & N Railroad and this area which appears to be a rather substantial area in the northwestern part of the city and ask if there any Negro population in that area at the present time. A. Whether there is any Negro population in that area at the present I couldn't specifically say, but this does not reflect exactly the area which is zoned industrial, the 1960 Comprehensive Plan.

Q. This is a comprehensive plan but this is the one you testified with reference to. A. Oh, no, I testified with reference to the amount of industrial land zoned in each one of the zoning tracts on the map which you just removed. This is a recommendation and the statement that I made was that in general the 1962 zoning laws followed the recommendations set forth in this plan, but in specific detail they differ.

Q. Is there any difference in this area? A. We would have to examine that. That can be done.

Q. Do this for me, please.

Court: Mr. Rabin, isn't that the map you were testifying from a while ago?

[601] A. Yes.

Court: Is that one of the maps you were using in your testimony?

A. Yes, it is, but it's not the map to which I related the zoning of the industrial areas. That was Exhibit 10.

Court: Well, the planning map is the one . . . go ahead.

A. Do you want to point out to me on this map which areas we're concerned about?

Q. Bounded by a creek on the east. A. Let me qualify one more thing. All three of the areas are outside the City of Charlotte and I stated in my statement on the stand that I examined only those thirty tracts which lie within the City of Charlotte. I made no examination of the areas. Here's the city line right here, 15, 43, 39 . . .

Court: Well, in order to get past that semantic difficulty, the school district includes the entire county. Will you examine the map that counsel is showing you and answer whatever questions he's putting about the contents of the map.

A. Area 15 is zoned R-9, I-2, R-6 and I-2. All of the industrial zoning with the exception of one small part in the lower corner is in undeveloped land. The residential zon-

ing is in land presently residentially developed and a good deal of land which is undeveloped.

Court: How big is that area?

[602] A. The area we just looked at is this one which is bounded by Beatties Ford Road, Peachtree Road, Cobbs Hill something . . .

Court: Mr. Waggoner, is there a scale on the map you have in your hand?

Mr. Waggoner: Yes, sir, there is a scale.

A. On here 2,000 feet to the inch, on this map.

Mr. Waggoner: This one has a scale in thousands of feet and it appears that I would estimate 3½ inches to each two miles, roughly, two inches to a mile.

Q. Before you pass on from #15, I'll ask you if the residential areas zoned R-6 do not adjoin Beatties Ford Road. A. Yes, it does.

Q. Is that not a predominantly Negro community? A. I don't know.

Q. I'll ask you if the great bulk of map #15 is zoned industrial. A. I would say that half of it is zoned industrial.

Q. And half residential, is that correct? A. That's correct. There is a buffer of office uses and multi-family uses running between the two.

Q. All right, sir, I direct your attention next to zoning map #43. A. Zoning map #43 is on two sides of Bellhaven Blvd. With the exception of an entirely undeveloped area in the southern portion, the rest of it is zoned R-9 and R-12.

I would estimate that the industrial zoning is about a fifth or a sixth [603] of the entire area.

Court: Mr. Waggoner, to save a little confusion on my part will you give me the census tract numbers of the areas that you have been asking him about which, I take it, you say involves some industrial zoning.

Mr. Waggoner: If the Court please, the only numbers that appear here are 44 . . .

Court: Let me see the little map you've got so I can get them in my hand, the one you have in your hand.

Q. The map we have just discussed is what number? A. 43.

Court: This is not marked. Is this a part of the exhibit?

Mr. Waggoner: This is my copy. This is the one that was in evidence, Your Honor.

Q. I next direct your attention to zoning map 39. I'll ask you if probably ¾ of that zoning map is zoned industrial. A. I'd say most of that zoning tract is zoned industrial, yes, and most of that zoning tract is also undeveloped and the areas which are developed are zoned R-6 and some of the undeveloped land is zoned R-9 multi-family.

Q. I next direct your attention to zoning map #42.

Court: Where is 39?

Mr. Waggoner: This is 39.

Court: Tell me what part of town.

[604] Mr. Waggoner: This is on the Piedmont-Northern Railway and Bellhaven Blvd.

Court: 43 is also in that neighborhood.

Mr. Waggoner: Yes, sir. 15 is also there.

Mr. Chambers: I'd like to interpose an objection to this because I don't think it's relevant to the testimony we were bringing out on the matter of racial housing patterns in the City of Charlotte. I would like to interpose that objection. We were talking about what action of the city within the City of Charlotte effected the housing patterns. We are confronted with the purple drawing on that overlay within the City of Charlotte.

Mr. Waggoner: Some of the areas we have been discussing lie within the city limits.

Court: It doesn't make any difference whether they lie within or without. If any of it is relevant, all of it is. The school district is the county. Where the notion we're trying the city case alone arose, I don't know.

Mr. Chambers: Your Honor, the question, though, is whether the racial housing patterns within the city have been developed through or encouraged by action of the city.

Court: Do you want to try it on just that bald [605] proposition?

Mr. Chambers: No, no. We have our great problem right here in the City of Charlotte.

Court: Granted. The objection is overruled. Go ahead.

Q. With reference to #42, I'll ask you the area lying adjacent to the Piedmont and Northern Railway, how is it zoned? A. I see the Seaboard. Some of it is zoned industrial, some of it is zoned R-9 multi-family; I would say some of it is zoned business 1. The uses vary. Taking

he frontage as a whole, I would say, oh, half or a little bit more is industrial and the other half is residential.

Q. In this area I'd like to ask you about one further map, #39. Is there any industrial zoning in this zoning area? A. Yes, there is.

Q. Would it be fair to say it's roughly ⅓ to ½ of the area of this map? A. Yes.

Q. So then we have clustered in zoning map areas 15, 13, 42 and 39 substantial areas of industrial zoning, is this not correct? A. I think I pointed out in my testimony that large areas west of the line, which I pointed out, were planned for industrial use and these areas were in excess of the land now being used for industry. These areas that you picked are all in that area I discussed.

Q. All right, sir. Now will you point out on the zoning map the [606] area of greatest concentration of Negroes within the county? A. I could do that more easily on the census tract map.

Q. All right, sir, let's take this one down. A. These areas in here.

Q. You're referring to what census tract numbers? A. 5, 47, 49, there is a concentration. Of course, the other thing that—

Q. Will you just go ahead and list the numbers, please. A. The other point that has to be made is that concentration doesn't necessarily coincide with the boundary.

Court: He's asking you to read the map.

A. I have pointed those out here and here, census tracts 47, 5, 49. I have observed large concentrations in 8 and in 9.

Court: When you talk about census tracts you lose me. If you'll talk about where in the city.

Yale Rabin—for Plaintiff—Cross

A. 8 and 9 is the Villa Heights area; census tracts 5, 49, 47, 46, 48 are the census tracts going roughly north from the central business district, University Park, Lincoln Heights, that area. This area is also concentrated.

Court: Are you going by the color of the map?

A. No, sir, I have been in Grier Heights. By the way, again there is a situation in which the non-white population does not coincide with the limits of the census tract itself. The non-white population is pretty much limited to the north side of whatever that road is.

[607] Court: Most of that is a big field, isn't it?

A. Yes. There is a park on the south side of the road and a good deal of undeveloped land and some ballfields down in here, but it gives a misleading impression of the distribution or population to put the shading in.

Court: Griertown occupies a small portion of the north end of that census tract and the rest of it is undeveloped land.

A. Yes, sir. Well, there is developed land down here.

Court: Most of the rest of it, then.

A. Yes, sir.

Q. I specifically direct your attention to Census Tract #48, which encompasses the area of West Charlotte, Census Tract 46 which encompasses the school of University Park, and Census Tract #47 which encompasses the part of the old Biddleville School area, and ask you if any

one of those census tracts have been substantially zoned industrial by the Planning Commission. Please refer to your maps. A. Again we'd have to look back at the maps. Would you help me to identify the relative numbers in the other maps. Perhaps if you put one on the floor we can do that.

Q. I direct your attention to zoning map 4.

Court: Mr. Waggoner, you're looking at the zoning maps and he's looking at the census tracts.

A. We're trying to relate the two.

[608] Q. Has some industrial zoning. . . . A. Not a whole lot, although the southern and eastern boundaries.

Q. I'll ask you if it comprises as much as 10% of the zoning map. A. Oh, no.

Q. So then in the heart of a predominantly Negro area we have all residential zoning, do we not? A. Surrounded by industrial zoning.

Court: His question was whether the area he referred to is residentially zoned.

A. I wouldn't say without looking at some of the other . . . we have just looked at one of the maps. This particular zoning tract is predominantly residentially zoned.

Court: How much of it is other than residential?

Mr. Waggoner: We can read from the map the boundaries shown here. On zoning map #4 the northern boundary crosses U. S. Highway 29 bypass perhaps a quarter of a mile; then it follows along Newland Road to Erwin Creek, along Erwin Creek to West Trade Street. At West Trade Street it

follows Tuckaseegee Road and then follows Piedmont & Northern Railroad and then it follows Stewart Creek up to Hoskins Creek, which is the northern limit. If the Court please, it is roughly this area here.

A. Actually it's a piece right out of the center like that, comes right down there. It includes part of 48, just about all of [609] 46. . . .

Q. You're referring to census tracts? A. Yes. This zoning tract 5 includes. . . .

Court: I'll tell you what let's do about that. These words will be meaningless to me apart from the maps and I think it would be far more useful if counsel would just take a map and point out the parts of the map they want the Court to consider, if this question is competent. I think I'm looking at what you're talking about and I think the blue area is an area which lies just to the right of the New Mount Holly Road, but I'm not certain, Highway 16. A little sliver of blue along the north side of Bellhaven Blvd., is that what you're talking about as the industrial encroachment within that industrial area?

A. This area only has industrial, like that, at the very bottom of it.

Mr. Waggoner: If the Court please, we will relate this to school districts, if that would be helpful.

Court: This map here, which was mentioned as being a portion of Exhibit 14, was identified, I think, as a map of the Planning Commission going back somewhere around 1960.

Mr. Waggoner: And they said these recommendations were made and adopted almost without exception.

[610] A. I didn't say that. I said they generally follow almost without exception. The zoning map in general reflects the recommendations of the 1960 plans, only these particular maps. They specifically illustrate how it's zoned. That map does not.

Mr. Waggoner: If the Court please, I would like to pursue this further in view of the statement that only Negroes will be displaced by the proposed zoning. It's a laborious process. . . .

A. I didn't say that. I said that the proposed industrial land is west of the line which I described. I did not say what you were saying. I said that there is a band of industrial land. . . .

Court: Never mind repeating the testimony. You are illustrating the difficulty of having to try to manage testimony which is not testimony but descriptions of testimony, but I think it's been helpful in understanding the maps. Go on and answer the rest of the questions.

Q. With reference to Census Tract #53 I'll ask you if it isn't substantially zoned industrial.

Mr. Waggoner: If the Court please, that covers four zoning maps and I hate to put the Court to the time and delay on this.

Yale Rabin—for Plaintiff—Cross

A. The zoning tract 18 includes most of 53, part of 14 and part of 13 and comes over to a line which is represented by Sugar [611] Creek, so that this thing we're talking about, Sugar Creek is right here.

Q. I'm asking you for the— A. That's #18, is that correct.

Q. 18 covers part of it, yes. A. It covers more than all of it—excuse me, it doesn't cover this bit of 53 at the very west of the section.

Q. Can you relate that to the census tract? A. This is Tryon coming down here and that area is zoned, except for a bit in the south, almost entirely residential.

Q. Would you say as much as ¼ of that is zoned industrial? A. No, sir, I wouldn't.

Q. What percentage would you attribute to it?

Court: What census tract are you in?

A. This is a map covering 53, 14, 13—

Q. You didn't understand my question. I asked about Census Tract 53. A. That's entirely residential.

Q. I ask you to move closer to town towards census tract 52, the next one in.

Court: I'm confused by your answer that census tract 53 is entirely residential.

A. Here is the map.

Court: You're looking at a different bunch of papers, go ahead. You're looking at a zoning map and I'm [612] asking about a census tract.

A. Yes, I'm sorry. These in general are larger than the census tract maps and tend to include either more than one

tract or parts of several tracts, which this one does. It does not include the far eastern portion of tract #53, I mean west. It doesn't include the far western portion of tract 53.

Q. I'll ask you if the western portion of zoning map 18 does not contain all industrial or substantially so. A. The western portion of tract #18 has home industrial zoning in the southwest corner.

Q. Would you next go to zoning map #17, if you will, please. With reference to map #17, which as I understand it contains the western portion of Census Tract 53, I'll ask you if the greater portion of that zoning map is not zoned industrial. A. Yes, it is.

Q. I'll ask you what the racial composition of Census Tract #53 is, I'll ask you if it isn't less than 20% Negro? A. That may be so. I can't tell by this map where those Negroes live. For example—

Q. Will you just answer the question.

Mr. Chambers: Your Honor, I think the witness is entitled to explain his answer.

Court: He hasn't answered the question.

A. I can't say whether this portion or that portion is where the Negroes live. This census tract is on two zoning map sheets.

[613] Court: All he's asking you is what the papers show, the same papers you have been testifying about. What do the papers show in response to his question?

Q. I'll ask you if substantially developed residential areas are not zoned industrial. A. That's correct.

Yale Rabin—for Plaintiff—Cross

Q. This is an area having less than 20% Negro, is that correct? A. I don't know that. The census tract has less than 20% Negro. This is only a portion of the census tract.

Q. You may return to the stand, please, sir. (The witness does so.)

Court: Which is the bigger unit, census tract or zoning map in most cases?

A. Zoning map.

Court: Zoning tracts are bigger than the census tracts?

A. Yes, sir.

Court: Just for comparison, let me see the zoning map you were just referring to. What was the number of that?

Mr. Waggoner: 17 and 18.

Q. Is it fair to say that the proposed zoning or the zoning now in existence in the City of Charlotte includes industrial zoning for both black and white areas? A. Would you repeat that, please?

Q. Is it fair to say that the industrial zoning in the zoning [614] area in the industrial areas include not only white but black neighborhoods? A. I'm not sure I understand what you mean by include. By include do you mean that they zone existing residential land for industrial use? Is that what you mean?

Q. Yes. A. May I qualify my answer?

Q. Certainly. If you answer the question first, then you may qualify it. A. The answer to the question is yes. My

observations are that considerably more developed residential land is taken from existing black resident areas than white.

Q. Let me ask you this, are the value of the homes that have been newly zoned industrial, are these valuable homes in dollars and cents? A. This is going to depend entirely on demand. I think that the effect on adjacent homes is far more specific than the effect on homes which lie within the industrial area.

Q. Are the homes that are located in proposed industrial areas homes of substantial value? A. This will vary.

Q. Will you answer my question and then qualify it, please. A. In the inner area they are of less value than they are in the outlying, more expensive, recent subdivisions. Unless you mean are they of more value by virtue of the industrial [615] zoning.

Q. No. I'm asking you if the homes that are physically within the industrial boundaries are not less valuable than the normal or average home in the City of Charlotte. A. I would say that generalization simply could not be made, since the industrial band runs over such a wide quality of housing.

Q. You stated that you had gone around these homes and had seen them and you know the city. We'd like to get an answer to my question. A. I answered your question. I said I don't think that it would be reasonable to generalize.

Court: Do you have an opinion on the answer to the question that he put whether the land that was zoned industrial, whether the houses in industrial areas are more valuable or less valuable than houses in other areas?

A. Generally less valuable.

Q. Thank you. Now, the proposed industrial zoning roughly follows the existing rail lines in this city, does it not? A. Not all of it. It follows some of them along great parts of their length and it follows some of them only at intermittent locations.

Q. Is it not true that in your study of Charlotte that the industrial location along the main line of the Southern Railway [616] starting at Concord and going to Gastonia or Columbia, as the case may be, had industrial developments along them since the railroads came here? A. That's historically true but not necessarily good planning.

Q. I'll ask you if it is not normal to expand existing industrial areas rather than spot them all over the city. A. I made no suggestion about spotting them. I am merely suggesting that historical trends, which directly related all industry to waterways or rail lines, no longer applies to modern practices in industry and many industries no longer require any direct proximity to those kinds of transportation facilities. That's all I'm suggesting.

Q. Is it not true that many businesses do require access to rail? A. Some businesses do, yes.

Q. Is it not also desirable to build your interstate highways and circulators in areas that have a lower land cost? A. I don't believe it's desirable to run an interstate highway through a city. There's no reason for it.

Q. Then you would differ with the city planners in that aspect of the plans? A. Yes, sir, yes, sir.

Q. Do you see a conscious design to further separate the races by barriers of highways? A. I wouldn't speculate about that.

Q. With reference to the displaced people who were moved out of [617] Brooklyn, are you familiar with the Urban Renewal in Brooklyn? A. Yes, sir.

Q. Where these people went and where they stayed are two different things, are they not? A. I don't know that, no.

Q. As an urban planner you find that the lower income people are substantial movers, do you not? A. I find that lower income people are substantially moved by public action, yes, repeatedly.

Q. And you're saying that any time a low income person moves it's because of some governmental action? A. No, sir, I didn't say that. I said that I find that low income people are repeatedly moved by public action such as Urban Renewal, code enforcement, highway construction, eminent domain proceedings for all kinds of public facilities.

Q. You mentioned code enforcement. Is this not an attempt on the part of governing authorities to upgrade the type of home these people live in? A. Not necessarily. It's an attempt to prevent people from living in substandard housing. It's not necessarily an attempt to upgrade their housing or that house. The object and, in fact, the result is very often the demolition of the property in which the people live and their displacement.

Q. Did you see the kind of homes people were living in in Brooklyn? A. No, sir, I didn't. It was torn down largely before I got here. [618] However, I have seen some of the homes they have been relocated into.

Q. Have you seen the homes they are living in in Biddleville? A. I don't know that area specifically so I couldn't say.

Q. Have you seen the kind of homes they are living in in Barringer Woods? A. Yes.

Q. Have you examined the kind of homes that are in the West Charlotte School District area? A. No, I don't

know the West Charlotte School District area specifically so I couldn't say.

Q. I'll ask you if you didn't find some excellent homes in all Negro districts. A. Yes, sir, of course.

Q. Now, in the course of your examination of the records in this case—

> Court: Mr. Waggoner, you think you'll be at this for some time?
>
> Mr. Waggoner: If the Court please, I have about twenty more minutes I'd like to pursue.
>
> Court: I'm agreeable to staying with it until we finish with Mr. Rabin or coming back at 2:00 o'clock, whichever you gentlemen prefer. I'd rather finish now if it can be done without pressing anybody.
>
> Mr. Chambers: I'd like to do it.
>
> [619] Mr. Barkley: I spoke to the Court Friday and I told the Court again this morning—
>
> Court: We opened court early hoping we could get through before you had to leave, Mr. Barkley. If and when you have to leave, you may go. We'll continue right now and you feel free to go when you have to.

Q. Now, in your study of the history of location of homes in or near industries, do you find that industry always follows the homes into a community? A. No, not necessarily.

Q. Are you familiar with the fact that Charlotte was surrounded by a number of outlying mills which have now been incorporated in the city limits? A. No, I am not.

Q. So you have no real opinion as to how the areas became industrial, whether they were residential and then

became industrial or were industrial and the residents just came to them, are you? A. I would assume—

Court: The question is what you know, not what you assume.

A. Repeat the question, please.

Q. Read the question back, please.

(The Court Reporter reads the question on Line 15 above.)

A. I have an opinion, yes.

[620] Q. What is your opinion? A. My opinion is that the early development was that industry and the housing of people who worked in it developed side by side years ago.

Q. This was the mill village concept, was it not? A. Yes.

Q. Does not industry often seek the lowest cost building to tear down and locate on the land?

Mr. Chambers: Your Honor, I object to that.

Mr. Waggoner: He's an industrial planner or urban planner.

Court: Overruled.

A. First of all, I have no knowledge that industry seeks buildings to tear down. I am aware that industry has to seek land in industrially zoned areas and I am aware that industrially zoned land with any kind of a building on it is going to cost more than similarly zoned land without any building on it. Therefore, it seems quite reasonable that industry seeking to locate would seek to locate on land on which they don't have to incur the expense of tearing down an existing building.

Yale Rabin—for Plaintiff—Cross

Q. Do I understand you to say—and this is without qualification—that industry will pay more for undeveloped land no matter where it's located? A. I didn't say anything resembling that. I said customarily land with no buildings on it—in fact, I said the opposite—[621] land with no buildings on it customarily costs more than similarly zoned and located land with existing buildings on it that must be torn down. If I've got to buy a building site and I can buy a piece of vacant land for X-dollars and I can buy a similarly located piece of land with buildings on it that I have to pay for and then have to bear the expense of tearing down, I'm going to buy the less expensive vacant land on which to build.

Court: Have you ever bought any industrial land?

A. No, sir.

Court: Let's go on to something that he's supposed to know about.

Q. As an urban planner have you found that Negro families ordinarily have more children than white families?

Mr. Chambers: Objection. That has absolutely no relevance.

Mr. Waggoner: If the Court please, Barringer School was criticized for—

Court: The objection is overruled. Go ahead and answer the question, if you know.

A. I find that Negro families have about the same number of children as white Catholic families.

Q. What about an urban southern Protestant community? A. Fertility does seem to be a bit lower among the white folks down here.

[622] Court: I think taking the state at large it was about 5.2 children per family twenty years ago. I don't know what it is now. Can you answer his question?

A. Well, taking census figures as a generalization about 3.10 is white family average size, about 3.8 average black family size.

Q. So you will find in a changing neighborhood from white to black that there is usually some taxing of the school facility, don't you? A. If young families with children are moving in, yes. If you are displacing elderly people and white families with children are moving out, you might have the opposite effect. This would depend on the age range in which the people are who are being displaced.

Court: Is this asking you for an answer to a question that you don't know the answer to?

A. I think that the question is not worded in specific enough terms.

Court: Let's go on to another question. We can look up the birth rate if we need to, Mr. Waggoner. I had sixteen aunts and uncles at one time on one side so I don't believe the birth rate inquiry is going to point to anything material.

Q. One further thing. You're aware of the fact that Plaintiff's Exhibit #4 does not purport to be a study of

the entire City [623] of Charlotte. A. Identify Plaintiff's Exhibit 4.

Q. This is the overlay we referred to. A. Well, this is true but I have looked at the census data and have it here and if it needs to be made an exhibit, possibly it can be. This lists all of the census districts and the percentages of their white and non-white population.

Q. And you are familiar with the fact that the publication called Blighted Areas September, 1962, did not purport to be a study of the entire city, too. A. That's correct. It's a study of blighted areas.

Q. It only studied certain census tracts that were designated in there, is that correct? A. Yes, sir. I don't know the exact proportion. As the map in the beginning shows, it substantially covers the entire western part of the city.

Q. You read the preface to the study, did you not? A. I don't recall it. Yes, I did read it but I couldn't quote from it without looking at it.

Q. These two rather incomplete studies form a substantial part of the conclusions you have drawn, do they not? A. Plus my observations. I rather extensively have driven around and through the eastern sections of the city as well.

Mr. Waggoner: No further questions.

[624] *Redirect Examination by Mr. Chambers*:

Q. One question, Mr. Rabin. You say that that blighted area map considers only those areas in the western side? A. I didn't say that. I said that it covers all of the western section. It reaches over, as you can see, into the central business district area and over to include Griertown, but other than that it's substantially the entire western portion of the city.

Yale Rabin—for Plaintiff—Recross

Q. Does it follow somewhat, too, the same belt you were talking about running from south to north? A. Yes, sir, it does.

Mr. Chambers: Nothing further.

Mr. Waggoner: If the Court please, I'd like to ask him just a few more questions.

Recross Examination by Mr. Waggoner:

Q. You are familiar with the fact that the City of Charlotte has a land area of approximately 64.8 miles, are you not? A. I am now, if that is so.

Q. I'll ask you if Washington, D.C., does not have a land area of approximately 62 square miles. A. That's true.

Q. So Charlotte is a bigger land area than Washington, D.C. A. Yes.

Mr. Waggoner: No further questions.

[625] Mr. Chambers: Nothing further.

Court: Mr. Rabin, thank you very much for coming.

Mr. Chambers: Your Honor, I'd like to make sure we have all our exhibits back before the Court.

Court: You probably would like to take all exhibits on the bench here and put them altogether. Do the defendants have any further evidence?

Mr. Waggoner: If the Court please, I am considering two exhibits here which are taken from the American Jurisprudence Lawyers Desk Book. It shows the population of land areas of the various cities for comparison purposes. We also have the areas of the states and the only purpose there is to show the land area of the District of Columbia.

Colloquy

Court: All right. Have you got the land area of this school district?

Mr. Waggoner: 542 square miles.

Mr. Chambers: We'll stipulate that but I don't know the relevance of the land area for Washington.

Mr. Waggoner: Your witness had a lot to say about school district and we wanted to show that he had a rather small area.

Court: The Washington district has about 45% more pupils than the Charlotte-Mecklenburg District.

Mr. Waggoner: Yes, sir.

Court: Roughly half again as many in Washington.

[626] Mr. Waggoner: We will offer these.

Court: Some question came up about the census figures. Is there in this batch of exhibits anything which shows how many people lived in these various census tract areas when the 1960 census was made?

Mr. Chambers: It shows the percentage of nonwhite residents in the various census tracts. We didn't introduce a copy of the 1960 census.

Court: How about somebody introducing that.

Mr. Chambers: All right. Your Honor, this is shown in this document giving the facts and figures of the population and economic data for the City of Charlotte dated March, 1968. We would like permission to introduce a copy of the 1960 census.

Court: I would appreciate it if you would.

Mr. Waggoner: If the Court please, we would like to introduce a composite exhibit, Defendant's Exhibit #9, which indicates the population of the United States cities over 100,000 people and also

contains a land area designation.

Court: Is that the latest figures?

Mr. Waggoner: This is 1960. These are the latest figures that we have.

Court: Well, the World Almanac has a lot of those figures up to date.

Mr. Wagonner: We will substitute if that will be all [627] right.

Mr. Chambers: It's my understanding, too, that there is a supplement dated 1968 to the 1960 census

Mr. Rabin: I understand that there has been some annexation since 1960 so that any figures which the '60 census might give as the population of Charlotte would be distorted to the extent that the area has been added to and additional population not caused by migration or birth.

Court: Current estimates, taking those things into account, run about 255 or 260 thousand in the city limits and a third of a million in the county. If somebody has got the latest dope on that, I'd like to have it for whatever use it may be.

Mr. Rabin: Any data which is taken from the '60 census should then include those tracts which in 1960 were outside the city but which now by annexation have been included so you would get a true picture of the area we're talking about.

Court: As a matter of curiosity I looked up the population of Rhode Island and found that it's undoubtedly considerably less now than the population of Charlotte. It was about 10,000 more nine years back and the witness said it wasn't growing, so I suppose Charlotte is about a fourth again as big as Providence.

Mr. Waggoner: They have an 18 square mile school district, though. 17.9 is the area of Providence.

[628] Court: I want to keep this record open a little while and if there is no objection, I'll keep it open until further notice. I may find in studying these data that there is a lot of other information that is readily available from public sources that ought to be looked at. I doubt that I will discover anything really pertinent that isn't somewhere in the mass of exhibits. The record will remain open and if either of you discover you'd like to introduce or have the Court consider something, the record will be open until further notice for that purpose. Is the pupil assignment plan fully described in the exhibits?

Mr. Chambers: The present one, Your Honor?

Court: The present one. It's portions of your Exhibit 1, I know. The items I have in mind are the answers to interrogatories 2, 3, 4, 5 and 6, I guess.

Mr. Waggoner: Your Honor, we have a publication that is given to the schools called Pupil Assignment Guidelines.

Court: How about introducing that so I can study it if I don't get the answers to the questions.

Mr. Wagonner: We will offer Pupil Assignment Guidelines June, 1967, as Defendant's Exhibit 10.

Court: There is also a paper on faculty assignment which is the answer to interrogatory #8 and there is a [629] good deal of testimony on that subject. Is there any other learning on the subject of employing and assigning teachers that I ought to know about?

Colloquy

Mr. Chambers: Your Honor, there was an amendment to the North Carolina General Statutes in 1967. What we hope to do, with the Court's permission, is to submit to the Court on Monday a brief setting forth our position relative to the whole suit along with proposed findings and we would in that brief call the Court's attention to the General Statutes applicable to teacher employment.

Court: All right. The only information we have in the record on transportation is that the 23,000 county pupils being transported with a day to day cost of about $19.00 a year, plus the initial outlay for buses. Are there any more figures on that subject that would be of any particular pertinence?

Mr. Chambers: I don't think so, Your Honor. It might be that we could secure from the City bus company the number of students who are transported to and from school each day.

Court: That figure is in one of the exhibits that the defendants produced, 23,000.

Mr. Chambers: I'm talking about on the City buses rather than on the school buses. There is some testimony in the record that some of the students within the city who are not entitled to ride the school buses are being transported to [630] school by the Charlotte City buses.

Court: At city expense?

Mr. Chambers: No, at their own expense. I said that might be of some relevance but we didn't get those figures before.

Court: If the School Board wanted to go into the business of transporting more children, wouldn't they have to face the problem with either the Legis-

lature or constitution to get the money for that purpose?

Mr. Chambers: Unless the School Board decided to provide local funds for that purpose. The present statute does not authorize students within the city to be transported on the regular basis and if the School Board decided to get into the business of transporting students, they would either have to provide funds locally or go to the Legislature and get some statutory amendment. I know there is presently pending before Judge Stanley a suit challenging the statute of the state refusing to give transportation for students within the city.

Court: I was wondering if that issue was being tested or proposed to be tested because you ask yourself why the state would take money from the cities and spend it purely on the basis of whether you live within or without a municipality.

Mr. Chambers: It is being challenged now. The case [631] was argued and submitted to Judge Stanley.

Court: He didn't tell you how he was going to rule, did he?

Mr. Chambers: I didn't participate in the case. The case was brought by the American Civil Liberties Union.

Court: Is it a suit to restrain the spending of money to transport rural pupils?

Mr. Chambers: It's a suit to enjoin the State from continuing to appropriate funds to transport students in the county unless it provides bus transportation for students in the city. It's really an affirmative suit to get bus transportation for students in the city.

Colloquy

Court: I don't suppose there's any need in my racking my brains to think of any further questions. I'll remember the other questions after we've all broken up, but I will feel free to call counsel on both sides for any further information necessary if anything else develops that appears to be of value. Mr. Hicks reads more law than I do and he very correctly says have you given me already the names of the cases you think are the leading cases and I ought to get familiar with them?

Mr. Chambers: Your Honor, we plan to present those on Monday. What we were hoping to do in the brief was to try to trace the basis of our contentions and set out the authority we think would support what we are suggesting here. There [632] have been two recent Fifth Circuit opinions that involved areas here. The names escape me but I'll be glad to call Mr. Hicks and give them to him. They are not printed yet in the report.

Court: Is there anything later or farther out than the sentence I was quoting to you this morning from the Fourth Circuit opinion?

Mr. Chambers: There is a case out of Illinois.

Court: I mean from the Supreme Court or from the Fourth Circuit.

Mr. Chambers: Not from the Supreme Court. There's nothing later than the Green case.

Court: I read the 180,000 word opinion and I didn't see anything in it that was any farther out than that little vague suggestion in the second Brewer case. That's what you're basing this morning's evidence on, the Brewer case, isn't it?

Mr. Chambers: That's correct.

Court: That's where they said the District Court should consider these things.

Mr. Chambers: We would contend that it ought not make any difference whether there had been discrimination or not in the sale or rental of houses, that as long as you have this kind of housing pattern it ought to require that something else be done. I was thinking of a case in Mississippi. They [633] had a situation where whites staying on one side of town and Negroes on the other and they had a railroad running through the town as the dividing line and the School Board said we're going to integrate and drew school district lines right down the railroad track. That case went on for about eight years and the court decided they have to do more than that. There was no inquiry in the court whether this housing pattern developed from private or public discrimination.

Court: I thought a week ago when I suggested to you that I didn't think this type of evidence was material that it didn't make any difference as far as present living is concerned whether it got into this situation through one reason or another. The second Brewer opinion, which I didn't have in mind at that time, suggests that might make a difference. I'm not sure that it's good law. I'm not sure that we ought to have to go back and examine the thinking of everybody who had a little part in the present social situation in order to reach a conclusion as to whether something can or can't be done about it.

Mr. Chambers: It makes for difficult inquiry but that's what the court indicated might be done.

Court: I'm not sure that I agree with Judge Butzner's suggestion there. Well, unless there is some-

thing further on this we'll meet again Friday afternoon. I [634] believe, isn't it, on the Anson County case?

Mr. Chambers: Yes, sir. Mr. Stein will be here Friday afternoon and I'll be ready to go with the court to Anson County Saturday morning.

Court: We had some fool notion such as that and I think we may follow through on it. Do you have evidence to present in the Anson County case?

Mr. Chambers: It's all taken in depositions and I think we can probably close the case in about an hour.

Court: Have the depositions been filed?

Mr. Chambers: They have not been filed, Your Honor. Mrs. Ferster took the depositions and she was completing the depositions for this case and she's working on the depositions for that case. Your Honor, I have one final thing.

Mr. Waggoner: I just read this.

Mr. Chambers: He knows what they are. These are principals' preliminary reports for 1968-69 and they have been certified by Mr. William Peak, the Director of Statistical Service for the State Department of Public Instruction.

Court: What am I supposed to do. . . .

Mr. Chambers: We're going to decipher that for you, Your Honor, and tell you what we're trying to show you. This is Plaintiff's Exhibit 44.

Mr. Wagonner: I have never seen these. It would be helpful to us to know what they contend. They are presented [635] at the tail end of the case and then great conclusions are going to be drawn from them. I have no idea what we're driving at. It seems

to me that we're entitled to some fair notice of what is involved in this lawsuit.

Mr. Chambers: Mr. Wagonner, we came by your office and went over all these exhibits and that included that. We had to order that from the State Department.

Court: I've been trying to find out what you want the Court to do for a week.

Mr. Chambers: Well, we tried to set out at the beginning of the hearing a statement of our basic contentions and what we would like the Court to do. We will try to set it out more extensively in a brief. We will try to file it by Monday.

Mr. Waggoner: It puts us to the point of preparing a brief on each little inference that might be drawn from this evidence. Would it be possible to get their brief and then, in effect, have an answer for it so we know what they're driving at.

Court: I'm thinking this might be more useful to everybody because if we do this, it will put the plaintiffs under the burden of being concrete instead of general in their request for relief. I don't want to stretch out the completion of the lawyer's part of the handling of this phase of the case, but I do think [636] it might be well to have a little gap between your filing of your request for findings of fact and proposed order and brief and the filing by the defendants. Are you going to be able to make the Monday time?

Mr. Chambers: Your Honor, we are going to try. I am going to plan to start working on it tonight.

Court: Let's modify that original arrangement to this extent, that you will be expected to file by Mon-

day or show good reason for not doing it and that the defendants will have five days after that to file their own requested findings. Does that take a little of the strain off of everybody?

Mr. Wagonner: Yes, sir.

Court: Let's take a recess.

RECESS

Wednesday, March 26, 1969—

Mr. Wagonner: At this time we would like to examine Mr. William McIntyre.

WILLIAM E. MCINTYRE, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Wagonner:

Q. Will you give us your name and residence, please, sir? A. William E. McIntyre, 200 Middleton Drive, Charlotte.

[637] Q. What is your official position with the Charlotte-Mecklenburg Planning Commission? A. Planning Director.

Q. How long have you held that position? A. Since January, 1955.

Q. What is your educational background? A. I graduated the University of Michigan 1938. I took post-graduate work there the following year.

Q. Have you held prior employment before coming to Charlotte in 1955? A. Yes. Before I came to Charlotte in 1955 I was employed by the Cleveland City Planning

Commission, Cleveland, Ohio, as a City Planner. Before that I was employed by the Tennessee State Planning Commission as a City Planner.

Q. What was the condition of zoning in the City of Charlotte when you came here in 1955? A. In 1955 when I came here the City of Charlotte was zoned. It was zoned by an ordinance enacted by the City Council in 1947.

Q. Do you know how the 1947 zoning was developed? A. I know from having been told by various people who were here on the scene when I came in 1955 who were also on the scene in 1947. I have not had any direct contact with the people who prepared the 1947 ordinance but with people who were associated with people who prepared it.

Q. Would you tell us what you know of 1947 zoning? [638] A. The 1947 zoning plan was prepared by an engineer who was employed by the city. I believe the man's name was Marshall, and the zoning ordinance that he prepared covered the city as it existed at that time. The ordinance was a fairly simple one as compared to the ordinance we have today in that it established fewer classifications of uses than we now have. It had two residential districts, I think it had two business districts and two industrial districts, I believe.

Q. In that zoning code, as I understand it, residence could be built in industrial zones, is that correct? A. That's right.

Q. Now, did your office engage in any efforts to improve on the 1947 zoning? A. Yes. One of our basic purposes after we started our planning operation in 1955 was to prepare a general development plan for the city and the perimeter area that had been established around the city at that time, to prepare a general development plan, which is a guide to growth and development and then, on the

basis of that general development plan, to establish zoning as one means of carrying out the plan.

Q. What criteria did you use zoning in preparing the new code with reference to residential housing? A. Well, we used a variety of criteria. Basically, of course, as in most zoning, we started off with surveys and studies of the community as it existed at that time so that we would [639] understand what types of development were located where. This naturally covered the residential sections of the area as they were established at that time. We surveyed these residential areas, not only to find out where residential neighborhood and development was located but also to find out the kind of development that it was in terms of density. We have a fairly wide range of residential densities here and we wanted to establish residential categories of densities via the zoning ordinance that would be compatible with the residential development that was on the ground at that time insofar as possible, and then we wanted to plan for the expansion and enlargement of the established residential areas to accommodate the new and additional population that we expected to see come into the community out to the year 1980.

Q. Now, as I understand it the criteria for zoning in a large part were dictated by the existing land uses, is that correct? A. Yes, to a very large extent they were dictated by land use. They were predominantly determined by the existing land use where we were dealing with large, built-up and established urban areas.

Q. Would this be true not only for residential but office and business and industrial categories? A. It was true, certainly, for office, business and industrial categories, but I think we always have to keep in mind that we are not only planning for what is there but also for what [640]

is to come with the growth and development of the community. But certainly our zoning plan was guided very much by the types of development, industrial, business or office, that we found in various locations at that time.

Q. What effect, if any, did the industrial zoning proposed and subsequently adopted have with reference to the 1947 industrial zoning areas? A. There was a very substantial cut-back from industrial zoning to residential zoning particularly as it related to some of the residential areas that were already established in the community. We found that quite a few areas that were established as residential sections had been zoned as industrial areas by the 1947 ordinance and we were concerned to forestall the invasion of industrial development into these areas by changing the zoning of those areas from industrial to residential.

Q. Would it be fair to say that you substantially reduced the amount of industrial zoning in the residential areas? A. Yes.

Q. Do you have in mind any particular areas? A. Well, I remember that the section known as Greenville was entirely zoned industrial by the 1947 ordinance and we eliminated most of the industrial zoning that covered that area. The section known as Brooklyn in the city was entirely zoned industrial by the 1947 ordinance and we eliminated that [641] industrial zoning and changed it to combination of business and office zoning in view of the forthcoming redevelopment of that particular area that was known at that time. We changed from industrial to residential some sections of First Ward also.

Q. With reference to the 1947 zoning code, were there substantial inroads of industry to residential areas? A. No, I don't think there was very substantial inroads of

industry into the residential areas, particularly those that I have described. We changed from an industrial zoning to a residential zoning.

Q. In coming up with your present zoning map were racial considerations involved to any degree? A. No.

Q. I next hand you a map from Plaintiff's Exhibit 12, which is captioned General Development Plan, which I understand to be the twenty year projection of zoning for your office. I'll ask you if the zoning indicated on that map is substantially identical with existing zoning in the City of Charlotte and perimeter area. A. I think I must correct the impression of what this map is. This is not a zoning map so I can't respond to your question which implied that this is a zoning map. This is a general development plan map. It is an indication of the planned uses of land and of the major traffic arteries that would be [642] compatible with and would serve the planned uses of land. This map provided us with the basis to formulate zoning for the area on a planned basis, on the basis of an established plan for the community. Now, I've forgotten your question.

Q. All right, sir. With reference to the area in blue which the legend indicates to be commercial and industrial are these blue areas substantially identical with the existing zoning ordinances of Charlotte-Mecklenburg Planning Commission? A. Very substantially. There are some changes, few changes here and there, but they are comparatively small in the context of the total industrial zoning scheme.

Q. Would there be as much as a 5% deviation from this? A. Possibly. I don't think it would be much more.

Q. Is the business zoning or business land use indicated on this map substantially in accordance with existing zoning? A. I think substantially, yes.

Q. With reference to residential, is it substantially in accordance with existing zoning? A. Substantially, yes.

Q. Does this general development plan reasonably depict the existing zoning in the City of Charlotte today? A. Yes. I think it should be pointed out, however, again that this is a general development plan and the zoning is much more specific and much more precise with respect to individual properties. The zoning is developed on a much more detailed [643] map. As a matter of fact, it's developed on about 63 or 68 section sheets where we can see every lot and every last street in some detail. Also I think it ought to be pointed out another difference between this map and the other zoning is that this map proposed residential areas in general. The zoning map specifies what kind of residential areas in terms of single family, multi-family and in terms of the density of the residential areas.

Court: You say this map shows all residential areas in the same color whereas the zoning is in grades of residence.

A. Yes, sir.

Court: Concentration?

A. Right.

Court: The substantial portions of this are in yellow, are they?

A. Yes, sir.

Q. Do you employ zoning districts in preparation of zoning? A. Yes. We establish a district structure as a basis for zoning the area.

Q. With reference to your general map, which indicates area 1, 2, 3, 4 and so on, are these zoning districts? A. You're not referring to this map.

Q. No. A. Yes. Those maps do show zoning districts.

[644] Q. Would you give me a definition of zoning districts as used by your office? A. A zoning district is an area in which there are specific regulations established for that district that are different from the regulations that are established for other districts. By way of illustration in terms of residential zoning districts, in the present ordinance we have R-6 districts, R-9, R-12, R-15.

Court: What do those mean?

A. The R-6 district means that a minimum lot size is required for a residence—

Court: Yes, I remember. That 6 indicates lot area in thousands of square feet.

A. Yes, sir.

Court: If a piece of land is zoned R-6 it means that any single family house in that area has got to have 6000 feet of real estate under it.

A. Yes, sir. Also, continuing in response to your question, using the same structure, R-6, R-9, R-12, within each of these districts there are different dimensional requirements that are established for set-back of buildings, amount of yard space, offsets from side and rear property lines, and to some extent there are differences in uses permitted within the district, although the district is essentially a residential one.

[645] Q. As I understand the zoning maps maintained in the Building Inspection Office, there is a key map and then there are pages within that book. Are these zoning districts? A. Yes.

Q. Each one of the pages would be a separate zoning district? A. Oh, no. Each page shows the zoning of the territory that is on that page. Now, on one page you may have quite a number of different types of zoning districts. In other words, the maps aren't structured, the area isn't divided up by a set of maps showing only one district on a map. The area is divided up by geographic sections and then the map shows whatever zoning districts happen to fall within that section of the community.

Q. Would it be fair to say these are conveniently sized areas that will fit on one of the zoning map pages? A. Yes.

Court: District is the term to indicate the use of the land instead of a general geographical section of the city.

A. Yes, sir.

Court: You may have an R-1 district adjacent to an office and business district in the next block.

A. Right.

Court: But it would all show on one section of the zoning map.

[646] A. Yes, sir.

Q. Mr. McIntyre, some criticism has been made of this existing zoning, stating that an industrial buffer zone sep-

arates the southeastern and northeastern parts of the city. Why does this industrial zone exist through the center of the community? A. Well, the industrial zoning exists through the center of the community for many reasons. Many of these reasons, of course, are historical ones. Through the center of the city and running practically parallel with the industrial zones that divide the city, you'll notice that we have one, two, three or more major traffic arteries that parallel this so-called industrial buffer zone, which I think is not a buffer zone. Also some of the mainline railroads, particularly the Southern Railway and the Norfolk & Southern Railroad, traverse this corridor. The existence of the railroads through that area for a great number of years resulted in a fair amount of industry concentrating within that corridor. When we did the surveys for the land development plan that we have here and for the zoning that followed it, we found a very substantial amount of industry already established in that corridor that cuts across the city from northeast to southwest. The fact that the industry was already there really established the core of this feature. It was really on the ground before any comprehensive planning was done in the area.

Q. I next direct your attention to the area south of Wilkinson [647] Blvd. which is zoned industrial. What criteria were used in establishing that as an industrial area? A. Three criteria, or four, really. One, existing industrial uses in the area; two, a railroad practically paralleling Wilkinson Blvd. to the south. Wilkinson Blvd. itself is a heavy duty traffic artery which is an asset for industrial development, to bring the heavy concentrations of traffic into and out of the industrial area, and is a highly useful facility for industrial development in that corridor; and finally, on the westerly side of the area south of Wil-

kinson Blvd. and south of the Southern Railway you will notice that's the location of the airport and the airport with its noise and industrial character dictated that the land immediately north of the airport be used for industry rather than for residence which would have been bothered considerably by the noise emanating from the airport and the aircraft flying overhead.

Q. I next direct your attention to the area bounded roughly by Graham Street, Interstate 85 and Statesville Road. What criteria were used in establishing that as an industrial area? A. That area had several characteristics that in our judgment indicated it would be better used for industry than residence. On the Statesville side of the area there had long been established a city dump which would not make the area very suitable for residential development in the immediate proximity. [648] The southerly portion of the area there was established Attando Industrial Park. North Graham Street and the Southern Railroad on the easterly side of the area provided a plus for industrial development and use, and Interstate 85 also provided a useful facility for the industrial type development.

Q. When this area was zoned was there any substantial residential development in this area? A. There was scattered residential development in this area. It was quite scattered, very thin, and taking the area as a whole, it was essentially a vacant area.

Q. I next direct your attention to the area bounded roughly by Piedmont & Northern Railway and N. C. 16 and the contiguous area zoned industrial and ask you what criteria were used in zoning that area industrial. A. Again, our industrial zoning was in part conditioned on the fact that there was industrial development in the area at the time. The area is traversed by two railroads, Piedmont &

Northern Railroad and the Seaboard Railroad, and N. C. 16 and Mount Holly Road were major traffic arteries which it's desirable to have to provide access into and out of industrial areas.

Q. I'll ask you if there is a tank farm located in this area. A. Yes. On the westerly end of that area colored in blue there is an oil tank farm.

[649] Court: You're talking about the oil depot at Thrift?

Mr. Waggoner: Yes, sir.

Q. Mr. McIntyre, some criticism has been made with reference to the zoning roughly bounded by Statesville Avenue, Highway 16 and Interstate 85 with reference to smaller lots for the zoning in that area. Could you tell the Court the reason for such zoning? A. Well, when the zoning was done again we were influenced to a very substantial degree by the established pattern of development and the established pattern of the development in that area consisted of comparatively small lots. I think the lots were generally probably in the vicinity of 6000 square feet, plus or minus. Naturally no area is developed with a completely uniform size lot, but the lots did range towards the lower level of lot size.

Q. Then was the purpose of zoning to merely zone in accordance with existing land use there? A. Yes.

Q. Did you participate with the Redevelopment Commission in its action in having the Brooklyn area removed of houses? A. Yes. The Planning Commission has the responsibility under State law of certifying that an area is blighted before the Redevelopment Commission can go into the area and acquire it. We did, then, make a finding that

the Brooklyn area was a blighted area under the provisions of North Carolina statutes [650] and therefore eligible for redevelopment.

Q. What criteria did you use in establishing areas of blight? A. We used the criteria that are established by the State law and that is that we must find, in order to determine that an area is blighted we must find it is old, dilapidated, deteriorated, obsolete, and a finding also be made that because of the age and obsolescence of the physical structures in the area that these produce adverse consequences in terms of health, morals, safety, welfare, as they effect the people of the area.

Q. And you certify this to the Urban Redevelopment Board and they in turn submit their application, is that correct? A. Yes.

Q. With reference to the Brooklyn area, did you participate in this Urban Redevelopment project? A. Yes.

Q. How did the Brooklyn area compare with other areas in Charlotte? A. Well, the Brooklyn area was one of the most seriously blighted sections of the city when we studied it back several years ago. So it compared in that sense, it compared very unfavorably with most of the residential sections of the community. There were, however, other similarly blighted sections in the city at that time.

Q. Could you tell us some of the other blighted areas? [651] A. The First Ward area.

Q. Has that subsequently been cleared also? A. No. The First Ward area has not been cleared through Redevelopment. A part of the First Ward area has been cleared and rebuilt with public housing, but that clearance did not take place through the Redevelopment processes or statutes. The Greenville area is a seriously blighted area; sections off of West Morehead Street on the west side of

the central business district are seriously blighted sections also.

Q. Are all of these areas scheduled for demolition of the buildings or have already been demolished? A. Not all of these areas are yet scheduled for Redevelopment. The First Ward area is scheduled for Redevelopment. The Planning Commission has made a finding that area is eligible. A bond issue was passed by the voters, I think two or three years ago, which set up the funds to defray the cost of doing that work. The Greenville area, we have since officially certified as a Redevelopment area and the Redevelopment Commission at the present time is at work on plans for the redevelopment of that section.

Q. Are or were the districts you have just described as blighted principally populated by Negroes? A. Yes.

Q. Would it be fair to say they have moved into better housing from these blighted areas?

[652] Mr. Chambers: I object to that.
Court: Overruled.

A. Well, I personally don't know where the people have moved when they have left the areas. This is a responsibility of the Redevelopment Commission and I am not directly involved in that process. I think all I can say about it is the Redevelopment Commission operates under a mandate from the Federal Government which says that they are required to assist in the relocation—

Mr. Chambers: Your Honor, I object to that. We can submit the mandates of the Federal Government and we don't think this witness is qualified to state what the rules and regulations of HEW are. In ad-

dition, he already stated he didn't know where the people moved and he certainly wouldn't be able to state if the Redevelopment Commission has carried out the requirements of HEW.

Court: Let me ask a question and see whether this matters. Your contention as it relates to this case is that they were moved to particular locations and followed there by the School Board. Isn't it a plain fact that the quality of the housing into which people have been removed by this process is generally superior to the housing they formerly occupied?

Mr. Chambers: That's what we contend is not the case, [653] Your Honor. We have not attempted to make an offer of evidence on the condition of the houses. The position that we took—

Court: Do you remember what the houses in Brooklyn looked like?

Mr. Chambers: Yes, sir. I also remember what those looked like in Greenville.

Court: Greenville hasn't been redeveloped, has it?

Mr. Chambers: They have removed some of those houses in Greenville, not all of them, and they removed some of the houses in First Ward, not all of them. I also know something about some of the conditions of the housing into which these people have moved. We have not attempted to make any showing with respect to that because we didn't think it was particularly relevant in this proceeding. The thing we're objecting to now is the witness clouding the record with what HEW requires without being able to state whether the Redevelopment Commission has complied with that regulation.

Court: Well, I understand he says he hasn't in-

spected the houses. I'll let him go ahead and tell what he understands the requirements to be.

A. I understand the requirements to be that the Redevelopment Commission must attempt to relocate the people into decent, safe and sanitary housing that's within their economic means.

[654] Q. Does the Urban Redevelopment Board actually place people in specific homes or do they simply offer assistance? A. My understanding is that they offer assistance. They cannot direct people to live in any particular location.

Q. Now, it's been stated in this case that railroads are not essential to industrial development or industrial zoning. Is this—

Mr. Chambers: Your Honor, I object to that. That's not a true restatement of what the witness stated.

Court: Well, ask the witness to testify as to his knowledge or understanding about the role of railroads in industry, whatever he knows about that. Do it briefly, please.

Q. Will you tell the Court the role the railroad plays in industrial zoning? A. The railroad played a very significant part in industrial zoning in this community. We found a great deal of our established industry when we started to work here was located adjacent or in the vicinity of railroads. So that has a very substantial effect upon industrial zoning.

Q. I next hand you Plaintiff's Exhibit #13, which I understand to be the major thoroughfares proposal or plan,

and I ask you if you had any participation in the preparation of that plan. A. Yes.

[655] Q. What participation did you have? A. We participated in this as a part of the comprehensive planning of this whole area, together with transportation planner consultants, State Highway Department, City Traffic Engineering Department and City Engineering Department. It was a collaborative effort on the part of those agencies.

Q. With reference to the north-south expressway, what criteria were used in locating that particular thoroughfare? A. One of the essential facts in the location of this is that this was a part of an interstate route.

Court: You're talking about the north-south expressway or the northwest expressway?

A. North-south expressway.

Court: That's the one down here?

A. Yes, sir.

Court: Is that the one that destroys a part of the golf course?

A. I don't recollect the golf course being destroyed by it.

Court: Go ahead.

A. A part of this route was influenced by the fact that it was to become part of Interstate 77, a route that goes up into Cleveland, Ohio, or coming down from Cleveland into this area. The route was otherwise influenced by the need for a north-south expressway route through the commu-

nity to expedite traffic in that direction. The specific location of the route [656] in the northern half, you might say, from the central business district up to the rest of the area, was influenced by the fact that there was vacant land along Erwin Creek Valley and this provided a comparatively inexpensive location and a location that would disrupt existing development to a more moderate degree than might otherwise have been the case. The location of the route from the central part of the city southward was influenced to some extent by the open space available that comprised Revolution Park and also I think it was influenced by the fact that it was desired to get it as close to existing development as possible without running through extensively developed areas. The area immediately to the east of this expressway is substantially developed. That's the area to the east of Pineville Road, so there is a comparatively open corridor through this area where the north-south expressway was located. Finally the southerly end. The location was influenced to some degree by the fact that Arrowwood Industrial Park had been established in that section and again it was felt that the expressway coming up, actually running along the side margin or in the side margin of Arrowood Industrial Park would provide a heavy-duty, high level traffic carrying facility to serve the great deal of traffic that is expected to be generated by industrial development in that industrial park.

Q. Are you aware of any racial considerations in the location of [657] of the north-south expressway? A. No, sir.

Q. With reference to the other expressways in the city and proposed thoroughfares, were any racial considerations made in proposing this plan? A. No, sir.

William E. McIntyre—for Defendant—Cross

Mr. Waggoner: You may examine him.

Cross Examination by Mr. Chambers:

Q. Mr. McIntyre, would you state for the record what city planning is? A. City planning is the comprehensive planning of a community with the effort to develop a good community for people to live in, a valuable community economically.

Q. It's mapping out land useage, whether it should be used for industry, business, office or residence? A. That's a part of city planning.

Q. What other considerations do you have? A. Well, I think basically when we start off our planning we are concerned with determining how many people we are going to have to provide for in a community. We're concerned about the economy of the community and what planning can do to assist and foster the economic development of the area. We're concerned about provision of utilities and facilities that are necessary for good urban living. We're concerned about open [658] space and recreation. We're concerned about the elimination of developments that aren't good for the community such as blighted areas. We are interested in things like the revitalization of the central core of the community. Planning is a fairly diverse matter and it's expressed in different ways, I think, in different communities.

Q. Taking residential areas, what factors would dictate that a particular area be zoned as residential? A. The principal factor to start with is whether an area is residential today or whether it isn't. If an area is residential today, then I think in all probability it would be zoned residential unless with the anticipated growth and development of the community there would be some reason for

planning a change of that residential area to some other kind of activity or use. It's possible, for instance, that—let's say in a central city area, that an expansion of the downtown with the growth of the community might take over and replace a residential section. Does that answer the question?

Q. The basic thing that you mentioned is the existing land use. If it's presently residential, it probably would be zoned residential. Is there anything else that you consider in determining whether to zone a particular area residential? A. Yes. We consider the quality of the environment in the area; we consider the suitability of the land for residential development; we also consider the desireability of establishing [659] residential areas in comprehensive enough fashion so they are more or less self-protecting. I don't know whether that makes much sense or not but we like to establish fairly sizeable residential areas to the extent possible. We like to establish residential areas of a size that can be easily served with schools, for instance, and parks and playgrounds and recreational facilities. These are some of the other factors that are taken into consideration.

Q. In an instance where you have an existing residential area that you propose to zone to industrial or commercial, is there a corresponding residential area created somewhere else in the city? A. No. No, I wouldn't say that.

Q. How do you plan for accommodating those persons who are zoned out of the residential area? A. Well, taking our own plan as an illustration, we knew that we had many thousands of acres of land that we were going to allocate to residential use. As a matter of fact, in the planning process we distributed the anticipated population over this planning area to know where people would be located,

or rather to know that we had space for residential use and development.

Q. We'll come back to that. In the zoning of residential areas—

> Court: As I understand your answer you said that you don't automatically create another residential zone if [660] you cut into a residential area for business or industrial purposes, but you also said that when this redevelopment took place you did establish some other residential areas in other parts of the city.

A. No, sir, I didn't say that.

> Court: Well, I heard you two ways and I'm just asking you to tell me again what you just got through saying. I misunderstood you, obviously, so just what did you just get through saying?

A. I said when we found a residential area we felt was going to be eliminated we did not make a specific provision for the relocation of this residential neighborhood to another place. What we did and what we do in our planning is allocate residential land on the basis of anticipated need for housing developments, whether they be by relocation of people from established residential areas or new influxes of population. In other words, our planning is not to say specifically we'll eliminate residential neighborhood located on spot X and we'll plan to put residential neighborhood located on spot X out here at the intersection of Y and Z. We do not do this type of specific planning.

> Court: What you're saying is you have enough residential space in your overall plan but you don't

try to put people in a particular place if they are kicked out of one neighborhood.

[661] A. That's right.

Q. Mr. McIntyre, you say that you zone areas residentially R-6, R-9 and R-12. What dictates besides existing land use whether a particular area should be zoned R-6 or R-9 or R-12? A. In addition to the existing zoning we are influenced, I think, to a very large extent by the established character of the area.

Q. What do you mean by the established character of the area? A. Whether it's a high income area or a low income area. We're influenced to a very large extent by this. We are also influenced by the need for various kinds of residential type of developments. For instance, we know that we have to have low and moderate cost housing for some people. We know that higher cost housing is available to other people and this influences the amount of ground space that people can afford and the kind of development they can afford to have and the amount of ground space, of course, is reflected in the zoning plan, R-6, R-9, R-12, and so forth.

Q. The multi-family zoning, I gather, would follow somewhat your same criteria. In other words, you think that you have to have a certain number of units for low income, middle income families and R-6 MF would be dictated by that, and if you were planning expensive apartment units or multi-family units you would zone it R-12 or R-20, is that right? A. Right.

[662] Q. Now, what effect, Mr. McIntyre, would planning for the zoning of a residential area as industrial have on the land value of those homes, or the value of the homes in those areas? A. Planning a residential area for industrial, what effect would it have on the value of the homes?

Q. That's correct. A. I am really not sure. I think it would vary a lot with different cases. I'm not in the real estate business and I don't really deal in property values as such.

Q. Let's take an instance. The 1947 zoning ordinance zoned all black residences industrial. A. Uh huh.

Mr. Waggoner: Objection.

Court: What was the answer? The objection is overruled.

Q. What effect would that type of zoning have, Mr. McIntyre, on the home values in those areas? A. Again, I really don't know what effect it had on the values because I've never made any studies of values of homes in such a situation as contrasted with the opposite situation where those homes might have been in a residential area.

Q. I think you indicated that residences could be built in industrial zoning under the 1947 ordinance. A. Right.

Q. Would not the industrial zoning also allow for other land [663] uses or variations, for instance, multi-family dwellings? A. Yes. In the industrial zones as they were established at that time you could have single family, multi-family dwellings, business. In other words, the industrial zone was really a mixed use zone. It allowed practically all uses that you might find in a city to locate there.

Q. Isn't it also true that the 1947 ordinance zoned basically all of the white residential areas residential? A. Basically, yes.

Q. Mr. McIntyre, isn't it true that this kind of zoning would effect the land value of the black residences, they being zoned industrial and the white being zoned residential? A. I really can't answer that. I don't know how it

affects the land value because when you say land value I assume you mean land value and not building value.

Q. I'm talking about the value of the homes themselves, rather than the land. A. I really don't know for a fact.

Q. Would one anticipate in your area, Mr. McIntyre, the same value being assessed to a home in an area zoned industrial or zoned for multi-family use as a home in an area zoned for residential use with perhaps an R-12? A. The same assessed value. . . .

Mr. Waggoner: If the Court please, we'll object to this there is no . . .

[664] A. I really don't know. Again, I don't deal in assessed valuation.

Mr. Waggoner: You have to deal with specific properties. Some industrial zoning change would enhance value and some would decrease it.

Court: The question relates to the value of the home, independent of any industrial value that might be attached to the land on which it stands. Do you want to stipulate an answer to this or do you want me to come in with some other witness by deposition to cover the point?

Mr. Waggoner: If the Court please, I really don't know the relevance of the depreciation or appreciation of value of homes in a school case of this type.

Court: I don't know that it is but it is a point under consideration. Do you want to stipulate that the answer to the question is that if you put an industrial zoning on a neighborhood where people live the value of the property for dwelling purposes is less than if it was zoned for residential?

Colloquy

Mr. Waggoner: No, sir, I don't think that is a true statement. People are appearing before the Zoning Board all the time trying to get changes of zoning from residential to business to industrial. Industry likes to locate where people live so they have a supply of [665] people coming in, so I don't think you can make a general statement of that kind.

Court: Why don't you just get an affidavit from somebody who will answer the question of some knowledge and submit it to the defendant and see if they will agree to introduction of the affidavit or any other affidavit they want to put in on that subject. I don't want to have another hearing because I think this is a routine point. Your point, Mr. Waggoner, is that land may be worth much more because of industrial zoning and, of course, that's true. Mr. Chambers' point, as I understand it, which he is trying to show, is that the use of that land, when that land is used for people to live in the value of the homes on that land is less because of industrial zoning. I would think that both of those propositions would be true without argument. If you can't stipulate it, both of you get affidavits to cover it and save a little time. Maybe the question is off base. Maybe desirability and attractiveness are more important than money value, but I think you're both right. I don't blame either one of you for stopping where it is and try to cover it by affidavit so we don't spin our wheels on it.

Mr. Waggoner: We would be willing to stipulate that, depending on the land, it may be worth more or it may [666] be worth less, which is pretty much of a nothing statement as far as I can see.

William E. McIntyre—for Defendant—Cross

Mr. Chambers: Your Honor, I think we've already got this particular point in by Mr. Rabin.

Court: I don't remember what was said on that subject. Mr. Rabin was the man with the Van Dyke beard?

Mr. Chambers: That's right.

Court: Go ahead to something else.

Q. Mr. McIntyre, as Planning Director do you have occasions to go out into the community to view the residential areas and the industrial areas? A. Yes, sir.

Q. You indicated that in the planning for the 1962 zoning ordinance that you did extensive investigation of existing land use. A. Yes.

Q. Didn't you on this occasion, Mr. McIntyre, have occasion to determine whether the residential areas were white or black? A. We made no particular note of this.

Q. You know, though, Mr. McIntyre, that blacks stay out Beatties Ford Road? A. Certainly.

Q. And that whites stay over in Myers Park? A. Certainly.

Q. You know, too, that most of the blacks in the city stay west [667] of Tryon Street, north and south? A. Right.

Q. And that most of the whites in the city stay east of Tryon Street. A. Right.

Q. Now, is there on the west side of Tryon Street any residential zoning R-12? A. Yes, I think there is.

Q. Would you be able to pick out that section?

Mr. Waggoner: If the Court please, we have a zoning map here he might like to refer to.

A. I happen to recall the section west of Little Rock Road I'm fairly sure is zoned R-12 and up off N. C. 27 there is

a section that I believe is zoned R-12. They are the only ones that I can recall.

Q. This is the index to the zoning ordinance. A. That wouldn't tell me. That's an index. It doesn't show the specific zoning.

Q. Would you be able to get from this the area you are referring to? A. Yes. As I recall, and this is from memory, I think we have places in map 41 and map 38 that are zoned R-12 and I believe on map 42 there are also places, areas that are zoned R-12.

Q. Looking at 38, the area you are talking about being zoned R-12, would you state whether there are any residences in that area [668] presently? A. Yes, there are.

Q. Are they black or white? A. To the best of my knowledge they are white.

Q. You're looking at map 38? A. Right.

Q. Would you look at Map 41. In the area zoned R-12 would you state whether there are presently any residences in that area? A. Yes, there are some residences in that area.

Q. Would you state whether they are black or white. A. To the best of my knowledge they are white. I don't know. I haven't made a survey of them.

Q. Mr. McIntyre, do you know of any black residential areas zoned R-12 in the City of Charlotte? A. In the City of Charlotte, no, I don't.

Q. Now, I believe that areas like Northwood Estates, Dalebrook, University Park were developed subsequent to the 1962 ordinance. A. I think they were.

Q. I believe that your comprehensive plan, the Next Twenty Years, which is Plaintiff's Exhibit 12, was published prior to 1962 or published in 1962. A. Prior to.

Q. Why didn't you in the planning at that stage, Mr.

McIntyre, plan for some R-12 zoning in some black residential areas? [669] A. What?

Q. Strike that. Does your office also in its planning, Mr. McIntyre, plan for recreation? A. No, we do not have any official responsibility of planning for recreation. We do upon request and rather infrequently, as a matter of fact, collaborate with the Park and Recreation Commission on a specific question, but the responsibility for planning for recreation is theirs.

Q. In your twenty year comprehensive plan did you set aside some areas for parks? A. No. The Twenty Year Plan does not indicate a park plan. It recognized some of the major existing parks as features of land use and the closest it came to expressing anything on parks aside from that was our recommendation that the low lands along streams that are subject to flooding be kept open and hopefully some of these might have been used for community open space or recreation. But it was not a specific recreation recommendation, it was rather a recommendation of what we felt the appropriate use of the land would be, not to be intensively developed.

Q. You indicated earlier that city planning involved comprehensive proposals dealing basically with everything in terms of land use. A. Right.

Q. And your testimony now is that you don't set aside areas in [670] comprehensive planning for parks and recreation? A. We do not have that responsibility here although this is normally considered a part of comprehensive planning in city planning.

Q. In your Twenty Year Plan you just didn't do that. A. That's right.

Q. Now, would you look again at the map Plaintiff's Exhibit 12. Now, comparing this map with the map for 1947

and the residential areas then existing, the proposed industrial zoning will carve out a substantial part of the residences, would it not? A. What do you mean carve out?

Q. Would eliminate. A. The industrial proposals here would eliminate a substantial part of the existing residences?

Q. Yes. A. No, I don't think it would eliminate a substantial part of the existing residences. As a matter of fact, I think to a greater extent existing residential areas were put into residential zoning districts than the opposite.

Q. You're talking about the change from the 1947 ordinance A. Right.

Q. I'm talking about the existing land use at the time that you proposed this plan.

> Court: I thought your first question was asking for a [671] comparison between the Twenty Year Plan and the '47 zones.
>
> Mr. Chambers: No, sir. I was trying to establish, if I could, that the proposed Twenty Year Plan would cut out a lot of the existing residential areas.

A. It would cut out the Brooklyn residential area because it was anticipated that would be redeveloped at the time. It would cut out a residential area over off of West Morehead Street, which is here indicated to become an industrial area. The reason for that is that we thought this was not a suitable place for housing and that that area should be cleared of the slums that were there and redeveloped for industrial and commercial purposes. It would be more appropriate to the character of that area. The other displacements of residential development by our industrial area plan I think are comparatively minor and fragmen-

tary here and there. I can't identify any major areas of residence that was to be replaced by industrial use.

Q. Now, the industrial band that runs along Tryon Street and then along the Southern Railroad, I think you said you would not describe that as a buffer zone because of the proposed interstate routes or expressways running through the city? A. I wouldn't describe it as a buffer zone because I think it's a use that stands on its own two feet. I don't think it serves the purpose as a buffer at all. It serves the purpose of a [672] legitimate function and not a transition, which is my understanding of the term buffer.

Q. Does it not, in fact, form a dividing line between the black residences and white residences of the City of Charlotte? A. The blue area along Tryon Street, that's the question?

Q. That's correct. A. Would you state that question again, please?

Q. Does it not, in fact, form a dividing line between the black residents and the white residents in the City of Charlotte? A. Well, I don't know what it does today. At the time that this plan was done, if I am not mistaken, the residential areas between North Graham Street and Tryon Street that are indicated on this map were white residential, so that the blue industrial strip in that context is not separating white from black but rather white from white. Now, this may be separating there today. I don't know whether that area is changed from white to black or not.

Q. Even in 1962 the substantial majority of the whites in the City of Charlotte resided on the east side of that line, did they not? A. Oh, yes.

Q. And the majority of the blacks in the city resided on the west side of the line. A. Right.

William E. McIntyre—for Defendant—Cross

Q. If you were to give the Court some division between the black [673] and white residents of the City of Charlotte would you not use that line? A. Yes, I think that would be a fair description to say that the black residences lie to the west of Graham Street and the white residences lie to the east of Tryon Street.

Q. Going further, Mr. McIntyre, in designing or planning for zoning don't you try to get some residences and then you perhaps might have some land office use or some business zoning before you get to the industrial zoning to provide some kind of buffer between the residences and the industrial area? A. To the maximum degree possible we do try to do this. We try to either have a transition kind of zoning district from industrial into residential or we try to capitalize on some existing natural feature in the ground—a stream course or something like that—that would help to make an easier transition from industrial activity to residential activity. To a large extent we use a light industrial district classification adjacent to residential areas.

Q. It makes for a more palatable home situation to have residential areas that are sort of protected from industrial areas either by office use or some light industry or business. A. Yes, sir.

Q. Looking at Plaintiff's Exhibit 12, the map, you have an industrial zone bordering on the east or northeastern part of the Billingsville or Griertown area. [674] A. Yes.

Q. I think Griertown is basically all black. A. (Shakes head affirmatively.)

Q. I think the adjacent areas are basically all white. A. Right.

Q. Does not the industrial zone form a buffer between the black residents in Griertown and the white residents

on the adjoining area? A. Well, I think it forms a different use district but I wouldn't say that it's a buffer. Again, I don't regard industrial districts as a buffer in that context.

Q. Now, looking on the west side of Griertown, I believe there are only two entrances into the Griertown area, or perhaps one off Randolph Road. A. Yes.

Q. It wouldn't be necessary to have a buffer or anything in that area, would it? . . . . between the black residents of Griertown and the white residents in the adjacent areas. A. It wouldn't be necessary as far as I'm concerned. It's not necessary to have a buffer anyplace for that purpose.

Q. I don't believe that anywhere along the railroad track on the eastern part of Griertown other than adjacent to Griertown that the Planning Commission planned any industrial zoning. A. To the east of Griertown?

Q. Right. [675] A. How far east are you including in your view?

Q. I'm looking basically at the street Beale Road and going as far north as Briarcreek.

Court: Going which way?

Mr. Chambers: Going northwest.

Court: Along 7th Street?

Mr. Chambers: Along Seaboard Railroad from Beale Road to Briarcreek.

Court: Coming back into town.

Mr. Chambers: Yes, sir.

Q. Nowhere else along that railroad track is there any industrial zoning in that area, is there? A. Not within that area.

Q. Now, running down Southern. . . .

William E. McIntyre—for Defendant—Cross

Court: Is Briarcreek the road which crosses 7th Street at Firemen's Hall or is Briarcreek the one further down?

A. It crosses at the Firemen's Hall.

Court: You're talking about a distance of a half-mile or less?

Mr. Chambers: I think it is.

Q. Mr. McIntyre, you indicated that you determined blighted areas for the Urban Renewal Commission in the City of Charlotte. A. Uh huh.

Q. And you determined that Brooklyn and First Ward and Greenville and I guess an area we might describe as Dilworth were [676] considered blighted areas. A. Yes.

Q. Did you determine also in your investigation whether there were available homes to which the residents in these areas could move into? A. No.

Q. You indicated a moment ago that when you closed out or changed an area from residential to commercial or industrial you didn't really create another area residentially into which these people could move but anticipated that you had enough residentially zoned areas for the residences that would be necessary. A. Right.

Q. Do you know, Mr. McIntyre, whether Negroes in this community have had some difficulty in securing homes in white or predominantly white residential areas? A. I don't know personally. I understood this to be the case but not through my own professional experience.

Q. You also have seen, have you not, Mr. McIntyre, that at least up through 1968 the Charlotte News and Observer, the Charlotte News advertised homes and apartments for

sale on the basis of race. A. Yes.

Q. Is it not also true, Mr. McIntyre, that many of the developers for private homes have developed sections for Negroes and [677] sections for whites? A. That appears to be the case.

Q. Now, in the Urban Renewal that has taken place in the City of Charlotte did you know that the Negroes who have been relocated have been relocated in predominantly or all Negro residential areas?

Mr. Waggoner: Objection, he already stated he didn't know where they went.

Court: Overruled.

A. I don't know personally where they went.

Q. If the Court were to find, Mr. McIntyre, from the evidence that's already in the record that the Negroes who were relocated from Brooklyn and who have been relocated from First Ward and from some other residences that have been effected by the expressway in all Negro areas, in your opinion would this further segregate the racial housing pattern? A. Certainly, if this were true.

Q. Now, in the relocation of these families has the City Planning Office taken into consideration the fact that the people involved might not be able to secure homes in any area of the city but would be limited to certain areas? A. No. We have not been particularly concerned with this because this is again the responsibility of the Redevelopment Commission to provide for the relocation of families.

Q. You therefore did not consider whether without adequate [678] planning and preparation Urban Renewal of particular areas would create more blighted areas in the city rather than really relieve the city of blighted areas?

Mr. Barkley: I believe I'll object to that. That's an assumption.

Court: Objection is overruled.

A. Restate the question, please.

Q. I'll withdraw the question.

Court: Mr. Chambers, are you anywhere near finished?

Mr. Chambers: Yes, sir.

Court: I have an appointment that I made before we set this hearing and I ought to leave if this is going to take more than five minutes or so.

Mr. Chambers: As a matter of fact, I'll stop now.

Court: Do you have any further direct examination?

Mr. Waggoner: No, sir.

Court: I don't want to shut you off. I want you to make a record I can read and I had in mind if it's going to go on more than another five minutes or so I'll ask Mrs. Berger to write this up today. But if you think we'll be through in another five minutes or so, I'll stay.

Mr. Waggoner: We have no further questions, Your Honor.

Mr. Chambers: We have no further questions.

Court: Thank you all for coming early, I appreciate it.

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Opinion and Order dated April 23, 1969 Regarding Desegregation of Schools of Charlotte and Mecklenburg County, North Carolina

Preliminary Summary

The case, originally filed in 1965, is now before the court under the "Motion for Further Relief" filed by the plaintiffs on September 6, 1968. The motion seeks greater speed in desegregation of the Charlotte-Mecklenburg schools, and requests elimination of certain other alleged racial inequalities. Evidence was taken at length on March 10, 11, 12, 13, 17 and 26, 1969. The file and the exhibits are about two and one-half feet thick, and have required considerable study. In brief, the results of that study are as follows:

The Charlotte-Mecklenburg schools are not yet desegregated. Approximately 14,000 of the 25,000 Negro students still attend schools that are all black, or very nearly all black, and most of the 24,000 have no white teachers. As a group Negro students score quite low on school achievement tests (the most objective method now in use for measuring educational progress); and the results are not improving under present conditions. The system of assigning pupils by "neighborhoods," with "freedom of choice" for both pupils and faculty, superimposed on an urban population pattern where Negro residents have become concentrated almost entirely in one quadrant of a city of 270,000, is racially discriminatory. This discrimination discourages initiative and makes quality education impossible. The quality of public education should not depend on the economic or racial accident of the neighborhood in which a child's parents have chosen to live—or find they must live—nor on the color of his skin. The neighborhood school concept never *prevented* statutory racial segrega-

tion; it may not now be validly used to *perpetuate* segregation.

Since this case was last before this court in 1965, the law (or at least the understanding of the law) has changed. School boards are now clearly charged with the affirmative duty to desegregate schools *"now"* by positive measures. The Board is directed to submit by May 15, 1969 a positive plan for faculty desegregation effective in the fall of 1969, and a plan for effective desegregation of pupil population, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970. Such plan should try to avoid any re-zoning which tends to perpetuate segregated pupil assignment. The Board is free to consider all known ways of desegregation, including bussing (the economics of which might pleasantly surprise the taxpayers); pairing of grades or of schools; enlargement and re-alignment of existing zones; freedom of transfer coupled with free transportation for those who elect to abandon *de facto* segregated schools; and any other methods calculated to establish education as a public program operated according to its own independent standards, and unhampered and uncontrolled by the race of the faculty or pupils or the temporary housing patterns of the community.

The Law Which Governs

This case vitally affects 83,000 school children of Charlotte and Mecklenburg County—and their families. That means virtually all of us. The School Board and this court are bound by the Constitution as the Supreme Court interprets it. In order that we think in terms of law and human rights instead of in terms of personal likes and preferences, we ought to read about what the Supreme Court has said.

Before 1954, public education in North Carolina was segregated by law. "Separate but equal" education was acceptable. This *de jure* segregation was outlawed by the two decisions of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and 349 U. S. 294 (1955).

The first *Brown* opinion held that racial segregation of schools by law was unconstitutional because racial segregation, even though the physical facilities and other tangible factors might be equal, deprives Negro children of equal educational opportunities. The Court recalled prior decisions that segregation of graduate students was unlawful because it restricted the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." The Court said:

> "Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Quoting a lower court opinion, the Supreme Court continued:

> "'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard]

> the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. . . ."

The second *Brown* case, decided May 31, 1955, directed school boards to do whatever was necessary to carry out the Court's directive as to the pending cases "with all deliberate speed" (349 U. S. 301).

North Carolina's most significant early response to *Brown* was the Pupil Assignment Act of 1955-56,[1] under which local school boards have the sole power to assign pupils to schools, and children are required to attend the schools to which they are assigned.

It is still to this day the local School Board, and not the court, which has the duty to assign pupils and operate the schools, subject to the requirements of the Constitution.

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[1] N.C.G.S., § 115-176. Authority to provide for assignment and enrollment of pupils; rules and regulations.—Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this State for admission to a public school. Except as otherwise provided in this article, *the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete*, and its decision as to the assignment of any child to any school shall be final. . . . No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education. In exercising the authority conferred by this section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the *orderly and efficient administration* of the public schools, and *provide for the effective instruction*, health, safety, and general welfare of the pupils. Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this article. (Emphasis added.)

It is the court's duty to assess any pupil assignment plan in term of the Constitution, which is still the Supreme law of the land.

Some token desegregation of Charlotte city schools occurred during the late 1950's. In 1961, upon economic and administrative grounds not connected with questions of segregation, the Charlotte City schools and the Mecklenburg County schools were consolidated into one school administrative unit under one nine-member board known as the Charlotte-Mecklenburg Board of Education. By 1964 a few dozen out of more than 20,000 Negro school children were attending schools with white pupils.

This suit was filed on January 19, 1965, by Negro patrons, to seek orders expediting desegregation of the schools. At that time, serious questions existed whether *Brown* required any positive action by school boards to eliminate segregated schools or whether it simply forbade active discrimination. An order was entered in 1965 by the then District Judge in line with the law as then understood, substantially approving the Board's plan for desegregation. The Fourth Circuit Court of Appeals affirmed the order.

Pursuant to the approved plan the Board closed certain all-Negro schools, established school zones, built some new schools, and set up a freedom of choice arrangement for the entire system. The students in a zone surrounding each school are assigned to that school: a period is allotted each spring to request assignment to another school: no reason for transfer need be given; all transfer requests are honored unless the requested schools are full; no transportation is available to implement such transfer.

In appraising the results under this plan in 1969, four years later, we must be guided by some other and more recent things the Supreme Court has said.

Opinion and Order Dated April 23, 1969, Etc.

In *Green* v. *New Kent County School Board*, 391 U. S. 430 at 435 (1968), the Supreme Court held unlawful a county school pupil assignment system which maintained a black school and a white school for the same grades. The Court said:

"It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* 'to effectuate a transition to a racially nondiscriminatory school system.' 349 U. S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the 'white' schools. See, *e. g.*, *Cooper* v. *Aaron*, 358 U. S. 1. Under *Brown II* that immediate goal was only the first step, however. *The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; . . .*"

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"It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's 'freedom-of-choice' plan to achieve that end.

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". . . In the light of the command of that case, what is involved here is the question whether the Board has achieved the 'racially nondiscriminatory school system' *Brown II* held must be effectuated in order

to remedy the established unconstitutional deficiencies of its segregated system. *In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequte to abolish its dual, segregated system. Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. *School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . .*"

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"*. . . 'The time for mere "deliberate speed" has run out,' Griffin* v. *County School Board,* 377 U. S. 218, 234; *'the context in which we must interpret and apply this language* [of *Brown II*] *to plans for desegregation has been significantly altered.'*"

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"*. . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.*

"The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. . . ."

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"We do not hold that 'freedom of choice' can have no place in such a plan. We do not hold that a 'freedom-of-choice' plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that *in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself.* As Judge Sobeloff has put it,

"'*Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects.* If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'" *Bowman* v. *County School Board,* 382 F. 2d 326, 333 (C. A. 4th Cir. 1967) (concurring opinion).

". . . Although the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

* * * * *

"... The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."

(All emphasis added except for the word "required" in the first quoted paragraph and the word "now" in the fifth quoted paragraph.)

It is obvious that between 1955 and 1968 the meaning and the force of the constitutional guaranty that education if tax paid be equal for all has been intensified. The duty now appears as not simply a negative duty to refrain from active legal racial discrimination, but a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical *apartheid*. It is in this light that the actions of school boards must now be studied.

Findings of Fact

Some Facts About the Charlotte-Mecklenburg School System:

a) *General Information.*—The system covers 550 square miles and serves more than 82,000 pupils. It is 43rd in size among the school administrative units of the United States. The county population is over 335,000. The population of Charlotte is now about 270,000. The student population increases at a rate betwen 2,500 and 3,000 students per year. The schools are 107 in number, including 76 elementary schools (grades 1 through 6), 20 junior high

schools (grades 7 through 9) and 11 senior high schools (grades 10 through 12). The Board also operates a learning academy, 4 child development centers (kindergartens for the underprivileged) and 3 psycho-educational clinics.

The students on the rolls as of January 1969 include 44,835 elementary students, 20,675 junior high students and 16,690 senior high students. Of these students, about 29% are Negro and about 71% are white. The ratio of black to white of all ages in the county is about one to three.

The 5,880 school employees include 3,553 classroom teachers; 404 other members of the instructional staff including principals, directors and special staff members. These include 60 guidance counselors and 114 librarians. Other employees include 325 secretaries and other clerical employees, 995 cafeteria employees, 357 janitors and maids, 219 maintenance and transportation workers and 27 people assigned to educational television work. The school system is the largest employer in the state's most populous county.

The nine members of the Board of Education are elected three every two years on a non-partisan basis for six-year terms.

Over 18% of the 3,553 classroom teachers have graduate certificates. Some 2,870 or nearly 81% have Class A certificates. Some 852 teachers are men.

Of 1968's 4,095 high school graduates, about 62% or 2,539 entered college. The drop-out rate for the past two years has been approximately 2.3% of the total enrollment of the schools.

The operating budget for the system (not counting construction costs) was nearly $40,000,000 last year. Average per pupil expense was over $530. Teachers' salaries range

from $5,669 to $10,230.25. School funds come 58% from the state, 35% from local sources, and 7% from federal funds.

Class size averages approximately 28 students in elementary schools (the first six grades); 26.4 in junior high schools and 29.3 in senior high schools.

All schools have libraries. The total number of books in the libraries is over 806,000, which is nearly 10 books per pupil, with a value estimated at $2,677,804. (This may be compared with the average of roughly one-half a book per pupil in the schools of the District of Columbia a couple of years ago.) These are not the textbooks which are furnished free by the state for individual use, but are library books for general circulation. Circulation last year was 2,884,252, or an average per pupil of 36 books.

The Board operates the largest food service industry in the state, serving over 70,000 meals a day on a budget of four and one-half million dollars.

Nearly one-fourth of the students (almost 20,000 last year) attend classes at the planetarium in the Children's Nature Museum. This is reportedly more children than attend regular classes at any other planetarium in the country.

Special consultants and teachers are provided in special areas such as art, music, languages, social studies, science, mathematics and physical education. Special teachers are employed to teach classes for the gifted, the mentally retarded and the physically handicapped. Guidance counselors, school psychologists and social workers are available where needed.

Faculty salaries are higher in Mecklenburg County than in most other counties of the state, by virtue of a substantial salary supplement from local taxpayers.

b) *History and Geography; Background of De Facto Segregation.*—Charlotte (270,000-plus) sits in the center of Mecklenburg County (550 square miles, total population over 335,000). The central city may be likened to an automobile hub cap, the perimeter area to a wheel, and the county area to the rubber tire. Tryon Street and the Southern Railroad run generally through the county and the city from northeast to southwest. Trade Street runs generally northwest to southeast and crosses Tryon Street at the center of town at Independence Square. Charlotte originally grew along the Southern railroad tracks. Textile mills with mill villages, once almost entirely white, were built. Business and other industry followed the highways and the railroad. The railroad and parallel highways and business and industrial development formed something of a barrier between east and west.

By the end of World War II many Negro families lived in the center of Charlotte just east of Independence Square in what is known as the First Ward—Second Ward—Cherry—Brooklyn area. However, the bulk of Charlotte's black population lived west of the railroad and Tryon Street, and north of Trade Street, in the northwest part of town. The high priced, almost exclusively white, country was east of Tryon Street and south of Trade in the Myers Park—Providence—Sharon—Eastover areas. Charlotte thus had a very high degree of segregation of housing before the first *Brown* decision.

Among the forces which brought about these concentrations should be listed the original location of industry along and to the west of the Southern railroad; the location of Johnson C. Smith University two miles west of Tryon Street; the choice of builders in the early 1900's to go south and east instead of west for high priced dwelling construction; the effect of private action and public law on choice of dwelling sites by black and by white pur-

chasers or renters; real estate zoning which began in 1947; and the economics of the situation which are that Negroes have earned less money and have been less able to buy or rent expensive living quarters.

Local zoning ordinances starting in 1947 generally allow more varied uses in the west than in the east. Few if any areas identified as black have a residential restriction stronger than R-6, which means that a house can be built on a lot as small as 6,000 square feet. Zoning restrictions in other areas go as high as 12,000 and 15,000 square feet per lot. Nearly all industrial land in the city is in the west. The airport in the southwest with its jet air traffic inhibits residential development. Many black citizens live in areas zoned industrial, which means that the zoning law places no restriction on the use of the land. The zoning laws follow the pattern of low cost housing and industry to the west and high cost housing with some business and office developments to the east.

City planning has followed the same pattern.

Tryon Street and the Southern railroad were not built to segregate races. In the last fifteen years grade crossings have been eliminated at great expense at Fourth Street, Trade Street, Twelfth Street and Independence Boulevard; and an elevated half-mile bridge, the Brodie Griffith Skyway, is now being built across the railroad in North Charlotte at a cost of more than three million dollars. The ramparts are being pierced in many spots and inner-city highways now under construction will make communication much simpler.

However, concentration of Negroes in the northwest continues. Under the urban renewal program thousands of Negroes were moved out of their shotgun houses in the center of town and have relocated in the low rent areas to the west. This relocation of course involved many ad

hoc decisions by individuals and by city, county, state and federal governments. Federal agencies (which hold the strings to large federal purses) reportedly disclaim any responsibility for the direction of the migration; they reportedly say that the selection of urban renewal sites and the relocation of displaced persons are matters of decision ("freedom of choice"!) by local individuals and governments. This may be correct; the clear fact however is that the displacement occurred with heavy federal financing and with active participation by local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon—railroad area, or on its immediate eastern fringes.

Onto this migration the 1965 school zone plan with freedom of transfer was superimposed. The Board accurately predicted that black pupils would be moved out of their midtown shotgun housing and that white residents would continue to move generally south and east. Schools were built to meet both groups. Black or nearly black schools resulted in the northwest and white or nearly all white schools resulted in the east and southeast. Freedom of students of both races to transfer freely to schools of their own choices has resulted in resegregation of some schools which were temporarily desegregated. The effect of closing the black inner-city schools and allowing free choices has in overall result tended to perpetuate and promote segregation.

SOME BOARD ACTIONS FOUND NOT TO BE DISCRIMINATORY

No racial discrimination or inequality is found in the following disputed matters:

1. *The use of federal funds for special aid to the disadvantaged.* The testimony and the exhibits failed to show

that federal money was used with any discrimination by race or with any improper displacement of local money.

2. *Use of mobile classrooms.* In recent years the system has required the addition of nearly two classrooms per week. Mobile classrooms have been used to provide extra space temporarily to cope with shifts and growth in school population. Mobiles are not inferior in quality and comfort to permanent classrooms, and recent models are superior in many ways to many existing permanent classrooms. Their use and location are matters to be determined by the Board in light of the court's instructions hereafter on the preparation of a new plan for pupil assignment.

3. *The quality of the school buildings and equipment.* The evidence showed the per pupil value of the land and buildings and equipment of the various schools. Average value of these items per pupil for elementary schools was $861; for junior high schools $1,229; and for senior high schools $1,567. Schools described by witnesses as "white" ranged well up and down on both sides of that average figure and schools described by witnesses as "black" showed a similar variation. Several of the oldest and most respected "white" elementary schools in the county (Sharon Road and Steele Creek, for example) have very low per pupil facilities values. One of the newest but still all black high schools (West Charlotte) has one of the highest per pupil facilities values. The highest priced school (Olympic High) is totally desegregated (522 white and 259 black students). No racial discrimination in spending money or providing facilities appears.

4. *Coaching of athletics.* Coaches at the predominantly black schools are usually black. Coaches at the predomi-

antly white schools are usually white. Several black coaches have been employed at "white" schools. No black coach was shown to have applied and been refused a job. No pattern of discrimination appears in the coaching ranks.

5. *Parent-Teacher Association contributions and activities.* Parents contribute to school projects through voluntary Parent-Teacher Associations. This voluntary parental action is not racial discrimination against children whose parents are less able to make such contributions, and it does not come about through state action.

6. *School fees.* It was contended that the school fee system is discriminatory. For example, at the elementary level, grades 1 through 6, each student is supposed to bring a dollar to school at the beginning of the year to provide some extra learning aids in the form of paper, art materials and the like. In poor communities collection of this fee averages only about 50%, whereas nearly all wealthy children pay all the fees assessed in their schools. This non-payment of school fees by the poor is not a racial discrimination against the poor. The schools where people are poorer have other funds by which this 50¢ per pupil can be made up.

7. *School lunches.* School lunches are provided free to needy students. The court finds that no one has ever knowingly been denied a free lunch on racial grounds if he could not pay for it.

8. *Library books.* Library books of comparable quality and content are available to all students, black and white, in all schools in an average number of nearly ten per pupil.

9. *Elective courses.* Some elective courses such as German are offered at some but not all of the high schools. They are offered at a school only if enough students express a desire for the course. Not all schools therefore have all elective courses every year. This situation is not the result of discrimination on account of race.

10. *Individual Evaluation of Students.* Individual students are evaluated annually in terms of achievement in particular subjects, and divided into groups for the study of particular subjects in accordance with their achievement. (This is not, truly described, the "track" system which was elaborately criticized by Judge Skelly Wright in his 119-page opinion in *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.C. D.C., 1967).) Few black students are in the advanced sections and most are in regular or slow sections. Assignments to sections are made by the various schools based not on race but on the achievement of the individual students in a particular subject. There is no legal reason why fast learners in a particular subject should not be allowed to move ahead and avoid boredom while slow learners are brought along at their own pace to avoid frustration. It is an educational rather than a legal matter to say whether this is done with the students all in one classroom or separated into groups.

11. *Gerrymandering.* Gerrymandering was contended in the 1965 hearing of this case. Perhaps the evidence comes closer to proving it this time. The court is not by this order foreclosing the later assertion of that contention or for that matter any other contention which may be advanced, because it is the court's duty to keep the matter under advisement. However, in view of the court's orders herein which are expected to produce substantial changes in the

pupil assignment system and a reappraisal of all zoning considerations, it is believed that nothing in particular need be said here about specific school district lines.

SOME COMMENT ON SPECIFIC ISSUES

a) *The Present State of Desegregation.*—Defendant's Exhibit Seven (attached as an appendix to this opinion) shows pupil and faculty population for each school in the system, by races, in March of 1965 and in October of 1968. From this and other evidence the following facts are apparent:

1) *The Rural Schools Are Largely Desegregated.* Of the 32,000 rural children of all twelve grades, some 23,000, black and white, are being hauled by bus to desegregated schools. No rural schools are all-black. The only all-white county schools are four new schools in the south and east portions of the county: Beverly Woods, Devonshire, Idlewild and Lansdowne.

2) *The City Schools are Still Largely Segregated.* A few city schools, Elizabeth (58% Negro); Highland (13% Negro); Plaza Road (19% Negro); Randolph (28% Negro); Sedgefield (19% Negro); Spaugh (18% Negro) and Harding (17% Negro) have a substantial degree of apparently stabilized desegregation. However, most of the fully desegregated city schools are not stable in that situation, but are rapidly moving (through a temporary desegregation) from an all-white to an all-black condition. Dramatic examples are Barringer (84% Negro); Villa Heights (86% Negro); Piedmont (89% Negro); Tryon Hills (50% Negro); Hawthorne Junior High (52% Negro); Lakeview (65% Negro); and apparently Dilworth (39% Negro) and Wilmore (33% Negro).

3) *More Than Three-Fourths of the Children Attend Schools Which Have One or More Children of the Opposite Race.* In Cornelius (49% Negro), Dilworth (39% Negro), Eiizabeth (58% Negro) and a few others, the races are close to being balanced in numbers. However, most schools have only a small handful of the minority race. Illustrations are: Second Ward High School (1,139 black and three white); Midwood (522 white, one black); Lincoln Heights (817 black, two white).

4) *Most Black Students Attend Totally or Almost Totally Segregated Schools.* Out of 24,000 black students:

4,780	attend nine all-black elementary schools;
3,380	attend six elementary schools which are more than 99% black;
2,491	attend three all-black junior high schools;
727	attend York Road with only six white fellow junior high students;
1,569	high school students attend all-black West Charlotte; and
1,139	black Second Ward High School students have only three white classmates.
14,086	

In other words, of the 24,000 or so black students, 14,086 of them attend school daily in schools that are all-black unless at York Road they see one of the six white students or at Second Ward they see one of the three white students, who were enrolled there last October.

5) *Most White Students Attend Largely or Completely Segregated Schools.* Thirteen elementary schools with 8,044 pupils are 100% white; eighteen other elementary schools with a pupil enrollment of 10,651 have only 150 black students. The total number of white elementary students is only 31,545. At the junior high level, 7,641 out of 14,741 white students attend school with only 193 black students in six schools. In the high schools, 12,310 white students attend school with 1,642 blacks, while 2,735 black students at West Charlotte and Second Ward attend school with three white students.

b) *The Opinions of Experts.*—Doctors Larson, Finger and Passy, all from Rhode Island College, of Providence, Rhode Island, testified at length. They submitted a 55-page report which outlines several possible plans for realignment of school zones and for provision of transportation; for pairing schools; for setting up feeder systems; for educational parks; and other approaches towards desegregation. None was as familiar with the local situation as the local Board and school administrators. All drew certain conclusions from the Coleman Report, which is a collection of statistics on performance of school children in certain areas about the country. Some said that kindergarten for all children would help the situation. Some said underprivileged children should start getting public education several years before first grade age. Some said that improving the faculty was important. Available statistics and expert opinion agreed that Negro students as a group do noticeably worse on achievement tests than students generally. The experts agreed that if children are underprivileged and undercultured, their school performance will be generally low. One expert, Dr. Passy, said that socio-

economic-cultural background is the sole major determinant of school performance. The Abraham Lincoln-Charles Kettering theory of the rise of Americans from poor backgrounds received small support.

One point on which the experts all agree (and the statistics tend to bear them out) is that a racial mix in which black students heavily predominate tends to retard the progress of the whole group, whereas if students are mingled with a clear white majority, such as a 70/30 ratio (approximately the ratio of white to black students in Mecklenburg County), the better students can hold their pace, with substantial improvement for the poorer students.

c) *The "Neighborhood School" Theory.*—Recently, the School Board has followed what it calls the "neighborhood school" theory. Efforts have been made to locate elementary schools in neighborhoods, within walking distance of children. The theory has been cited to account for location and population of junior and senior high schools also.

"Neighborhood" in Charlotte tends to be a group of homes generally similar in race and income. Location of schools in Chalotte has followed the local pattern of residential development, including its *de facto* patterns of segregation. With a few significant exceptions, such as Olympic High School (about ⅓ black) and Randolph Road Junior High School (28% black), the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built. Specific instances include Albemarle Road Elementary (99%+ white); Beverly Woods (100% white); Bruns Avenue (99%+ black); Hidden Valley (100% white); Olde Providence (98% white); Westerly Hills (100+ white); Albemarle Road Junior High (93% white).

Today people drive as much as forty or fifty miles to work; five or ten miles to church; several hours to football games; all over the county for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood. Parents with children of all ages may be members of two or three separate and widely scattered school "communities." *Putting a school in a particular location is the active force which creates a temporary community of interest among those who at the moment have children in that school.* The parents' community with the school ordinarily ends the day the youngest child graduates.

If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships. The neighborhood school concept may well be invalid for school administrative purposes even without regard for racial problems. The Charlotte-Mecklenburg School Board today, for example, is transporting 23,000 students on school buses. First graders may be the largest group so transported. If a first grader lives far enough from school to ride a bus, the school is not part of his neighborhood.

When racial segregation was required by law, nobody evoked the neighborhood school theory to *permit* black children to attend white schools close to where they lived. The values of the theory somehow were not recognized before 1965. It was repudiated by the 1955 North Carolina General Assembly and still stands repudiated in the Pupil Assignment Act of 1955-56, which is quoted above. The neighborhood school theory has no standing to override the Constitution.

d) *Bussing.*—Under North Carolina General Statutes, §115-180, the Board is expressly authorized to operate

school busses to transport school children. The state pays bus expenses only for rural children and for some who have been annexed into the city in recent years. This apparent discrimination against city dwellers is reportedly under attack in another court. This Board already transports 23,000 students to school every day out of the 32,000 who live in the area presently eligible for bus service. The present cost of school bussing is about $19 for bus operation plus the cost of the bus which at $4,500 per bus should not exceed $20 per pupil a year. In other words, it costs about $40 a year per pupil to provide school bus transportation, out of total per pupil school operating costs of about $540. The income of many black families is so low they are not able to pay for the cost of transportation out of segregated schools to other schools of their choice.

The Board has the power to use school buses for all legitimate school purposes. Buses for many years were used to operate segregated schools. There is no reason except emotion (and I confess to having felt my own share of emotion on this subject in all the years before I studied the facts) why school busses cannot be used by the Board to provide the flexibility and economy necessary to desegregate the schools. Busses are cheaper than new buildings; using them might even keep property taxes down.

e) *Faculty Desegregation.*—The Board employs over 2,600 white teachers and over 900 black teachers. New teachers hired last year numbered 700. Technically their contracts are with the Board of Education to teach where assigned. The Board makes no sustained effort to desegregate faculties. The choice where to teach is a matter between the principal and the prospective teacher. The Board assumes white teachers will tend to choose white schools and black teachers black schools.

The results of this passive selection policy are obvious. Of the thirteen all-black schools in the system serving 8,840 students, only four have any white teachers. Those four have ten white teachers and 161 black teachers for 3,662 students. Few predominantly black schools have any substantial number of white teachers, except a few schools which serve areas rapidly turning from white to black. Eight other schools 99% or more black had only six white teachers among them for 5,246 black and 24 white pupils. Second Ward and West Charlotte High Schools, with 2,700 black students and three white students, have 131 black teachers and only nine white teachers.

All of the white elementary schools have at least one and in a few cases as many as three or four black teachers. The proportions of black teachers in the junior and senior high schools run slightly higher. The system has not operated, however, to produce any substantial teaching of black students by white teachers.

Desegregation of faculties does not depend upon proof of superiority of one group of teachers or students over the other. Whatever the discrimination that may result from a segregated faculty, it will be eliminated only when a child attending any school in the system will face about the same chances of having a black or a white teacher as he would in any other school. Mecklenburg schools pay a sizeable salary supplement. Desegregation is proceeding in other counties and school districts. It can not be assumed and should not be a tacit part of Board policy that white school teachers are opposed to equality of education or that they will refuse to teach in black schools. In fact, white and black teachers are working together in substantial numbers in several schools of this system and there was no evidence at the hearing of any friction or

difficulty caused by a bi-racial faculty. It is from the teachers that children learn their first glimmerings of the right to equality of opportunity which still constitutes America's chief contribution to modern civilization. The right of all children to equal education is part of that right. It is believed that if the Board takes a stand that requires faculty desegregation and treats all teachers equally in working towards that end, the teachers will participate wholeheartedly.

f) *Metropolitan High School.*—Supported by impressive recommendations from Engelhart, Engelhart & Leggett, educational consultants, the Board has planned and has two million dolars on hand to build Metropolitan High School at or near the location of present Second Ward High School. In addition to being a school for conventional high school work, it is to be a center for vocational training and special courses in music, the creative and performing arts and other special subjects not practical to offer in all the high schools. Second Ward is now a 99%+ black school in the Brooklyn urban renewal area four or five blocks south of the Court House and City Hall. The First Baptist Church and the School Board itself have buildings under way on adjacent or nearby land. This is near the geographical and traffic center of the city and county, one-half a mile from the central business district, a few blocks from Central Piedmont Community College and within easy travel distance of most of the city. The location and proposed purposes appear ideal.

Plaintiffs' attorneys object to Metropolitan High School. Some present school patrons want the school built. The School Board has announced a stoppage of work on that school pending this decision.

All three groups may be proceeding upon an erroneous assumption—that the school if built will be a black school because the pupil and faculty populations will be governed by freedom of transfer and school zones as presently administered. That assumption should no longer be entertained. Pupils for regular and vocational subjects can travel or be transported to and from this area, in all directions, with greater ease than is true of any other location in the county. The nearest other high schools, Harding, West Charlotte, Garinger, East and Myers Park, form a hollow pentagon six or seven miles on the side surrounding Second Ward. It would be tragic to refrain from building a needed educational facility simply upon the assumption that it has to be an all-black school and therefore either unlawful or unattractive. The School Board is advised to make plans for desegregation of this school along with other schools in the system. With the unrestricted statutory power to assign pupils and provide transportation, the only thing necessary to build Metropolitan High School according to the dreams of its planners is the decision to do so.

g) *The Percentage Racial Mix.*—Counsel for the plaintiffs says that since the ratio of white to black students is about 70/30, the School Board should assign the children on a basis 70% white and 30% black, and bus them to all the schools. This court does not feel that it has the power to make such a specific order. Nevertheless, the Board does have the power to establish a formula and provide transportation; and if this could be done, it would be a great benefit to the community. It would tend to eliminate shopping around for schools; all the schools, in the *New Kent County* language, would be "just schools"; it would make all schools equally "desirable" or "undesirable" de-

pending on the point of view; it would equalize the benefits and burdens of desegregation over the whole county instead of leaving them resting largely upon the people of the northern, western and southwestern parts of the county; it would get the Board out of the business of lawsuits and real estate zoning and leave it in the education business; and it would be a tremendous step toward the stability of real estate values in the community and the progress of education of children. Though seemingly radical in nature, if viewed by people who live in totally segregated neighborhoods, it may like surgery be the most conservative solution to the whole problem and the one most likely to produce good education for all at minimum cost. It would simply put the all-white and all-black school people in the same school situation now being experienced by patrons of Cornelius, Davidson, Ranson, Long Creek, Dilworth, Olympic, Huntersville, Pineville, Randolph Road Junior High, Statesville Road, and similar schools. Such action would be supported by the unanimous testimony of all the experts and by inferences from the Coleman Report that although mixing a few whites and a heavy majority of blacks retards the whole group, nevertheless mixing a *substantial majority of whites* and a few blacks helps the blacks to advance without retarding the whites.

h) *A Word About the School Board.*—The observations in this opinion are not intended to reflect upon the motives or the judgment of the School Board members. They have operated for four years under a court order which reflected the general understanding of 1965 about the law regarding desegregation. They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been re-

viewed in appellate court decisions. The Charlotte-Mecklenburg schools in many respects are models for others. They are attractive to outside teachers and offer good education. The problem before this court is only one part (albeit a major part) of the educational problem. The purpose of this court is not to criticize the School Board, but to lay down some legal standards by which the Board can deal further with a most complex and difficult problem. The difference between 1965 and 1969 is simply the difference between *Brown* of 1955 and *Green* v. *New Kent County* of 1968. The rules of the game have changed, and the methods and philosophies which in good faith the Board has followed are no longer adequate to complete the job which the courts now say must be done "now."

Conclusions of Law

1. Since 1965, the law has moved from an attitude barring discrimination to an attitude requiring active desegregation. The actions of school Boards and district courts must now be judged under *Green* v. *New Kent County* rather than under the milder lash of *Brown* v. *Board of Education*. The court has outlined changes which should be made in the activity and theory of the local Board.

2. The manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance and community development. The Board did not originate those patterns; however, now is the time to stop acquiescing in those patterns.

3. Freedom of transfer as operated in this system does not answer the problems of racial segregation. The evidence shows that the black students as a group have very low incomes. Freedom of transfer without transportation is to such a student often an empty right.

4. The faculties have not been adequately desegregated as directed. This permits and promotes inequality of education.

5. The court does not find any inequality based upon racial motives or reasons in the use of federal funds; the use of mobile classrooms; quality of school buildings and facilities; athletics; PTA activities; school fees; free lunches; books; elective courses; nor in individual evaluation of students. The problem of alleged gerrymandering of district lines need not be covered separately from the general order herein made.

6. There has been substantial desegregation in many areas—mostly the rural areas—of this large and complicated school system. A majority of the black students, however, still attend segregated schools and seldom, if ever, see a white fellow student. Many all-black and all-white schools still remain. The neighborhood school concept and freedom of choice as administered are not furthering desegregation.

7. The School Board has an affirmative duty to promote faculty desegregation and desegregation of pupils, and to deal with the problem of the all-black schools.

8. The School Board is free and encouraged to use school busses or other public transportation and to use

mobile classrooms as needed to provide equality of educational opportunity.

9. The Board has assets and experience beyond the reach of a judge to deal with all these problems, and should be requested to formulate a plan and time table of positive action.

ORDER

1. All findings or statements of fact in this opinion and order shall be deemed conclusions of law, and all conclusions of law shall be deemed to be findings of fact as necessary in support and furtherance of this order. All competent and relevant evidence in the record has been considered in support of this order.

2. The defendant is directed to submit by May 15, 1969, a plan for the active and complete desegregation of teachers in the Charlotte-Mecklenburg school system, to be effective with the 1969-70 school year. Such plan could approach substantial equality of teaching in all schools by seeking to apportion teachers to each school on substantially the same ratio (about three to one) as the ratio of white teachers and black teachers in the system at large. It is suggested that teachers' preferences not be especially sought and that teachers be assigned as a routine matter for the purpose of accomplishing this equalization of the application of educational manpower and womanpower in the public schools. Such a plan should provide safeguards against racial discrimination in the discharge of any teachers whose jobs might be changed or abolished. Such safeguards should include provisions that if anyone has to be discharged, his qualifications will be weighed against

those of all personnel in the system rather than simply against those in the capacity in which he has been working; no teacher should be dismissed or demoted or denied employment or promotion because of race or color. In other words, the Board will be expected to see to it that teachers displaced by virtue of this order will not be discriminated against on account of race.

3. The defendant is directed to submit by May 15, 1969, a plan and a time table for the active desegregation of the pupils, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970. Freedom of choice and zoning may be used in such a plan provided they promote rather than defeat desegregation. If freedom of choice is retained in such plan, it should include provision for transportation free for any student who requests transfer out of a school where his race is in the majority, and to any school where his race is in the minority, and a means of insuring that all students have full and timely knowledge of the availability of such transportation.

4. In formulating its plan the Board is, of course, free to use all of its own resources and any or all of the numerous methods which have been advanced, including pairing of grades and of schools; feeding elementary into junior high and into senior high; combinations of zone and free choice where each method proceeds logically towards eliminating segregation; and bussing or other transportation. The Board may also consider setting up larger consolidated school units freely crossing city-county lines to serve larger areas. There is no magic in existing school zone lines nor in the present size of any school. The Board is encouraged to get such aid as may be available from state and federal agencies including the offices

of the Department of Health, Education and Welfare. The court does not direct a treaty with the Department, but does suggest that since its employees are in the business of dealing with these problems, they have a store of technical assets and manpower and information which could be useful in the Board's making any particular judgment or analysis.

5. The plan should be the plan of the Board for the effective operation of the schools in a desegregated atmosphere, removed to the greatest extent possible from entanglement with emotions, neighborhood problems, real estate values and pride. The court's task has not been easy, but it is fully realized that the task facing the Board is far more difficult and will require a conspicuous degree of further public service by the Board's members.

This the 23rd day of April, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

APPENDIX

Page 1

The Charlotte-Mecklenburg Schools

Research Report 2-'69

SUMMATION OF DEGREE OF INTEGRATION 1965 (MARCH) AND 1968-69 (OCT. 1,

For Pupils		Professional Staff	
Schools Having Integration			
For Pupils	1965 1 N + 22 W = 23 of 109 or 21%	1968 16 N + 68 W = 84 of 112 or 75%	For Staff 1965 3 N + 0 W = 3 of 109 or 3%	1968 16 N + 82 W = 98 of 112 or 87½%

	1965		1968		1965		1968	
	N	W	N	W	N	W	N	W
				Number in Minority Race (integrated)				
Pupils	9W	476N	1192W	6704N	5.7W	0N	131W	208N
				Number in Majority Race (integrated)				
Pupils	343N	16,446W	8697N	47,356W	143.3N	+0W	374N	2575W

	Total Involved by Integration				
Predominantly Negro Schools -- Pupils 352	9889	Staff	149	505	
Predominatly White Schools -- Pupils	16,922	54,060	Staff	0	2783
Total -- Pupils	17,274 or 24% of 72,336 Enrolled	63,949 or 77% of 83,111	Staff	149 or 5% of 3140 incl. part assignments in schools	3288 or 91% of 3613 assigned at one definite school

APPENDIX

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The Charlotte-Mecklenburg Schools

RACIAL DISTRIBUTION OF PUPILS AND PROFESSIONAL STAFF
1965 (March) and 1968-69 (Oct. 1, '68)

Grade	No. School	1965 Pupils N	1965 Pupils W	No. School	1968 Pupils N	1968 Pupils W	Professional Staff 1965 N	1965 W	19 N
1-6	72	9,364	27,696	76-	13,290	31,545	377+	1161½	478
7-9	17	2,475	11,804	21	5,934	14,741	111-	533	228
10-12	8	1,625	10,677	11	4,377	12,313	65	479½	178
	97	13,464	50,177	108-	23,601	58,599	553½	2184	884
		28.1%	72,336T 71.9%		28.2%	83,111T 71.8%			
Other	12	6,877	1,818	4+	640	271	323½	79	33
					: Kgn. + Trainable				
1-4	1	360					15½		
1-7	2	431	207				17	9½	
1-9	3	729	1611				32	68	
5-9	1	505					25½		
1-12	3	2400					113½		
7-12	2	2452					120	1½	
Total	109	20,341	51,995	112	24,241	58,870	877	2263	907
		28.1%	72,336T 71.9%		28.2%	83,111T 71.8%	Include Part-time		Not in Part-t

Among teachers assig
more than one school

APPENDIX

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69*		
Elementary	N	% N ↓	W	N	% N ↓	W (other)	N	% N ↓	W	N	% N ↓	W (other)
Albemarle Rd.				4	1%	499				6	32%	13
Alexander Street	342	100%		257	100%		14.1	100%		11	100%	
Allenbrook				50	10%	452				2	10%	18
Ashley Park		0%	694		0%	553		0%	22.9	2	9%	20
Bain		0%	674	25	3%	699		0%	28.2	1	3%	28
Barringer		0%	604	668	84%	131		0%	24.8	13	42%	18
Berryhill		0%	1026	119	15%	685		0%	39.6	2	6%	32
Bethune	343	97%	9	223	99%	3	17.6	100%		11	100%	
Beverly Woods					0%	286				1	8%	12
Biddleville	434	100%					17.2	100%				
Billingsville	729	100%		619	100%	2	32.1	100%		25	100%	
Briarwood	2	0%	582	8	1%	640		0%	23.9	3	12%	22
Bruns				740	99%	4				26	93%	2
Chantilly		0%	445	2	0%	491		0%	18.8	1	5%	21
Clear Creek		0%	207	58	20%	225		0%	9.6	1	8%	12
Collinswood		0%	375	72	13%	490		0%	16.1	1	5%	21
Cornelius		0%	241	239	49%	252		0%	11.3	7	33%	14
Cotswold		0%	631	11	2%	567		0%	25.0	1	5%	21
Crestdale	97	100%					5.0	100%				
Davidson		0%	178	101	35%	186		0%	7.8	1	8%	11
Marie Davis	808	100%		705	100%		34.3	100%		29	100%	
Derita	6	1%	892	165	18%	728		0%	35.4	3	9%	32
Devonshire	2	0%	474		0%	889		0%	19.5	4	10%	37
Dilworth	100	20%	401	223	39%	355		0%	23.8	4	15%	22
Double Oaks	703	100%		800	100%		28.2	100%		32	100%	
Druid Hills	520	100%		504	99%	3	20.7	100%		20	100%	
Eastover		0%	704	49	8%	580		0%	27.1	1	4%	24
Elizabeth	5	1%	448	270	58%	194		0%	22.9	2	9%	21
Enderly Park		0%	368	2	1%	374		0%	14.9	1	6%	15
Fairview	702	100%		363	100%		28.0	100%		19	100%	

	First Ward	473	100%		749	100%		22.8	100%	30	100%
1-12-65	J. H. Gunn	696	100%					33.6	100%		
	Hickory Grove		0%	530	80	13%	531		0%	21.7	1	9%
	Hidden Valley					0%	977				2	5%
	Highland	2	1%	273	47	13%	324		0%	14.0	1	11%

* Does not include staff assigned to more than one school per HEW request.

% N is nearest whole per cent that N is of total

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69
Elementary	N	% N	W	N	% N	W (other)	N	% N	W	N
Hoskins		0%	342	18	6%	261		0%	14.7	2
Huntersville		0%	553	162	22%	560		0%	22.9	2
Huntingtowne Farms		0%	358	7	1%	695		0%	15.1	1
Idlewild		0%	592	2	0%	521		0%	23.9	1
1-4-65 Amay James	360	100%		477	100%	1	15.5	100%		19
1-7-65 Ada Jenkins	431	100%					17.0	100%		
Lakeview		0%	400	269	65%	147		0%	18.5	14
Lansdowne		0%	633		0%	758		0%	23.9	1
Lincoln Heights	783	100%		817	100%	2	29.1	100%		30
Long Creek		0%	423	250	35%	466		0%	17.6	2
1-9-65 Matthews		0%	937	(1-6) 93	11%	742		0%	39.7	1
Merry Oaks		0%	538		0%	469		0%	21.9	1
Midwood		0%	560	1	0%	522		0%	24.9	2
Montclaire		0%	720		0%	722		0%	29.1	1
Morgan	305	100%					14.9	100%		

Myers Park		0% 575	23	4% 543		0% 24.9	1	4% 23
Myers Street	820	100%			32.2	100%		
Nations Ford		0% 513	63	10% 585		0% 21.6	1	4% 25
Newell		0% 463	73	15% 423		0% 18.3	1	5% 18
Oakdale		0% 402	72	13% 480		0% 17.2	1	5% 21
Oakhurst		0% 548	2	0% 615		0% 22.8	1	4% 23
Oaklawn	666	100%	650	100%	26.0	100%	25	93% 2
Olde Providence			10	2% 434			1	6% 17
Park Road		0% 583		0% 551		0% 22.7	1	5% 21
Paw Creek		0% 793	63	7% 861		0% 30.3	1	3% 31
Pineville		0% 364	168	32% 363		0% 16.2	1	5% 21
Pinewood		0% 719		0% 707		0% 28.1	1	4% 26
Plaza Road		0% 400	99	19% 409		0% 17.7	1	5% 21
Rama Road		0% 442	2	0% 777		0% 18.7	2	9% 27
Sedgefield	3	1% 526	7	1% 545		0% 21.8	2	9% 20
Plato Price	505	100%			25.4	100%		
Selwyn		0% 531	5	1% 598		0% 21.9	1	4% 22
Seversville	96	30% 229				0% 14.8		
Shamrock Gardens		0% 536		0% 539		0% 21.9	1	5% 20
Sharon		0% 591		0% 519		0% 22.9	1	5% 20

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69*		
Elementary	N	% N	W	N	% N (other)	W	N	% N	W	N	% N (other)	W
Starmount		0%	481	25	3%	713		0%	20.9	1	3%	28
Statesville Road		0%	650	295	36%	534		0%	25.9	3	9%	29
Steele Creek		0%	222	12	2%	531		0%	10.7	1	5%	20
Sterling	699	100%					33.9	100%				
Thomasboro		0%	885		0%	705		0%	34.3	2	7%	25
Torrence-Lytle	1005	100%					46.1	100%				
Tryon Hills		0%	324	241	50%	245		0%	15.0	1	5%	20
Tuckaseegee		0%	631	61	10%	553		0%	23.9	1	4%	23
University Park	700	100%		777	100%		25.8	100%		30	91%	1
Zeb Vance	465	100%		257	100%		19.5	100%		11	100%	

Villa Heights	23	4%	594	796	96%	126		0%	28.3	23	62%	14
Wesley Heights	214	100%					8.3	79%	2.2			
Westerly Hills					0%	569				1	4%	22
Wilmore	6	2%	323	145	33%	293		0%	15.4	8	40%	12
Windsor Park	1	0%	679	2	0%	737		0%	25.8	1	9%	27
Winterfield		0%	455		0%	689		0%	18.7	1	4%	26
Woodland	360	100%					14.8	100%				
Woodlawn		0%	283					0%	14.0			
Isabella Wyche	383	100%		222	100%		18.6	100%		12	100%	

Child Development (Kgn.)

Davidson,	Center #1			83	41%	117			3	30%	7
Pineville,	Center #2			166	82%	37			2	20%	8
Seversville,	Center #3			174	87%	26			8	80%	2
Morgan,	Center #4			188	97%	6			8	80%	2

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69 *		
Junior High	N	% N	W	N	% N	W (other)	N	% N	W	N	% N	W (other)
Albemarle Road				66	7%	881				4	9%	43
Alexander		0%	577	347	31%	755		0%	28.9	6	12%	44
Cochrane		0%	872	76	5%	1444		0%	35.4	6	10%	56
Coulwood	3	1%	574	119	14%	727		0%	27.1	4	11%	34
Eastway		0%	1046	3	0%	1364		0%	43.2	3	5%	55
Alex. Graham		0%	1048	8	1%	1084		0%	43.8	4	9%	43
Hawthorne	25	4%	670	492	52%	447		0%	33.9	12	27%	33
Irwin Ave.	785	100%		666	100%		42.7	100%		32	91%	1
McClintock		0%	1273	46	4%	1228		0%	51.5	2	4%	49
Northwest	773	100%		932	100%		33.7	100%		39	100%	

Piedmont	121	29%	291	428	99%	53		0%	26.8	13	52%	12
Quail Hollow		0%	766	171	12%	1261		0%	35.2	3	5%	61
Randolph				272	29%	711				2	5%	38
Ranson	9	1%	658	253	30%	586		0%	30.0	6	16%	31
Sedgefield	6	1%	920	189	19%	802		0%	40.5	5	11%	39
Smith		0%	1115		0%	1389		0%	48.6	3	5%	57
Spaugh	1	0%	930	186	19%	871		0%	42.5	6	12%	43
Williams	752	100%		893	100%		34.9	100%		37	100%	
Wilson		0%	1064	60	5%	1132		0%	45.6	4	8%	45
York Rd.	(7-12) 1041	100%		727	99%	6	49.9	100%		32	99%	1
Learning Academy - 7th & 8th grades counted in JH, above,										5	19%	21

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69*		
Senior High	N	% N	W	N	% N	W (other)	N	% N	W	N	% N	W (other)
East Mecklenburg		0%	1782	155	8%	1739		0%	79.2	6	7%	85
Garinger	2	0%	2266	202	9%	2157		0%	100.0	6	6%	102
Harding		0%	1002	169	17%	814		0%	48.0	4	8%	49
Independence				92	9%	962				6	9%	59
Myers Park	31	2%	1772	158	8%	1855		0%	76.7	6	6%	87
North Mecklenburg	1	0%	1155	410	27%	1109		0%	51.8	6	9%	63
Olympic				259	33%	522				5	11%	39
Second Ward	1411	100%		1139	100%	3	70.0	98%	1.5	57	95%	3
South Mecklenburg	30	2%	1430	106	6%	1812		0%	72.0	4	5%	78
West Charlotte	1560	100%		1569	100%		65.0	97%	2.0	74	93%	6
West Mecklenburg	1	0%	1270	118	8%	1340		0%	61.4	4	5%	73

Motion for Temporary Restraining Order

(Filed May 15, 1969)

Plaintiffs, by their undersigned counsel, respectfully move the Court for an order temporarily restraining the defendants from initiating or continuing the construction of new schools or new facilities at any existing schools without the specific prior approval of the Court and, as grounds therefor, show the following:

1. This action was initially filed in 1965 by forty-two black parents and students in the Charlotte-Mecklenburg School System seeking the elimination of racial segregation in the Charlotte-Mecklenburg Public Schools. An order was entered by this Court on July 14, 1965, from which the plaintiffs appealed. The Court of Appeals for the Fourth Circuit issued its opinion in 1966. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 369 F.2d 29 (4th Cir. 1966).

The plaintiffs moved this Court for further relief on September 6, 1968, contending that the Board had failed to meet its affirmative duty to adopt and implement plans for the total and complete desegregation of the Charlotte-Mecklenburg Public Schools. (A more detailed history of this litigation is contained in plaintiffs' motion for further relief.)

2. On April 23, 1969, this Court filed an opinion and order requiring the defendant to submit plans, by May 15, 1969, "for the active and complete desegregation of teachers in the Charlotte-Mecklenburg school system, to be effective with the 1969-70 school year" and "for the active desegrega-

tion of the pupils, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970."

3. The Court concluded as a matter of law:

"2. The manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance and community development. The Board did not originate those patterns; however, now is the time to stop acquiescing in those patterns."

4. The plaintiffs contended and offered evidence in support of their contention that attendance lines had been gerrymandered to foster segregation within the various schools. The Court reserved judgment on this issue:

"11. *Gerrymandering.* Gerrymandering was contended in the 1965 hearing of this case. Perhaps the evidence comes closer to proving it this time. The court is not by this order foreclosing the later assertion of that contention or, for that matter, any other contention which may be advanced, because it is the court's duty to keep the matter under advisement. *However, in view of the court's orders herein which are expected to produce substantial changes in the pupil assignment system and a reappraisal of all zoning considerations, it is believed that nothing in particular need be said here about specific school district lines.*" (Emphasis added.)

5. The Court's expectation that its order would produce "substantial changes in the pupil assignment system and a reappraisal of all zoning considerations" was entirely rea-

sonable. The order required as much and a United States District Court should expect compliance with its orders. However, the actions of the defendant since April 23, 1969, when the Court entered its order, strongly suggest that what was expected—and required—is unlikely to occur.

The administration, in response to the Court's order and under the direction of the Board, spent approximately two weeks preparing a plan. In light of the *Green* trilogy decided approximately one year ago, the Norfolk, Virginia school case (*Brewer* v. *School Board of the City of Norfolk*, 397 F.2d 37 (4th Cir. 1968)) decided in June of 1968 and the pendency of plaintiffs' motion for further relief, (see also, *Felder* v. *Harnett County Board of Education*, — F.2d — (No. 12,894, 4th Cir., April 22, 1969)) a school board acting in good faith would be expected to have developed some contingency plans. There is no evidence of such planning.

The plan which is now before the Board and which apparently is the only plan under consideration, is totally unresponsive to the directions of this Court. It does not call for "substantial changes in the pupil assignment system" and reflects no "reappraisal of all zoning considerations." It contains no hint of "active desegregation of the pupils" for the 1969-70 school year. There is no plan for pupil desegregation for the 1970-71 school year as required by the order. There is, at best, a plan to develop a plan *if* a consensus can be reached.

6. The Board has neither accepted the decision of the Court as a statement of the applicable law under the facts of the case nor has it sought review. Instead, it has held public meetings to hear expressions from citizens as to the social wisdom of this Court's decision. It has failed to assume its responsibility to educate the public as to the re-

quirements of the law as enunciated by this Court (and the Supreme Court of the United States) but has offered a forum to those who disagree with the law. In fact, members of the Board, including its Chairman, have encouraged and joined those who express resistance to the kinds of changes required by the Constitution of the United States. (See *Monroe* v. *Board of County Commissioners,* 391 U.S. 450, where the Court reasserted and quoted from *Brown* v. *Board of Education,* 349 U.S. 249 (Brown II) a fundamental principal: "'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.'")

7. The Board has had before it at its two most recent meetings the plan which was prepared by the administration—a plan which is totally unresponsive to the order of this Court. The Board has yet to act upon or even discuss the plan submitted by the administration. At the most recent meeting, on Tuesday, May 13, 1969, the Board decided only that it would ask for an extension of time within which to submit plans to the Court. (The Court has now granted a two-week extension.) No instruction was given to the administration as to the preparation of any other plan and no decision was reached as to the plan before the Board. No date was set for a further meeting of the Board.

8. At the meeting of May 13, 1969, the Board, while failing to take action upon a desegregation plan, did take action on further construction of school facilities. It approved bids on "Project 600," a new facility, and bids for renovations and additions to Wilson Junior High School,

Clear Creek Elementary School and Myers Park Senior High School. These projects involve more than two million dollars in construction costs. The action taken on each of these projects was done without having adopted a plan or even a policy for the desegregation of the Charlotte-Mecklenburg Schools and, of course, no such plan had been approved by, or even filed with, this Court.

9. Plaintiffs contend that the construction of new school facilities in the absence of a legally acceptable plan for desegregation should be temporarily enjoined until it is demonstrated to the satisfaction of the Court that such facilities would contribute to, rather than detract from, the desegregation of the schools. Plaintiffs sought such relief in their motion filed in September of 1968. Plaintiffs submit that such an order was appropriate then and that such an order is required now. See, e.g., *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967); *Wheeler* v. *Durham City Board of Education*, 346 F.2d 768 (4th Cir. 1965); *Brewer* v. *School Board of the City of Norfolk, supra.*

The Court has suggested that "[t]he Board may also consider setting up larger consolidated school units freely crossing city-county lines to serve larger areas." It may be that the Board will be required to take this course of action as part of its legal obligation to desegregate the schools. However, in continuing to plan and approve new school constructions without having adopted an effective desegregation plan, the Board is foreclosing its options in this respect. This would be true even if the Court's assumption were correct that the Board has proceeded and would continue to proceed in a good faith effort to comply with the requirements of the law. We submit that the Court can no longer indulge in such an assumption. It is crucial at

this time that the Board be enjoined from continuing or initiating any further construction where evidence of good faith compliance is absent. A new school stands for generations. The course of action taken by the Board since the order was entered on April 23 is entirely inconsistent with the Board's constitutional duties and legal obligations to the Court; rather, the Board's actions have been consistent with a policy of delay and resistance to the requirements of the law.

WHEREFORE, plaintiffs respectfully pray that this motion be heard at the earliest practicable time and that upon hearing of this motion the defendant be temporarily enjoined from initiating or continuing the construction of new schools or new facilities at any existing schools.

Respectfully submitted,

CONRAD O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina

CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

Plan for Desegregation of Schools

(Filed May 28, 1969)

In compliance with the order of the Court dated April 23, 1969, the Board of Education proposes to amend and modify the plan or policy adopted by the Board on March 11, 1965, which plan was approved by the Court, and which plan was amended by action of the Board of Education on June 13, 1967, by substituting therefor the following provisions:

Pupil Assignment Guidelines

1.

Attendance Areas

Attendance areas are hereby established for all schools within the Mecklenburg County Administrative School Unit and the boundaries thereof are hereby established as shown on those three certain maps this day exhibited to the Board and approved by the Board. These maps are identified and designated as follows: "Map No. 1, Attendance Areas for Elementary Schools," "Map No. 2, Attendance Areas for Junior High Schools" and "Map No. 3, Attendance Areas for Senior High Schools." The Chairman and Secretary of this Board shall each affix his signature to each map in his official capacity and the official seal of the Board shall be affixed, as evidence of its adoption by the Board. A copy of each map shall be kept at each school in the attendance areas shown thereon. The maps shall be open to public inspection in the office of the Superintendent and at the schools.

Plan for Desegregation of Schools

2.

Assignment of Pupils

All pupils within any attendance area shall be assigned to the school of his or her grade within such attendance area. Assignment for any forthcoming school term shall be made not later than the last school day or as soon thereafter as possible. In the case of children enrolled during such term, notice of assignment may be given by noting the same on the report card of the pupil thereof or any other means that will adequately insure the delivery of written notice to the parent. Except for beginners, pupils not then enrolled shall be assigned at the time of their application for enrollment.

3.

Assignment from Pre-School Clinics

Beginners (children entitled to enrollment under G.S. 115-162) may attend any pre-school clinic but shall be assigned to the first grade of the school in the attendance area where the parent resides. Written notice of each assignment shall be given by mail to the parent at the same time as the report card or other written notice to pupils already enrolled. (The word parent as used in these regulations shall denote the parents, if living together, or the parent or person in loco parentis with whom the pupil resides.)

4.

Free Choice or Transfer

After original assignment, the parent of any pupil may apply to the Board for reassignment of such pupil to any school serving his or her grade and located in any other

attendance area. Any such request for transfer shall be allowed as of course to the extent that the facilities and accommodations of the chosen school will permit. Application may be made for Choice I, Choice II and Choice III and transfer will be permitted, in the order of choice, to the school having the facilities and accommodations to admit such child or children. Requests for transfer shall be on a printed form available at the office of the Superintendent or at any school office. When signed, the form may be delivered or mailed to the principal of the school of original assignment or to the office of the Superintendent. No reason need be given therefor. Application for a transfer or reassignment shall be made within ten days after the date of the original assignment. If there should be requests for transfer to a particular school by more pupils from other attendance areas than the transferee school can accommodate, proximity to the school shall be the controlling factor. To encourage transfer by students from schools in which their race is in the majority to a school in which their race is in the minority, free transportation will be provided for students exercising and granted such transfer.

5.

Transfers Limited in Case of New Schools

In the case of mass assignments of pupils to newly (newly described to mean the first full year of operation) opened schools in newly created attendance areas, the Board may deny the request for the transfer of any pupil back to the school in which he was previously enrolled, if in the judgment of the Board it appears that the number of transfer requests is of such volume as to unduly reduce the enrollment in such new school or interfere with the orderly administration thereof.

Plan for Desegregation of Schools

6.

Varsity Athletics

A student who exercices the privilege of free choice under these regulations and is granted transfer to a senior high school (grades, 10, 11 or 12) other than the senior high school serving the attendance area in which he resides, shall not be eligible for participation in varsity or junior varsity athletics for the duration of the first school year of assignment in the chosen school: Except that where by reason of changes in the boundaries of attendance areas a pupil is originally assigned to a school other than the one in which he was previously enrolled, such pupil, if he chooses to return to said school and is assigned accordingly, shall be immediately eligible for varsity participation.

When a student returns to the school of original assignment, he may exercise all the privileges at said school without penalty.

The Director of Physical Education and Athletics shall administer the above regulations pertaining to athletic participation and shall maintain appropriate records in his office and shall require that similarly appropriate records be kept in the individual senior and junior high school offices pertaining to total athletic participation eligibility.

7.

School Capacity to be Determined

A rated capacity shall be established and adopted by the Board for each school facility in the Mecklenburg County School Administrative Unit prior to the date of initial assignments for any ensuing school term. Under normal

circumstance, additional assignments of students from outside the official attendance area of each specific school will be limited to a total anticipated enrollment to be established within 10 days after the close of the school term in each year not to exceed the maximum capacity of the school plus ten per cent of such capacity in the school. All requests from a majority race to a minority race will be granted within 20 per cent of such capacity before other transfers are granted.

The determination of the majority race will be based upon the pupil enrollment of the school at the time original assignments are made.

The limitation of school capacity shall not apply to new residents in an attendance area.

The Board will act upon transfer requests immediately after determination of such anticipated enrollment for an ensuing term, as hereinabove provided for, and the determination at that time shall control notwithstanding subsequent changes in enrollment at any school.

8.

Transportation

Where transportation is provided in any school attendance area, the school buses will not normally operate beyond the boundaries of such attendance area, and therefore, it will not be practicable to transport a pupil residing in one attendance area to the school of his choice in another attendance area. The only exception to this provision will be that for pupils who have exercised free choice of transfer from a school in which their race is in the majority to a school in which their race is in the minority, free trans-

portation will be provided. Provided, however, that any other pupil residing in any attendance area and attending school in another attendance area may have transportation to such school from any regular stop for receiving pupils and from the school to any regular stop for discharging pupils within such attendance area.

9.

Enrollment Continues for School Term

Any child enrolled in any school after original assignment or by transfer after original assignment shall remain in the school of enrollment for the school term, and no subsequent transfer will be permitted except for a change of residence from one attendance area to another, or for a return to the original assignment as provided in Section 4, or for other good cause shown. In the event of change of residence, the pupil may elect to remain in the school of enrollment for the remainder of the school term. A pupil enrolled in a school in an attendance area other than that of his or her residence shall be advanced, at the appropriate time, to junior or senior high school, as the case may be, serving the attendance area in which the pupil resides. This provision shall not have the effect of denying such pupil the right to transfer to another school of his grade and choice at the end of the term of the school in which the pupil is enrolled.

In the event a student has dropped out of school and then desires readmittance, requesting a transfer to a school other than the school to which he was last assigned, a period of at least one semester must have lapsed since last date of attendance and the request must follow the procedure heretofore outlined in these guidelines.

10.

Special Education and Special Abilities and Talents Students

When children are identified as eligible for Special Education and SAT classes, they will be assigned to the suitable class in their attendance areas or, if no space is available, they will be placed on the appropriate waiting list for assignment as space is available. Currently applicable attendance areas are identified on attendance area maps for Special Education and SAT. While administrative responsibility for assignment to Special Education or SAT classes is shared by the home school principal and the pupil assignment office, the recommendation for such assignment must come from the Special Education or SAT Department. Such recommendations are made to the home school principal after the prescribed identification and evaluation procedures have been completed.

Freedom of choice as outlined elsewhere in this document will apply to Special Education and SAT pupils insofar as comparable class placement is available in the schools of choice.

Requests for assignment from Special Education or SAT classes to regular classes will be received and acted upon by the principal of the school in which the pupil is enrolled. Decision of such requests can be made only after appropriate involvement of and recommendations from the Director of Special Education or the Director of SAT.

Plan for Desegregation of Schools

11.

Tuition Students

No student residing outside of Mecklenburg County shall be permitted to attend the Charlotte-Mecklenburg Schools. If a student is living within Mecklenburg County but his parents or legal guardians are living outside the county, said student may attend the Charlotte-Mecklenburg Schools upon payment of a $100 tuition fee for the school year subject to approval by the Superintendent of Schools. This tuition fee is to be collected by the principal of the school the student is entering and forwarded to the Treasurer of the Charlotte-Mecklenburg Schools.

If a parent owns property on which he resides and it is partially in Mecklenburg County and partially in another county but it is a continuous piece of property, the child or children of said parent would be permitted to attend the Charlotte-Mecklenburg Schools. Students of parent residing outside of Mecklenburg County but who own a separate piece of property in Mecklenburg County are not eligible for attendance in the Charlotte-Mecklenburg Schools.

Determining legal residence of a student shall be the responsibility of the principal in the school where the child is requesting entrance.

12.

Effective Date and Duration of Rules and Regulations

These policies and guidelines shall control the assignment and reassignment of pupils for the forthcoming 1969-1970 school term and shall be and remain in full force and

effect until amended, modified or altered by the Board and due public notice thereof given. Upon the opening of new schools, the policies set forth herein shall prevail in the establishment of new attendance areas for such schools.

13.

Notice of Rules and Regulations

These policies and guidelines shall be spread upon the Minutes of this Board and notice of their adoption by the Board shall be given promptly once a week for two weeks in the Charlotte Observer and the Charlotte News and by such other means as the Board may consider desirable to give adequate and effective notice of the same.

II

METROPOLITAN HIGH

The Board of Education has determined that Second Ward High School shall be converted into a model specialized school serving all students residing with Mecklenburg County. The high school attendance areas surrounding Second Ward High School will be redrawn in order that students attending Second Ward High School may be reassigned to the school serving the district in which they reside. It is anticipated that as a result of the elimination of the present Second Ward High School a large majority of the Second Ward students would be reassigned to predominantly white schools.

Plan for Desegregation of Schools

III

Faculty Desegregation

The Board of Education in recognition of its duty to achieve substantial faculty desegregation within the school system, will carry out the following procedures:

1. Teachers having a high degree of motivation and an interest in volunteering for service in achieving this objective will be actively sought.

2. Currently employed teachers will be allowed to move with co-workers wherever possible.

3. Currently employed teachers will be given an opportunity to indicate their choices of schools and consideration will be given to these insofar as possible.

4. Newly employed teachers will be carefully assigned in an effort to further desegregate faculties.

In the event the above procedures fail to achieve a substantial faculty desegregation, the Board will exercise its power to assign faculty for this purpose.

These policies and guidelines shall control the assignment and reassignment of teachers for the forthcoming 1969-70 school term and shall be and remain in full force and effect until amended, modified or altered, by the Board of Education and due public notice thereof given. These policies and guidelines shall be spread upon the Minutes of this Board.

Plan for Desegregation of Schools

IV

Educational Assistance to Under-Achievers

The Board of Education recognizes that it has a responsibility to provide the best educational program possible for all students. It further recognizes that there are some students who are served less effectively than others and that the system has a unique responsibility to these students. The Board of Education intends to make every effort to offer supplementary support to these young people by providing additional funds to the extent that they can be made available for use in employing additional staff, providing a broader range of curricular offerings and developing learning materials for pupils of varying levels of educational maturity.

I, William C. Self, Superintendent of the Charlotte-Mecklenburg school system and Secretary to its Board of Education, do hereby certify that the foregoing is a true, perfect and correct copy of the plan for further desegregation of the Mecklenburg School Unit as adopted by the Board of Education on the *21st* day of May, 1969, and spread upon its minutes, as amended on May 27, 1969.

This the *28th* day of May, 1969.

Secretary to the Board
William C. Self

Report in Connection With Submission of Plan of Desegregation

(Filed May 28, 1969)

The defendant, through its attorneys of record, respectfully submits to the Court its plan, the same being attached, for further desegregation of the schools of the Charlotte-Mecklenburg School Administrative Unit as approved by the Board of Education.

With reference to pupil desegregation, the Board held extensive deliberations and study of the alternative suggestions by the Court and other alternatives and reached the conclusion that there were no possible means of getting the children together without substantial compulsory bussing and, in effect, destroying the neighborhood system, whereby, in the City of Charlotte, children in general attended those schools near to their homes as has been the practice in the City of Charlotte for many years.

It is the judgment of the Board that the plan submitted herewith will accomplish further desegregation of pupils within the various schools. Under this plan, after the construction of Metropolitan High School, less than 500 Negro students (some West Charlotte High School graduates) during the course of their education may finish school without attending a predominantly white school. By continuing freedom of transfer and providing free transportation for students transferring from a majority race to a minority race school, these students, as is the case with all students within the system, may attend desegregated schools at all levels of their education. All white students will continue attending some desegregated schools in the course of their education. The Board and its staff will give reasonable publicity and notice of its free transportation offer.

Report in Connection With Submission of Plan of Desegregation

With reference to Metropolitan High School, the plan provides for establishing a county-wide attendance area for this school. Upon construction of the school, students of Second Ward High School will be assigned to those schools with attendance lines adjoining those of Second Ward High School, most of which have predominantly white student enrollment. The student and faculty population of the new Metropolitan High School is expected to be substantially desegregated.

In connection with faculty desegregation, it is believed that the present plan offers substantial progress in achieving a reasonable degree of faculty desegregation. The plan embodies a voluntary approach to teachers in seeking their agreement to transfer, assignment of new personnel and assignment of teachers in the event reasonable desegregation is not achieved. It was reported that the Classroom Teachers Association out of a survey of 1,300 teachers reporting indicated that 240 teachers were agreeable to transfer to schools in which their race was in a minority. By projecting this figure, it would appear that in excess of 600 teachers in the system would be willing to voluntarily transfer. In addition, the school system expects to employ 700 new teachers to fill an expected 600 vacancies and 100 positions created by growth in the student population, such new teachers to be assigned in such manner as to achieve further racial balance of faculties. In the event the foregoing procedures do not insure substantial desegregation of faculties, the Board will then reassign faculty members to achieve this result.

The Board of Education's staff proposes to implement faculty desegregation in the following manner:

Report in Connection With Submission of Plan of Desegregation

1. Solicit the help of the presidents of the local professional organizations.

2. Use the facilities of the educational television station to encourage teachers to volunteer.

3. Make available to teachers a form requesting voluntary reassignment. (See attached copy.)

4. Call together those who are presently teaching in opposite race situations to request their assistance.

5. Seek to retain in their present positions as many as possible of those who are teaching in opposite race situations.

6. No faculty member will be dismissed or demoted or denied employment or promotion because of race or color.

7. Encourage schools to invite volunteers to meet faculty members prior to the end of the school term.

During the 1969-70 school year, the Board of Education will carry on an intensive in-service education program for volunteers and newly assigned personnel who are teaching in opposite race situations. To accomplish this:

1. Teachers who are transferred and newly assigned teachers will be offered a two weeks' summer workshop. Those who participate will receive a stipend of $100 per week. The cost of such a program is estimated as $200,000. An extensive effort will be made to underwrite the cost with funds from federal and state sources. If this attempt is unsuccessful, the project will be supported by local funds.

Report in Connection With Submission of Plan of Desegregation

2. The Board of Education will renew the request for curriculum planning time for teachers which was approved by the Board of Education on October 8, 1968. The original plan which provided for planning time twice a month will be amended to provide for dismissal of pupils at approximately 1:00 p.m. one day per week. If necessary, the Board will petition the legislative delegation for emergency enabling legislation.

3. The in-service education department will be assigned a sum of $10,000 for the employment of substitute teachers. The substitutes will be used to free experienced and highly qualified staff members for a period of time so that they may give added support to their fellow teachers through in-service workshops.

Attached to this report is a form for voluntary reassignment which the Board presently contemplates using in the faculty assignment. The Board does not represent that the procedures are inflexible or fixed as conditions in the future may warrant change as circumstances may dictate.

In further improving the quality of education, the Board will seek to secure supplementary support for schools with pupils having test scores which are two years or more below the Charlotte-Mecklenburg median on paragraph meaning. In order to bring the expenditure for these pupils up to the national average per pupil, expenditure will require an additional $100 per pupil. Since approximately 13 per cent of the pupils in the system are in this category, the total expenditure will be about $1,100,000. A small percentage of this amount will be used to employ staff support not assigned to a specific school, and the remainder will be apportioned among the schools on the basis of the per-

centage of qualifying pupils enrolled in each school. The principal and his teachers will be asked to submit a plan outlining how the allocation is to be spent. By a special formula, the allocation for supplementary support will be determined.

Submitted for information of the Court are proposed letters to be delivered to the child for delivery to the parent with respect to free choice of transfer, marked Exhibit "B", notice of assignment, marked Exhibit "C", tabulation of school capacities and projected enrollment, marked Exhibit "D" and data on effect of free choice of transfer, marked Exhibit "E".

The Board is not unmindful of the suggestions by the Court in its order and therefore sought the assistance of the State Department of Public Instruction prior to formulation of the attached plan. At a recent conference of the National School Board Association attended by several School Board members, it was reported by a representative of the Department of Health, Education and Welfare that his department regarded desegregation under court orders as basically a local matter, and therefore, no real assistance was offered to local school boards in preparing plans for compliance with court orders. It was, therefore, deemed fruitless to pursue the suggestion of the Court in this regard.

Respectfully submitted,

/s/ Brock Barkley
818 Law Building
Charlotte, North Carolina

/s/ William J. Waggoner
1100 Barringer Office Tower
Charlotte, North Carolina

CHARLOTTE-MECKLENBURG SCHOOLS

VOLUNTARY REASSIGNMENT

Staff Member's Statement

Recognizing my professional responsibility to teach young people of all races and the value which an integrated faculty can have for the total education of pupils, I volunteer for reassignment to a school where the majority of the current staff is of a race other than mine. I shall appreciate consideration being given to the following requests:

1. To be reassigned to one of the following schools:

   1st choice _____ Grade/Subject_____

   2nd choice _____ Grade/Subject_____

   3rd choice _____ Grade/Subject_____

2. To be reassigned with the following co-workers who have volunteered for similar school assignments:

   1. 3.

   2. 4.

Certification: ☐ Class "A" ☐ Class "G" ☐ Other: _____

Record of service in the Charlotte-Mecklenburg Schools:

School	Grade/Subject	Dates of employment From	To
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Mr.,Mrs.,Miss: _____ Race: _____
(signature)

Address: _____ Telephone: _____
(street)

_____ Date: _____
(city) (state)

Please send one copy of this form to the personnel office by June 4,1
One copy should also be filed with your principal.

Administrative action by the Personnel Department
School assignment for 1969-70: _____ Grade/Subject:_____

Signature: _____ Date:_____

Exhibit "A"

May 27, 1969

Dear Staff Members:

As the first step in achieving substantial faculty integration for 1969-70, the Board of Education has directed that we actively seek volunteers for reassignment from our current staff.

We ask that you consider the importance of this undertaking and the role which you may have in it. If you are willing to volunteer for this service, please complete the form on the reverse side and return it to the personnel office by June 4.

We appreciate your cooperation and your understanding as we seek the attainment of this goal.

Sincerely,

William C. Self

William C. Self
Superintendent

W. L. Anderson, Jr.

W. L. Anderson, Jr.
Assistant Superintendent
Personnel

Pupil's last name _____ First name _____ Middle name _____

Address _____ Telephone number _____

School last attended _____

Original Assignment for 1969-70: Grade: ___
(Please so indicate if in Special Education or SAT Program.)

School: _____

Date of original assignment: June 5, 1969 _____
School Address Code

Race: _____

Request for Transfer:

First Choice: _____ School

Second Choice: _____ School

Third Choice: _____ School

Signature of adult with whom pupil lives: _____

Relationship to pupil: _____

Mail or deliver by June 15, 1969 to any school office or to the Pupil Assignment Office, Charlotte-Mecklenburg Schools, P.O. Box 149, Charlotte, North Carolina 28201

Do not write in space below this line

Assignment: _____

Date: _____

Signature: _____

For school official receiving request:

Date received or Postmarked

_____

By Whom Received: _____

CHARLOTTE-MECKLENBURG SCHOOLS

ROBINSON CHURCH ROAD

CHARLOTTE, NORTH CAROLINA

Notice to All Parents:

Your child has been assigned on the back of this notice to the school serving the attendance area in which you live or to the school which your child attended through free choice during the 1968-69 school year. The Board of Education policy states that "After original assignment the parent of any pupil may apply to the Board for reassignment in any other attendance area" and that "any such request for transfer shall be allowed - to the extent that the facilities and accommodations of the chosen school will permit." The only exception to this is in newly constructed schools for which attendance areas have been created.

FREE TRANSPORTATION SHALL BE PROVIDED TO ANY PUPIL WHO EXERCISES AND IS GRANTED A MAJORITY RACE TO MINORITY RACE TRANSFER.

Provision is made on the back of this notice for your use if you are not satisfied with the assignment of your child and want to request reassignment. This request for reassignment must be made not later than June 15, 1969.

Parents are assured that school personnel will neither favor nor penalize any pupil because of the choice he makes in the exercise of his rights under this plan.

Maps showing school attendance areas may be found in the office of each school of the system and at the Board of Education office.

William E. Poe

William E. Poe, Chairman
Charlotte-Mecklenburg Board of Education

William C. Self

William C. Self, Superintendent
Charlotte-Mecklenburg Schools

Exhibit "B"

CHARLOTTE-MECKLENBURG SCHOOLS

Charlotte, North Carolina

NOTICE OF ORIGINAL ASSIGNMENT

_____

_____

_____

The original assignment for your child _____

for the 1969-70 term is grade ____, _____

Date: _____ Signed: _____

MJK:mf

Exhibit "C"

CHARLOTTE-MECKLENBURG SENIOR HIGH SCHOOLS

1969 - 1970

NAME OF SCHOOL	TOTAL TEACHING SPACES.	RATED CAPACITY (27)	MAXIMUM CAPACITY (30)	+ 10%	+ 20%	PROJECTED ENROLLMENT	OPEN OR CLOSED
East Mecklenburg	70	1890	2100	2310	2520	2130	
Garinger	73	1971	2190	2409	2628	2515	
Harding	37	999	1110	1221	1332	1000	
Independence	41	1107	1230	1353	1476	1150	
Myers Park	60	1620	1800	1980	2160	1990	
North Mecklenburg	49	1323	1470	1617	1764	1670	
Olympic	31	837	930	1023	1116	785	
Second Ward	41	1107	1230	1353	1476	1135	
South Mecklenburg	55	1485	1650	1815	1980	2115	
West Charlotte	65	1755	1950	2145	2340	1475	
West Mecklenburg	55	1485	1650	1815	1980	1575	

CHARLOTTE-MECKLENBURG JUNIOR HIGH SCHOOLS

1969-70

NAME OF SCHOOL	TOTAL TEACHING SPACE	RATED CAPACITY (27)	MAXIMUM CAPACITY (30) + 10% + 20%			PROJECTED ENROLLMENT	OPEN OR CLOSED
Albemarle Road	25	675	750	825	900	990	
Alexander	32	864	960	1056	1152	1150	
Cochrane	44	1188	1320	1452	1584	1590	
Coulwood	27	729	810	891	972	830	
Eastway	41	1107	1230	1353	1476	1360	
Alexander Graham	34	918	1020	1122	1224	1030	
Hawthorne	44	1188	1320	1452	1584	1075	
Irwin Avenue	29	783	870	957	1044	630	
McClintock	38	1026	1140	1254	1368	1465	
Northwest	40	1080	1200	1320	1440	940	

1969-70

NAME OF SCHOOL	TOTAL TEACHING SPACE	RATED CAPACITY (28)	MAXIMUM CAPACITY (30) + 10%	+ 20%		PROJECTED ENROLLMENT	OPEN OR CLOSED
Piedmont	25	675	750	825	900	495	
Quail Hollow	49	1323	1470	1617	1764	1490	
Randolph	40	1080	1200	1320	1440	1020	
Ranson	23	621	690	759	828	865	
Sedgefield	32	864	960	1056	1152	1020	
Smith	44	1188	1320	1452	1584	1430	
Spaugh	34	918	1020	1122	1224	1040	
Williams	32	864	960	1056	1152	940	
Wilson	35	945	1050	1155	1260	1265	
York Road	26	702	780	858	936	785	

NAME OF SCHOOL	TOTAL TEACHING SPACE	RATED CAPACITY (28)	MAXIMUM CAPACITY (30)	+ 10%	+ 20%	PROJECTED ENROLLMENT	OPEN OR CLOSED
Albemarle Road	16	448	480	528	576	505	
Alexander	15	420	450	495	540	260	
Allenbrook	20	560	600	660	720	520	
Ashley Park	23	644	690	759	828	575	
Bain	22	616	660	726	792	760	
Barringer	19	532	570	627	684	805	
Berryhill	36	1008	1080	1188	1296	815	
Bethune	15	420	450	495	540	195	
Beverly Woods	20	560	600	660	720	550	
Billingsville	24	672	720	792	864	635	
Briarwood	20	560	600	660	720	675	
Bruns Avenue	26	728	780	858	936	780	
Chantilly	18	504	540	594	648	480	
Clear Creek	7	196	210	231	252	285	
Collinswood	23	644	690	759	828	580	
Cornelius	18	504	540	594	648	480	
Cotswold	20	560	600	660	720	555	

NAME OF SCHOOL	TOTAL TEACHING SPACE	RATED CAPACITY (28)	MAXIMUM CAPACITY (30) + 10%	+ 20%		PROJECTED ENROLLMENT	OPEN OR CLOSED
Berita	31	868	930	1023	1116	895	
Devonshire	24	672	720	792	864	935	
Dilworth	24	672	720	792	864	580	
Double Oaks	25	700	750	825	900	810	
Druid Hills	18	504	540	594	648	505	
Eastover	24	672	720	792	864	540	
Elizabeth	21	588	630	693	756	490	
Enderly Park	12	336	360	396	432	375	
Fairview	26	728	780	858	936	330	
First Ward	28	784	840	924	1008	755	
Hickory Grove	17	476	510	561	612	585	
Hidden Valley	24	672	720	792	864	1055	
Highland	12	336	360	396	432	375	
Hoskins	12	336	360	396	432	280	
Huntersville	26	728	780	858	936	725	
Huntingtowne Farms	22	616	660	726	792	580	
Idlewild	24	672	720	792	864	575	
Amay James	10	280	300	330	360	505	

NAME OF SCHOOL	TOTAL TEACHING SPACE	RATED CAPACITY (28)	MAXIMUM CAPACITY (30)	+ 10%	+ 20%	PROJECTED ENROLLMENT	OPEN OR CLOSED
Lakeview	16	448	480	528	576	430	
Lansdowne	28	784	840	924	1008	770	
Lincoln Heights	24	672	720	792	864	765	
Long Creek	19	532	570	627	684	735	
Marie Davis	30	840	900	990	1080	695	
Matthews	35	980	1050	1155	1260	850	
Merry Oaks	18	504	540	594	648	460	
Midwood	19	532	570	627	684	525	
Montclaire	25	700	750	825	900	730	
Myers Park	20	560	600	660	720	555	
Nations Ford	24	672	720	792	864	695	
Newell	22	616	660	726	792	525	
Oakdale	20	560	600	660	720	560	
Oakhurst	20	560	600	660	720	640	
Oaklawn	24	672	720	792	864	565	
Olde Providence	20	560	600	660	720	545	
Park Road	20	560	600	660	720	840	

1969-70

NAME OF SCHOOL	TOTAL TEACHING SPACE	RATED CAPACITY (28)	MAXIMUM CAPACITY (30) + 10%	+ 20%		PROJECTED ENROLLMENT	OPEN OR CLOSED
Pineville	20	560	600	660	720	550	
Pinewood	24	672	720	792	864	715	
Plaza Road	16	448	480	528	576	510	
Rama Road	24	672	720	792	864	820	
Sedgefield	21	588	630	693	756	565	
Selwyn	20	560	600	660	720	620	
Shamrock Gardens	18	504	540	594	648	535	
Sharon	20	560	600	660	720	410	
Starmount	24	672	720	792	864	800	
Statesville Road	24	672	720	792	864	825	
Steele Creek	16	448	480	528	576	560	
Thomasboro	27	756	810	891	972	690	
Tryon Hills	20	560	600	660	720	470	
Tuckaseegee	20	560	600	660	720	600	
University Park	24	672	720	792	864	750	
Villa Heights	25	700	750	825	900	960	
Westerly Hills	16	448	480	528	576	605	
Wilmore	17	476	510	561	612	440	

1969-70

NAME OF SCHOOL	TOTAL TEACHING SPACE	RATED CAPACITY (28)	MAXIMUM CAPACITY (30)	+ 10%	+ 20%	PROJECTED ENROLLMENT	OPEN OR CLOSED
Windsor Park	24	672	720	792	864	770	
Winterfield	24	672	720	792	864	715	
Isabella Wyche	19	532	570	627	684	215	
Zeb Vance	12	336	360	396	432	235	
TOTAL	1595	44660	47,850	52635	57420	45,630	

358a

APRIL 1, 1969 SURVEY OF
PUPILS TO BE MOVED IF FREEDOM OF CHOICE IS ENDED*

Schools	Pupils to send to own district		Pupils to receive from another school (reside in district)		Total to Move	Net effect to minority (more desegregation)
	W	N	W	N		
Elementary	1530	292	1530	292	3644	+ 525
Junior High	1040	410	1040	410	2900	+ 495
Senior High	676	583	676	583	2518	+ 336
Schools	3246	1285	3246	1285	9062	+1356

NET EFFECT IN DETAIL

Schools	No. Pupils
Elementary	
To 15 schools (predominatly Negro):	Add 515 White pupils
To 16 schools (predominatly White):	Add 83 Negro pupils
In 16 schools (predominatly White):	Send 73 Negro pupils
Junior High	
To 6 schools (predominatly Negro):	Add 501 White pupils
To 6 schools (predominatly White):	Add 60 Negro pupils
In 6 schools (predominatly White):	Send 66 Negro pupils
Senior High	
To 2 schools (predominatly Negro):	Add 76 White pupils
To 7 schools (predominatly White):	Add 255 Negro pupils
In 2 schools (predominatly White):	Send 6 Negro pupils
NET EFFECT	Add 1356 Pupils to Minority

sed upon count of Pupil Accounting and Data Processing offices.
Count has errors due to limited time and difficulty to count pupils residing in grid squares on map which were crossed by school boundary.

Exhibit "E"

April 1, 1959
DATA ON EFFECT OF FREEDOM OF CHOICE

School Elementary	Predominant race ( )	Pupils attending from outside district* W	N	Pupils in district attending another school* W	N	Net Effect without Freedom of Ch to Minority
Albemarle Road	(W)	70	2	19	0	- 2 N
Alexander Street	N	0	33	0	3	-
Allenbrook	W	5	0	17	0	-
Ashley Park	W	77	0	14	0	-
Bain	W	15	1	15	0	- 1 N
Barringer	N	15	2	34	10	+19 W
Berryhill	W	157	2	26	0	- 2 N
Bethune	N	0	0	1	0	+ 1 W
Beverly Woods	W	7	0	7	1	+ 1 N
Billingsville	N	0	0	13	11	+13 W
Briarwood	W	16	7	11	0	- 7 N
Bruns Avenue	N	0	0	1	7	+ 1 W
Chantilly	W	7	0	34	0	-
Clear Creek	W	0	0	20	6	+ 6 N
Collinswood	W	11	0	11	0	-
Cornelius	W	6	12	27	5	- 7 N
Cotswold	W	12	9	1	0	- 9 N
Davidson	W	11	0	3	7	+ 7 N
Marie Davis	N	0	12	1	0	+ 1 W
Derita	W	51	9	32	12	+ 3 N
Devonshire	W	14	0	8	0	-
Dilworth	W	2	9	38	0	- 9 N
Double Oaks	N	0	36	0	6	-
Druid Hills	N	0	8	9	14	+ 9 W
Eastover	W	72	1	62	0	- 1 N
Elizabeth	N	0	0	40	1	+40 W
Enderly Park	W	7	0	23	1	+ 1 N
Fairview	N	0	3	35	2	+35 W
First Ward	N	0	3	0	24	-
Hickory Grove	W	32	5	18	2	- 3 N
Hidden Valley	W	76	0	8	0	-
Highland	W	34	1	4	0	- 1 N
Hoskins	W	16	0	27	17	+17 N
Huntersville	W	34	15	14	12	- 3 N
Huntingtowne Farms	W	24	0	17	1	+ 1 N

entary	Predominant race ( )	Pupils attending from outside district* W	N	Pupils in district attending another school* W	N	Net Effect without Freedom of Choice to Minority
ld	W	70	1	3	0	- 1 N
ames	N	0	0	216	0	+216 W -- 477
ew	N	6	9	51	10	+45 W
ane	W	50	1	1	0	- 1 N
n Heights	N	0	11	0	4	-
Creek	W	19	0	25	3	+ 3 N
es	W	11	0	26	0	-
Oaks	W	23	0	7	0	-
d	W	57	0	3	4	+ 4 N
eire	W	52	0	30	0	-
Park	W	Have Adv. Classes		8	0	-
s Ford	W	0	0	13	1	+ 1 N
	W	37	4	13	0	- 4 N
e	W	46	23	2	3	-20 N
st	W	21	2	7	0	- 2 N
n	N	0	26	2	17	+ 2 W
Providence	W	26	0	12	0	-
Road	W	40	0	13	0	-
reek	W	0	0	7	0	-
ille	W	0	0	11	12	+12 N
od	W	57	0	6	0	-
Road	W	8	0	54	7	+ 7 N
Road	W	0	0	24	0	-
field	W	10	0	1	0	-
n	W	13	0	5	0	-
ck Gardens	W	28	0	4	0	-
n	W	18	0	26	1	+ 1 N
unt	W	15	0	72	0	-
sville Road	W	11	11	35	24	+13 N
Creek	W	0	0	0	4	+ 4 N
boro	W	35	0	19	0	-
Hills (Trend to N)		2	0	91	6	+89 W
segee	W	36	0	1	0	-
rsity Park	N	0	34	1	7	+ 1 W
nce	N	0	0	0	0	-
Heights	N	0	0	42	6	+42 W
ly Hills	W	63	0	3	0	-
e	W	0	0	12	2	+ 2 N
r Park	W	0	0	20	0	-
field	W	5	0	73	0	-
la Wyche	N	0	0	1	11	+ 1 W

School Junior High	Predominant race ( )	Pupils attending from outside district* W	N	Pupils in district attending another school* W	N	Net [illegible] without Freedom of to Minority
Albemarle Road	W	52	2	17	0	- 2 B
Alexander	W	15	6	23	18	+12 B
Cochrane	W	73	0	29	19	+19 B
Coulwood	W	38	1	12	5	+ 4 B
Eastway	W	79	1	34	0	- 1 B
Alexander Graham	W	95	1	30	1	-
Hawthorne	N	30	12	174	54	+144 W
Irwin Avenue	N	0	47	33	44	+33 W
McClintock	W	105	0	36	5	+ 5 B
Northwest	N	0	30	14	54	+14 W
Piedmont	N	21	21	131	29	+110 W
Quail Hollow	W	46	2	46	0	- 2 B
Randolph	W	73	6	45	7	+ 1 B
Ranson	W	46	40	15	17	-23 B
Sedgefield	W	105	45	102	8	-37 B
Smith	W	92	0	36	0	-
Spaugh	W	77	19	53	18	- 1 B
Williams	N	0	96	10	32	+10 W
Wilson	W	71	3	17	22	+19 B
York Road	N	0	74	190	67	+190 W

High	Predominant race ( )	Pupils attending from outside district* W	N	Pupils in district attending another school* W	N	Net Effect without Freedom of Choice to Minority
cklenburg	W	92	0	93	69	+69 N
r	W	81	13	138	66	+53 N
	W	109	27	51	44	+17 N
dence	W	128	3	35	0	- 3 N
rk	W	78	21	55	82	+61 N
ecklenburg	W	49	19	22	30	+11 N
	W	25	16	58	40	+24 N
Werd	N	0	353	57	36	+57 W
ecklenburg	W	52	4	59	1	- 3 N
arlotte	N	0	111	29	189	+29 W
cklenburg	W	62	5	62	26	+21 N

State of North Carolina

Superintendent of Public Instruction
Raleigh 27602

May 22, 19[illegible]

Mr. William E. Poe, Chairman
Charlotte-Mecklenburg Board of Education
Box 149
Charlotte, North Carolina 28201

Dear Mr. Poe:

This letter is to indicate to all concerned that you and several members of the Charlotte-Mecklenburg school staff have consulted with me and members of my staff regarding the recent Court Decision handed down by Judge James B. McMillan.

While we were not able to find a perfect solution to the tremendous problem which you face, I do hope that our comments were of some help to you.

You and your Board are faced with a most difficult task. The entire State will be interested in the steps you take to deal with it.

You have our best wishes.

Sincerely,

A. Craig Phillips
State Superintendent of Public Instruction

ACP/jt

Response to Motion for Temporary Restraining Order

(Filed May 29, 1969)

The defendant, by and through its counsel, responding to the plaintiffs' motion for a temporary restraining order dated May 15, 1969, respectfully shows unto the Court as follows:

1. Paragraphs 1 through 7 of the plaintiffs' motion for a temporary restraining order relate to plaintiffs' contentions and conclusions with respect to the present posture of this action and also contains plaintiffs' erroneous conception of action taken by the Board of Education subsequent to entry of the order of April 23, 1969. Suffice it to say, the Board of Education has been moving diligently in an effort to review not only the various alternatives suggested by the Court, but also other alternatives.

2. The construction of Project 600 and renovations to Wilson Junior High School, Clear Creek Elementary School and Myers Park Senior High School represent the culmination of extensive planning, representations to voters, representations to communities within the system, and expenditure of substantial time, not only by the school staff and affected principals, but also by architects who are now entitled to and have been paid substantial commissions for the services performed thus far.

3. In 1967, prior to the $35,000,000 school bond vote, the School Board gave extensive publicity by way of newspaper, television, public meetings throughout the county and other methods by which specific use of the proceeds of the proposed bond issue was outlined with reference to how it would affect and improve educational facilities in the various areas of the school district. Substantial reli-

ance by the voters upon the proposed allocation and use of funds is believed to be a major factor in the passage of the bond issue. The proposal specifically covered the schools and the approximate amount of funds to be expended at the various schools. To halt the construction proposed at these schools would, in effect, amount to a breach of trust to the voters of this school district.

4. It is submitted that the $35,000,000 bond issue as approved represents a most minimal capital funds program to provide an upgrading of schools in the school district. The school staff initially proposed a building program of $70,000,000 to be expended over a five-year period beginning 1967. After evaluating the proposed program and the anticipated voter response, the Board of Education reduced the bond request to $35,000,000 to cover the most acute building needs in the community. The building program sought to be enjoined represents some of the most pressing needs as indicated by the following:

A. Project 600—This facility will be a junior high school located in the Carmel Road area, which is one of the fastest growing areas in the school district. It is projected for the school year beginning September, 1969, that Smith Junior High School will be overcrowded by 230 pupils, McClintock Junior High School will be overcrowded by 350 pupils. It is contemplated that the attendance lines will be adjusted in such manner as to place approximately 600 students in this facility by relocating the Smith Junior High, Alexander Graham Junior High, Quail Hollow Junior High and McClintock Junior High attendance lines. It is estimated that a minimum of 125 Negro children will attend the new facility.

B. Clear Creek Elementary—This school will be replaced as it represents one of the oldest facilities in the school system. It was previously examined by architects, structural, electrical and mechanical engineers who determined that the structure should be replaced at the earliest opportunity. The students now utilize an old auditorium which was divided into three classroom teaching spaces, the school cannot conduct an adequate library program and it is projected that the school will need four additional classrooms for the next year. All mobiles owned by the county are now in service and it will be difficult to provide relief with mobile units. During the current school year, the school has a student population of 58 Negro and 225 white students.

C. Wilson Junior High—Renovations proposed for this building relate to doubling the library, art and science facilities. The present facilities are based on a school having a 600 student enrollment and it is projected that the 1969-70 enrollment will be approximately double this amount. This school has the most severe shortage of the facilities proposed for construction of any junior high school in the system. The present student population is comprised of 60 Negro and 1,132 white students.

D. Myers Park Senior High—This school has inadequate physical education facilities and the proposed construction would provide additional dressing rooms and showers which would bring it on a par with other senior high schools in the system. Enrollment consists of 158 Negro and 1,855 white students.

5. The school system, in the past four years, has experienced a rise in construction costs of approximately 25 per cent. In view of the continued spiraling costs of construction, any delay in the building program will in all likelihood create substantial additional costs in providing much needed educational facilities.

6. Each of the projects has been bid by the contractors, the bids have been accepted by the Board of Education (except for Myers Park High School, which was rejected and will be offered for rebidding) and the contractors have scheduled material and personnel to commence immediate construction and any delay imposed on the School Board may give rise to claims to be asserted by the various contractors or subject the projects to rebidding at increased cost.

7. The continued construction of new schools and additions to existing schools is consistent with the duty of the Board of Education to provide equal educational facilities for all students served by the school system.

WHEREFORE, the defendant respectfully prays that the motion for a temporary restraining order be denied; and in the event the restraining order should be allowed, then in such event, the plaintiff be required to post good and sufficient bond to indemnify the defendant from any loss

it may sustain by reason of the improvident granting of such restraining order.

Respectfully submitted,

s/ BROCK BARKLEY
Brock Barkley
818 Law Building
Charlotte, North Carolina

s/ WILLIAM J. WAGGONER
William J. Waggoner
1100 Barringer Office Tower
Charlotte, North Carolina
Attorneys for Defendant

Order dated June 3, 1969

The defendants have filed a proposed plan of action pursuant to the court order of April 23, 1969. The plaintiffs have filed a motion requesting restraint on further school construction until the school board has dealt satisfactorily with the segregation question. A further hearing is indicated. The court has two weeks of criminal court starting June 2; and Monday, June 16, 1969 is the earliest predictable time that a hearing could be conducted.

All parties are therefore notified that a hearing will be held in the United States Court House in Charlotte starting on Monday, June 16, 1969, at 10:00 a.m. All parties are requested to be present.

Under the law the burden is upon the school board to come forward with a plan which "promises realistically to work now" to eliminate segregation in the Charlotte-Mecklenburg schools. The obligation of the court under the law is "to assess the effectiveness of a proposed plan in achieving desegregation." Evidence will be received from all parties on these general subjects.

Without limiting any party in the scope and type of relevant evidence which he may wish to produce, the court directs the parties to come forward with exhibits, statistics, records, and other information so that the court will be in adequate position to make findings upon the following subjects, among others:

1. What has been accomplished, by June 16, toward achieving the duty which the defendants have accepted of "achieving substantial faculty desegregation," and what the plan proposed by the defendants may be expected to accomplish further along that line by September, 1969.

2. What school zones may fairly be said to have been gerrymandered (either by control of their boundary lines

Order Dated June 3, 1969

14. Scholastic aptitude tests and achievement tests and intelligence tests for all grades for which such data are available in all schools in the county and city since 1954.

15. What concrete and specific steps, if any, plaintiffs would have the defendants adopt in order to comply with the Constitution. The court is not interested in a restatement of the previous demand of plaintiffs that all the schools in the system be populated on a 70/30 basis, because as previously stated the court does not have the power to make such an order and the defendants have served notice that they will not undertake such an assignment themselves. What is desired is some tough and detailed thinking and planning as to detailed methods to reduce and promptly eliminate segregation in the Charlotte-Mecklenburg schools.

The above questions and requests, insofar as they call for facts and figures, call for the production—not the creation—of the desired information. Counsel are requested to advise the court immediately if the production of already existing records does not provide any of the statistical information mentioned above. It is not the intention of the court to put the parties to work creating new charts nor re-assembling existing statistics, but rather to make available existing information.

This the 3rd day of June, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Order Adding Additional Parties dated June 3, 1969

Several changes in the personnel of the defendant school board have taken place since this suit was instituted. In order that all parties may be fully before the court and that there be no avoidable technical irregularity.

IT IS ORDERED that all the present members of the Charlotte-Mecklenburg Board of Education be and they are hereby made formal parties to this action; that copies of the MOTION FOR FURTHER RELIEF filed September 6, 1968 be served upon them and that there also be served upon them copies of all orders and motions that have been filed since that time.

Service of these motions and orders (including this order making new parties and the order of this same date regarding the further hearing of June 16, 1969) should be made by the United States Marshal. The members of the school board and their addresses are:

Mr. William E. Poe, Chairman
2101 Coniston Place (Home)
1014 Law Building (Office)
Charlotte, North Carolina

Mr. Henderson Belk
529 Hempstead Place
(Home)
308 East Fifth Street
(Office)
Charlotte, North Carolina

Rev. Coleman W. Kerry, Jr.
1022 Kohler Avenue
Charlotte, North Carolina

Mr. Dan Hood
Route 4
Matthews, North Carolina

Mrs. Julia Maulden
Box 6
Davidson, North Carolina

Order Dated June 3, 1969

8. Statistics on school population by race in the system for the years since consolidation and similar statistics for the separate county and city units from 1954 until consolidation.

9. The facts about school bussing operations of the Charlotte-Mecklenburg school system, including such records as already exist on bus routes, year by year, since 1961, including where the busses get the pupils and where they take them, and the races of the pupils transported.

10. The pupil attendance zones or school zones, year by year, for all years since 1954.

11. What the pending school construction programs will do in terms of creating pupil accommodations, and whether the programs will tend to perpetuate or to alleviate segregation in the schools.

12. Why decision on the construction and purposes of Metropolitan High School should not be postponed until after a final court ruling, appellate or otherwise, has been rendered, so that the decision on the educational questions can be made in a quieter and non-racial atmosphere. Also, why the defendants should not retain any land or control over any land they may now have, pending such decision.

13. Why no action has been taken by the defendants on the various possible methods for further reduction of segregation such as re-examination of zones, enlargement or combination of school zones, reorganizing the existing 23,000 pupil bus system, pairing of schools, consultation with the Department of Health, Education and Welfare, and other possible methods.

or by control of their student capacity or both) so as to fit a particular pocket or community of all- or nearly all-black or all- or nearly all-white students; and what could be done to reduce or eliminate segregation in those zones.

3. What progress if any toward desegregation of pupils may reasonably and predictably be expected by September, 1969, from the pupil plan presented by the defendants.

4. What effect if any the pupil plan may be expected to have upon the present large group of all-black or 99%+ black schools, and upon the more than 14,000 children who still attend them.

5. Why students allowed to transfer from one zone to another to avoid racial discrimination should be penalized by being required to wait a year before taking part in varsity athletics, as the proposed pupil plan requires, which self-admitted "penalty" is lifted if they return to the zone originally assigned by the defendants.

6. The actual meaning of the "free transfer" plan—the numerical extent to which the plan requires that students wishing to transfer and being supplied transportation to transfer will actually find space in the schools of choice if they exercise their option to transfer. This is not a trick question but one directed to the ambiguity of the plan and the conflicts in the language used in the plan. Clarification is requested.

7. What steps will be followed to insure that the transfer-with-transportation choice is actually communicated personally to children who may be entitled to the choice, and to their parents, and affirmatively accepted or rejected by them.

Order Adding Additional Parties Dated June 3, 1969

Mr. Ben F. Huntley
Box 128
8301 Pineville Road
(Office)
Pineville, North Carolina

Mr. Sam S. McNinch, III
2914 Hampton Avenue
(Home)
4037 E. Independence Blvd.
(Office)
Charlotte, North Carolina

Mrs. Betsey Kelly
3501 Mountainbrook Road
Charlotte, North Carolina

Dr. Carlton G. Watkins
1223 Marlwood Terrace
(Home)
1630 Mockingbird Lane
(Office)
Charlotte, North Carolina

This the 3rd day of June, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Motion to Set Aside Order Joining Additional Parties Defendant

(Filed June 12, 1969)

The defendants, corporate and individual, by and through their attorneys, respectfully request the Court to set aside the order entered on the Court's own motion, without notice and hearing, wherein Mr. William E. Poe, Chairman, Mr. Henderson Belk, Mr. Dan Hood, Mr. Ben F. Huntley, Mrs. Betsey Kelly, Rev. Coleman W. Kerry, Jr., Mrs. Julia Maulden, Mr. Sam S. McNinch, III, and Dr. Carlton G. Watkins were added as parties defendant and served with copies of all orders and motions that have been filed since September 6, 1968, and in support thereof respectfully show unto the Court as follows:

1. Rule 17-B of the Federal Rules of Civil Procedure dealing with the capacity of parties plaintiff and defendant states as follows:

> "(b) CAPACITY TO SUE OR BE SUED. The capacity of an individual other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized . . ."

2. The defendant, Charlotte-Mecklenburg Board of Education, is a corporate body as provided by G.S. 115-27, which provides as follows:

> "115-27 BOARD A BODY CORPORATE.—The Board of Education of each county in the state shall be a body corporate by the name and style of 'The . . . county board of education' and the board of education of each city administrative school unit in the state shall be a body

corporate by the name and style of 'The city board of education'. The several boards of education, both county and city, shall hold all school property and be capable of purchasing and holding real and personal property, building and repairing school houses, selling and transferring the same for school purposes, and of prosecuting and defending suits for or against the corporation . . ."

3. In *Kistler* v. *Board of Education,* 233 N. C. 400, the plaintiff instituted suit against the Board of Education and others including the members of the Board of Education seeking to restrain the purchase of a site for a new school. Mr. Justice Denny of the Supreme Court stated:

"The Board of Education of Randolph County is the body corporate and by that name it shall hold all school property belonging to Randolph County, and it is authorized to purchase and hold real and personal property, build and repair school houses and to prosecute and defend suits for or against it in its corporate capacity. G.S. 115-45.

"The demurrer ore tenus to the complaint by the individual defendants was properly sustained. These defendants as individuals possessed no authority to exercise any of the powers that the plaintiffs seek to enjoin. *Board of Education* v. *Commissioners,* 192 N.C. 274, 134 SE 852."

In *McLaughlin* v. *Beasley,* 250 N.C. 221, suit was instituted against the individual members of the county board of education and others to enjoin the Union County Board of Education from proceeding with plans to acquire a school

site. Again, the North Carolina Supreme Court through Justice Bobbitt stated:

> "As to the individuals, who, according to the caption, constitute the members of the Board of Education, the demurrer ore tenus was properly sustained. *Kistler* v. *Board of Education,* supra as stated by Denny, J. 'These defendants *as individuals* possessed no authority to exercise any of the powers the plaintiff seeks to enjoin.' "

4. Under the pleadings and evidence in this action, the Court is without authority to join the individual members of the Charlotte-Mecklenburg Board of Education as they have no capacity to be sued under the state and federal law applicable to this action.

WHEREFORE, the defendants pray that the order dated June 4, 1969, entered by the Court in this action joining the individual members of the Board of Education as parties defendant be set aside and that this action be dismissed as to such individual defendants.

/s/ BROCK BARKLEY
Brock Barkley
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/s/ WILLIAM J. WAGGONER
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Attorneys for Charlotte-Mecklenburg Board of Education, Defendant

Response to Defendants' Motions to Strike Additional Parties Defendant

(Filed June 16, 1969)

Plaintiffs, by their undersigned attorneys, respectfully move the Court to deny defendants' motions to strike the Court's order adding them as additional parties defendant, and as grounds therefor, respectfully show the Court as follows:

1. This action was brought by Negro plaintiffs seeking an order enjoining further racially discriminatory policies and practices by the School Board in the operation of the Charlotte-Mecklenburg Public Schools. On April 23, 1969, the Court entered an Opinion and Order in connection with plaintiffs' motion for further relief, finding that the Board had failed to take effective steps to desegregate the school system. The Court accordingly enjoined the defendant to present plans for complete desegregation of the system. On May 28, 1969, the Board filed its proposed plan which completely ignored the instructions of the Court and proposed to do nothing further than provide free transportation for students moving from racial majority to racial minority situations. By order, date June 4, 1969, the Court noted that there had been several changes in the personnel of the School Board since this action was instituted and ordered that all present members of the School Board be made parties-defendant to the action in order that they may be fully before the Court and aware of all proceedings in this matter. The Court directed that copies of the Pleadings, Motions and Orders, be served upon the new parties. The new parties defendant have now moved the Court that the Court strike its order adding them as parties defendant contending that they have no capacity to sue or to be sued in this proceeding

and that the Court is without the authority to add them as parties defendant.

2. In view of the numerous cases, particularly school cases, in which individual members of school boards have been added and found to be proper parties defendant in a school desegregation case, one is hardput to understand defendants sincerity with their motion to strike their additions as parties defendant. Rules 19 and 20 permit joinder of parties whose additions are considered necessary or proper in order to provide complete relief in pending proceedings. These rules permit joinder of parties by the Court, with or without a motion by either party, if the Court should deem their additions proper for effective disposition of the pending action. 3A Moore's Federal Practice §§ 19.18, 19.19, 20.06; 2 Barron and Holtzoff, Federal Practice and Procedure, §§ 513.7, 533. See e.g., *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 12 L. ed. 2d 256; *Coppedge* v. *Franklin County Board of Education*, 273 F. Supp. 289 (E.D.N.C., 1967), aff'd 394 F. 2d 410 (4th Cir., 1968); *Scott* v. *Winston-Salem/Forsyth County Board of Education*, —— F. Supp. —— (M.D.N.C., 1968), proper not only to join the Board of Education, but also County Board of Commissioners, State Board of Education, and State Superintendent of Public Instruction. It is patently clear that the Court has authority to join as parties all persons having responsibility for implementing the Court decree or who might interfere with others having the responsibility to implement the decree. *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D.N.C., 1967), aff'd; *Wallace* v. *United States*, 389 U.S.

215, 19 L. ed. 2d 422. The School Board cannot act without the action of the individual members of the Board. The individual members, and not some supposed, imaginary entity are the true parties preventing the implementation of the Court's order. Plaintiffs have moved that each of the members of the School Board be ordered to show cause why they individually, and in their representative capacity, should not be held in contempt of the Court's order. As the Court has stated in its order of June 4, 1969, in order to avoid any misunderstanding or technicality, it is necessary and proper that all of the members of the School Board be brought individually before the Court and fully apprised of the Court's instructions. Their joinder is necessary and proper in order that the plaintiffs might have complete relief in this proceeding.

3. Defendants have cited several North Carolina decisions, all of which are completely inapposite to the matters involved here. The cases cited by the defendants concern generally the question of how title of school property is held. Plaintiffs do not challenge that, under North Carolina law, title of school property is in the local board of education. We are dealing here, however, with the question of desegregation of the school system and implementation of the Court order. The Courts have long sustained joinder of the individual members of school boards in such cases.

WHEREFORE, plaintiffs respectfully pray that the Defendants' Motions to Strike Additional Parties-Defendant be

denied, and that plaintiffs be granted relief as they have prayed in this proceeding.

Respectfully submitted,

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Transcript of June 16, 1969 Proceedings (Excerpts)

[487] * * *

Excerpts not Legible

Mr. Chambers: Your Honor, prior to the next case we have some additional documents to identify, introduce as exhibits for the p

Court: All right. If you will prepare [488] these documents and give a copy to the and to opposing counsel, we will dispose of ing the list or identifying them as we go me what they're about.

Mr. Chambers: They consist of [illegible] routes and descriptions in the Charlotte-Mecklenburg School System; annual reports on the transportation by the Transportation Department of the Board.

Court: Where are they?

Mr. Chambers: For the school years 66-67 through 67-68; and maps showing the district boundary lines for the school system from 1965 through 1967-68.

Mr. Waggoner: These are the documents we brought in as a result of the Court's direction.

Court: Mr. Waggoner, I received as evidence to the extent that it contains evidence the paper that you filed Monday entitled Answer to questions posed by the Court in June 4 order.

Mr. Waggoner: If the Court please, do I understand that the Court also is receiving in evidence the report filed with our plan of desegregation on May 28?

Court: Yes. If there are any specific objections, I'll entertain the objections but I assumed there were none because none have been made.

Mr. Chambers: As to the Board's report?

[489] Court: Yes.

Mr. Chambers: We have no objection.

Court: Is there any further evidence for the plaintiffs?

Mr. Chambers: None, Your Honor. We would like to tender in evidence the exhibits that we previously identified.

Court: Let them be received.

Mr. Barkley: We'd like to have an objection entered to the whole bunch of newspaper clippings entered in evidence. I don't believe we can try the case on the basis of newspaper clippings.

Mr. Chambers: Your Honor, we don't have but about three or four newspaper clippings that we identified and used, and the only reason for introducing those was to corroborate some testimony given by a witness.

Mr. Barkley: I don't believe a newspaper corroborates necessarily. Bring the reporter in here, his testimony might tend to corroborate or might not.

Court: I don't know whether the newspaper clippings you're talking about would contain anything corroborative or not but if they are considered by the Court that will be the only purpose for which they will be considered, whether they corroborate or rebut or impeach the testimony that has otherwise been offered. So to that extent the objection is sustained.

[490] Mr. Chambers: We have nothing further, Your Honor.

Court: Any further evidence for the School Board?

Mr. Waggoner: Yes, sir. I'd like to call Dr. Hanes.

Dr. Robert C. Hanes—for Defendant—Direct

DR. ROBERT C. HANES, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Waggoner:

Q. Will you state your full name and residence address? A. Robert C. Hanes, 1510 Audubon Road.

Q. What is your official position with the Charlotte-Mecklenburg Board of Education? A. I am Assistant Superintendent for Secondary Education.

Q. You cover the junior and senior high schools, is that correct? A. Yes, sir.

Q. Dr. Hanes, did you have occasion to deliver some documents pertaining to Metropolitan High to Mrs. Betsy Kelly? A. Yes, sir, I did.

Q. Would you tell the Court the circumstances of the conversation you had with Mrs. Kelly?

Mr. Chambers: Your Honor, I object again on the same ground that I raised yesterday. I take it that the defendant now tends to discredit his own client and a witness, I submit, should be a witness of the defendant. The party involved is a named party defendant [491] and I submit it would be improper for this type of examination to attempt to discredit one of the defendant's attorneys own clients.

Court: I'm going to overrule the objection but I do want Mr. Waggoner to say whether he does or does not continue to represent the witness Kelly, or the party Kelly.

Mr. Waggoner: If the Court please, I discussed this with Mrs. Kelly this morning and told her that in view of the developments of yesterday that I had some concern that I could properly continue repre-

senting her and offered to withdraw. She said that she had no personal feelings toward me and—

Court: I'm not asking a question about consent or lack of it applying but it raises a rather serious question about the propriety of the attorney in attacking the credibility of a client of his whom he is representing in court in this fashion. I have never seen it done before.

Mr. Waggoner: If the Court please, I ask permission of the Court to withdraw as counsel for Mrs. Betsy Kelly.

Mr. Chambers: I object to that, Your Honor.

Court: Tell the Court who you do represent, Mr. Waggoner. Do you represent all the members of this [492] Board except Mr. Poe.

Mr. Waggoner: If the Court please, we represent the Board of Education. The Court joined then all the members of the Board.

Court: The motion on behalf of Mrs. Kelly was filed by you and argued by you on her behalf.

Mr. Waggoner: Yes, sir. It was fairly well understood that we would continue representing the Board and represent the members of the Board for the purposes of this motion. I have had no private conversations with Mrs. Kelly in the nature of an attorney-client, no more than I have had with any other member of the Board. This was a convenience to them. We filed a joint motion on behalf of the Board and also on behalf of the individual members. I feel that perhaps it would be a little unfair for us at this time to withdraw as representing Mrs. Kelly because she hasn't had an opportunity to consult with counsel. By the same token, we have an obligation to the

Board of Education to present the facts as fully and fairly as we can. We did not introduce this evidence into the case.

Court: Was this conflict foreseeable?

Mr. Waggoner: No, sir, I was not aware of this. As late as last week we had a meeting and we discussed [493] the plan and what we proposed doing with the motion and at that time I understood that Mrs. Kelly fully supprted the Board policy.

Court: Wasn't it foreseeable that there would be some differences between some of your clients and some of your other clients about facts in the case?

Mr. Waggoner: Yes, sir, it was foreseeable but I had no idea it would ever reach the evidentiary stage. We objected to this but we have been pushed into this—

Court: As a professional matter does it leave you any comfort to know that you have come into a situation here where you are cavalierly making a choice in open court to abandon one client and pursue the others?

Mr. Waggoner: If the Court please, it is not cavalierly. The election to represent the individual Board members was purely a fortuitous circumstance that came up within the last two weeks. We have represented the Board continuously through this case. I came into it in February. If the Court please, to avoid any problem I will withdraw Dr. Hanes from the stand.

The Court: I'm not going to exclude his testimony. Frankly, I overlooked the problem when you were attacking Mrs. Kelly yesterday until it was all done.

Mr. Waggoner: It didn't occur to me until late in the evening that there was the professional possibility [494] of conflict. Mr. Gage is present. He has filed papers on behalf of Mr. Poe. Perhaps he could represent Mr. Poe as far as this aspect of the case is concerned. I think under any circumstances it would be unreasonable to expect new attorneys to come into the case when the order was entered to appear at this hearing and been of beneficial counsel to the parties.

Court: I don't know why that would be so. The order was entered two weeks ago.

Mr. Waggoner: If the Court please, this case is extremely complicated.

Court: The thing that is bothering me is a professional matter which I overlooked calling to your attention yesterday. A client is entitled to an attorney without a conflict of interests. Obviously you made a choice to pursue a conflicting course. I don't think you can pursue both courses. As a purely strongarm way out of it, if Mr. Gage wants to pursue the examination for this purpose, I'll let him question the witness but I believe in the interest of propriety you better not.

Mr. Waggoner: All right, sir.

Court: That doesn't satisfy the propriety but at least it keeps us from being afoul of it from this point forward.

[495] *By Mr. Gage*:

Q. Dr. Hanes, would you testify about the substance of your conversation with Mrs. Kelly, please, sir? A. I was not in court yesterday so I don't know exactly what was

said but I shall relate the incident that I think she was referring to as I recall it.

Q. We wish for you to give your own recollection of it. A. On a Saturday morning, shortly after the Court's order was published, Mrs. Kelly called me at home. She said that she and several of her friends were reviewing the Second Ward-Metropolitan situation and that she needed another copy of the staff study on the Metropolitan High School. I told her I would be glad to mail her a copy the first thing Monday morning. As we talked on she said she needed it before then and if I were going to the office any time over the weekend would I mind picking up the document and bringing it by her house. She suggested that I should just leave it in the mail box if she were not there. Late on Saturday afternoon I took the document by her house and gave it to her son. As I was getting in the car she came to the door and called me from the porch and I walked back down the walk and stood in front of her house on the walk and talked for a few minutes. We talked about a number of things. As I tried to recall all the things that we talked about, she was critical of me and other members of the staff because she felt that we did not [496] express our views strongly enough at Board-staff meetings. I replied to the effect that the Board members themselves were divided on most issues and this was a most difficult environment in which to work. She made some comment that we should not feel that our jobs as employees of the Board of Education were threatened in that she represented five votes on the Board. I disagreed with her and said, as I recall, that my estimate was that she was one of only four people on the Board who agreed on most matters and there were five others that disagreed. I do recall saying something to the effect that this kind of split was a threat al-

though I personally was not concerned about job security. I recall saying that the tensions were high among the Board and the staff and that people were under stress and that Dr. Self and Mr. Poe had certainly had disagreements as did other Board and staff members. I don't recall making such a statement that five members of the Board were threatening Dr. Self's position. If our conversation led Mrs. Kelly to this conclusion, I regret it but it's not to my personal knowledge that this is a fact. We talked briefly about the Metropolitan High School situation and about some other individual school situations which she asked me some questions about and we discussed.

Q. Was that the entire substance of the conversation? A. As I recall it.

Mr. Gage: Thank you, Dr. Hanes.

[497] Mr. Chambers: No questions.

Dr. William Self, having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Waggoner:

Q. Dr. Self, will you state your name and residence address? A. Dr. William C. Self, 5834 Kirkpatrick Road.

Q. Are you Superintendent of Schools for Charlotte-Mecklenburg? A. I am.

Q. Dr. Self, when did you first receive a copy of the Court order dated April 23? A. I believe that I received it on that same day or if not, on the following morning.

Q. Did your office make these Court orders available to all members of the Board of Education? A. They did. I talked with Mrs. Gattis about this since this has been an

object of testimony and she informed me that the copies were in Mr. Poe's hands, that Board members were called individually and were told they were there and they might pick them up, if they chose to go by.

Court: Let me inquire about this. There's been a lot of testimony about an unnecessary thing. I handed about a dozen copies to the attorneys for the School Board. What happened to those copies that day before [498] this thing was delivered to the newspapers or Clerk? What happened to those copies?

Mr. Waggoner: If the Court please, the copies were handed to me on April 23 approximately 2:00 or 2:30.

Court: It was just before or within minutes after the thing was filed in the court. What is the mystery about the information getting to the Board?

Mr. Waggoner: There is none although there has been a suggestion of it. This is what Dr. Self is testifying to.

Court: I guess I'm asking what the lawyers did with the copies of the order. The thing was held up until the order could be duplicated so there would be a copy for every member of the Board so they could have it before they read the newspapers.

Mr. Waggoner: They were not duplicated, as I understand it. Perhaps they were.

Court: Duplicated by me.

Mr. Waggoner: I received the copies that the Court instructed me were copies for the members of the Board of Education. I delivered them to Mr. Poe's office and the Board members were called in-

dividually on the same afternoon and told they could come by and pick up a copy if they wanted to come get them in a hurry. Dr. Self was telling what happened next.

[499] Court: Let's go on. I've been wondering about this all along.

A. To complete the picture, I believe Mr. Watkins did go by and pick up his copy. Mrs. Maulden instructed Mrs. Gattis to have hers mailed to her and the other Board members received their copy by courier the following day.

Q. So no later than April 24 every Board member should have had their copy, is this correct? A. That is my understanding.

Q. Dr. Self, upon receiving the order did you hold any staff meetings with reference to reviewing the order? A. Yes, we did. We met the following morning.

Q. Did you distribute copies to members of your staff? A. I did.

Q. Now, did you have occasion prior to preparing the so-called Self Plan to confer with the attorneys for the Board of Education? A. On several occasions, yes.

Q. And at that time the various aspects of the order were reviewed with you, were they not? A. Yes.

Q. And based on this, our recommendations, recommendations of your staff and other sources of information, you began the preparation of the Self Plan, is this correct? A. That's correct.

[500] Q. Was very much time spent in preparation of this plan? A. Quite a bit, yes.

Q. Was any consideraiton given to pairing? A. Yes.

Q. Was any consideration given to establishing a feeder system? A. Yes.

Q. Was any consideration given to busing? A. Yes.

Q. Would it be fair to say that consideration was given to all the alternatives suggested by the Court? A. I think we considered all the alternatives.

Q. Were there other alternatives that you considered? A. We, at one point in our thinking, were talking about exchange programs of both students and teachers. I don't believe you have mentioned that. We considered the possibility of alteration of attendance zones in such a way as to accomplish more integration.

Q. Now, the plan that you finally submitted to the Board of Education, was this proposed by you and the staff as a final plan? A. It was proposed as a tentative plan and was so marked. It was intended to generate discussion among staff members and Board members.

Q. In other words, this was to get conversation going in various areas of the plan, is this correct? [501] A. That's correct.

Q. Dr. Self, with reference to the proposed plan, I understand that it was submitted to the Board of Education. A. Yes.

Q. Would you describe the circumstances under which it was submitted? A. Copies of the plan were given to the Board for study. A press conference was held prior to the meeting of the Board of Education to brief them so that they might have an opportunity to more thoroughly digest the information and perhaps do a good job of reporting. We met. The Board heard the staff presentation. They asked questions for clarification and agreed at that point to take it under advisement and come back later and discuss it.

Q. Was this a public hearing? A. It was.

Q. Were television cameras present? A. No, they were

not although we did meet at WTVI. I beg your pardon, the commercial cameras were present, the WTVI cameras. This was not a school televised meeting.

Q. Dr. Self, could you tell us the occasions on which the staff and/or the School Board met to consider the Court order of April 23? A. I have a chronology of the meetings that were held. Is it your intention that I review these dates?

[502] Q. Yes, if you would. Just tell us the meeting date and if you recall, what took place on that date. A. As I have said previously, on April 24 we held our first meeting of the executive staff to discuss the plan. On April 28 we met with the elementary principals, distributed copies of the plan and interpreted the plan, solicited their opinions and reactions. There was on that same date a meeting of the Board of Education at which time the Board directed the staff to begin preparation of the plan. On April 29 the executive staff set to work. We considered the results of the principals' meetings. We began to develop the format of the plan. We followed with meetings with the secondary principals, paralleled the meetings that we had with the elementary principals earlier. There was on April 29 a meeting of the Board of Education and the professional organizations study group representatives. This was just prior . . .

Court: What professional organizations are you talking about?

A. Your Honor, the professional organizations study group is a committee of the Presidents of the professional organizations.

Court: What professional organizations are you talking about?

A. The NCEA, the NCHA, the Classroom Teachers Association, and I believe it's called the Mecklenburg Classroom Teachers Association. This meeting was held just prior to an area [503] meeting of the Board of Education.

Court: Where was that?

A. Garinger High School. The executive staff continued to work on the plan, meeting again on May 1. On that same, May 1, there was a meeting of staff members, namely, Self and Anderson with the same representatives of the professional organization. The primary purpose of this meeting was to discuss faculty integration and how it might be implemented. This was held at Dilworth School, a site which we frequently choose for meetings because of its central location. On that same date, May 1, we met again with elementary principals to follow up the first meeting that we had with them. We met on May 2 to continue our work on the plan. It was on this date that I spoke to the faculties of the various schools and tried to share with them the problem we were facing. I asked them to meet as a faculty and to select one member of their faculty to follow back to the executive staff their opinions and their concerns. That same date there was a meeting of the Board of Education and the so-called Harris School Study Committee. On May 3, which was a Saturday, we manned our telephones at the central office to receive the comments from teachers who had viewed the telecast on the previous day.

Court: What telecast was that?

A. The one where I spoke to the faculty. We asked the faculties to meet in schools and I used the channel WTVI to speak to [504] them about what techniques we might employ to achieve faculty desegregation. We continued to work on May 4 and on May 5 the directors and coordinators of the school system, which I called our second line of people, began to consider the problem and what their contribution might be in terms of helping to resolve it. On May 8 I held a general staff meeting of all directors and coordinators and principals to interpret the developing staff plan to them and on that evening we met with the Board of Education to present the staff plan. I believe that May 12 was the meeting between the Board of Education and representatives of the same professional organizations. This meeting was held at Dilworth. On May 13 there was a meeting of the Board of Education and this was a televised Board meeting using the educational television channel. I recorded that on May 19 the Board held its work session on the staff plan at the education center. On May 15 we met as an executive staff to consider the reactions of the Board of Education to our staff plan and see what alterations or amendments were called for. We continued to meet, this time on May 20 and on May 21 the Board of Education met to adopt the plan of desegregation which is presented to the Court.

Q. Dr. Self, do you have any estimate as to how many people were involved in the preparation of the plan? A. In terms of what I would call making heavy contributions, the [505] executive staff did the prime work. Beyond that directors and coordinators were involved particularly as it concerns faculty desegregation, as were all the principals in the school system.

Q. Would it be fair to say that the proposal that you came forward with was not lightly made? A. It certainly was not.

Q. Dr. Self, were you given any detailed rules or regulations under which you were to formulate your plan? A. No, I wasn't, Mr. Waggoner. I thought our charge was a rather broad and general one. I took it that we had the restraint of attempting to comply to the Court order and at the same time to attempt to prepare a plan with which the professional family could live and at the same time prepare a plan with which the community as a whole could live.

Q. Dr. Self, what is your opinion with reference to the accomplishment on faculty desegregation as of the present time under the plan? A. Please state your question again.

Q. What has the plan of desegregation accomplished at the present time with reference to faculty desegregation? A. According to a report presented to me this morning by Mr. Anderson, Assistant Superintendent for Personnel, there are 66 teachers who have volunteered. Twenty-eight of these are at the elementary level; twenty of the twenty-eight are black [506] and eight are white. At the junior high school level—this would include the Learning Academy—there are twenty-five volunteers; fifteen are black and ten are white. At the senior high school level there are thirteen volunteers; three are black and ten are white. The total then is thirty-eight black and twenty-eight white and the grand total is sixty-six.

Court: Are these all teaching positions?

A. These are all teaching positions, Your Honor.

Court: This is the final report?

A. This is the report as of this date. We are continuing to get some of the blue assignment sheets in from time to time.

Court: What was the significance of Sunday the 15th of June in this connection?

A. Sunday the 15th of June is the terminal date for pupil request of transfers. There is no terminal date to accept a teacher request.

Court: I'm sorry, I'd forgotten what that date referred to.

Q. Dr. Self, with respect to newly employed persons, has there been change in the report we filed with the Court in which we indicated that seventy-six newly employed teachers would be assigned across racial lines? Has there been any change in this? A. It's still our plan to use newly employed teachers wherever [507] possible to effect faculty integration. That seventy-six, of course, can change from one day to another and hopefully we can increase it.

Q. Is the staff prepared to make assignment of non-voluntary personnel?

Mr. Chambers: I object to that unless he can show they have authorization from the School Board to make such assignments.

Court: The testimony is that the plan under which it has been operating for four years, all teachers are employed by the Board and are assigned wherever the Board says. Is there any testimony that that's been changed?

Dr. William C. Self—for Defendant—Direct

Mr. Waggoner: If the Court please, I'm simply asking him if his staff is prepared to make a recommendation on this.

Court: Objection overruled. You can ask him about the authorization later.

A. I am prepared to share some feelings with the Court in terms of what effect the volunteers and newly assigned teachers will have on the overall faculty integration picture. May I use a chart to do that?

Q. Certainly. Do you have additional copies of that, Dr. Self? A. Yes.

Mr. Waggoner: May I have this identified as Defendants' [508] Exhibit #1.

A. The chart which has been passed out is one that is familiar to the Court.

Q. Dr. Self, you're referring to Defendants' Exhibit #1?

Court: I'm sorry. This is a chart that I have spent some hours trying to read but have never become familiar with it. Have you got a better way to tell me what you've got in mind?

A. I think so, if you can follow with me down the righthand column. I share your frustration at trying to interpret the figures. They are rather difficult. Down the righthand column under the heading of Professional Staff we have accumulated data in terms of faculty desegregation. Beneath those words are the year 1968 which reveals that we had 98 of our 112 schools with some degree of faculty integration, some degree meaning one or more. Those 98

was really made up of sixteen predominantly Negro schools and 82 predominantly white schools.

Court: Are you talking now about the way it's been up through last month?

A. That's right and I was going to try to show you how it would be updated.

Court: You've got 900 black teachers and 2800 white teachers in the system? Maybe it's 2600 white teachers and 900 black, is that about right?

[509] A. The total is the total at the bottom of the page, 505 and 2783; grand total of 3288. The key figure is in the middle of the page where you see the 131 and the 208. Can we dwell on that? That 131 represented 131 white teachers that were in predominantly Negro schools. The 208 are 208 Negro teachers in predominantly white schools. With the assignment of our volunteers and of our new people, this number that Mr. Waggoner read out a moment ago, that 131 white teachers will grow to 170 white teachers. The 208 Negro teachers will become 292. Those figures are penciled in to the right.

Mr. Chambers: Your Honor, I object.

Court: You've got 208 black teachers teaching in white schools. Where do you get the other 56?

A. Newly employed personnel, Your Honor.

Mr. Chambers: Your Honor, I object to this testimony because it's more confusion than factual. I assume this 208 means he is going to have the same 208 Negro teachers in the school next year.

Court: Is that part of your assumption?

A. There are 13 of those Negro teachers who are no longer in the position. We have to make up that amount of integration that we had won before we assign from this point on. There are 24 of those 131 white teachers who are no longer with us and we have to make up that loss before we assign additional teachers.

Court: I have never followed the theory of this page. [510] Can you tell me in words what it is you've got in mind? This page doesn't confuse me, it just doesn't enlighten me at all or darken me at all because of the way it's made up. I'll have to get you to tell me what you've got in mind.

A. Well, Your Honor, there were fourteen schools last year that did not experience any degree of faculty integration. As I recall it, these were all black schools. If we are going to have faculty integration in these schools, we must place white teachers in vacancies which exist on those school faculties. There are vacancies in five of those all black schools now. We intend to fill them with white teachers. To move in faculty integration in the other nine schools, we will have to take teachers from the faculty roll and move them somewhere else before we can assign white teachers there. The staff is interpreting the Board's plan on faculty integration, that part of which says that if voluntary efforts fail that the Board will use its power to assign teachers, to mean that we can move staff members from these all Negro schools.

Court: Aren't all of the teachers in the system subject to assignment wherever you ask them to serve unless they want to quit?

A. Yes.

Court: Do you create a vacancy by just transferring a teacher from one school to another?

[511] A. If there are no vacancies, particularly in a school with a diminishing enrollment, then the only way that you can have a vacancy into which you can move a white teacher is by transferring the Negro teacher out.

Court: What do you have in mind other than filling vacancies?

A. Moving some teachers from the all black schools to create vacancies so we can effect faculty integration. Beyond that, I think we would go to those schools which have minimal faculty integration and attempt to increase it.

Court: Anything else?
Mr. Waggoner: Yes, sir.

Q. Dr. Self, is it true that of the approximately eight or nine hundred black teachers in the Charlotte-Mecklenburg system that 292 of those teachers will be in predominantly white schools? A. That's our projection.

Q. That is purely on the voluntary and newly assigned teacher basis. A. That's right.

Q. So this is nearly a third of the black teachers in the community that will be in these situations? A. That's correct.

Q. Now, do I understand the lower figures to indicate that 95% of all teachers will be teaching in integrated schools next [512] year insofar as this part of the plan

goes? A. Assuming that you accept one teacher of an opposite race as evidence of integration.

Court: How do you view that particular proposition. If you've got one white teacher in a school with fifty black teachers is that an integrated faculty? And, if so, what benefits accrue to the students from having that arrangement?

A. Your Honor, it's integrated in terms of statistical accounting. In terms of it being a desirable situation, I would not judge it to be so.

Court: What would deem to be a desirable situation in this county?

A. I would say that there ought to be enough members of that minority race on the faculty so they can produce reinforcement and support for one another. That would mean a considerable number.

Court: Do you have the same essential feeling about the role of the black teacher who is assigned to a white school with fifteen or forty white faculty members?

A. I do.

Court: If the plan were designed so that you reorganized the faculty of the schools so there was a thorough going desegregation of the faculty, wouldn't [513] the whole process be more acceptable to those teachers who participated in that?

A. I think that this was the sentiment that the heads of the professional organizations did state.

Court: Will desegregation of faculties produce closer to an equality of educational calibre in all the schools that it would be if we carried on the way we are? Would it tend to equalize the educational opportunities as far as instruction is concerned?

A. I don't believe it would guarantee it.

Court: I didn't ask to guarantee it, what would be the tendency of it?

A. It would be the tendency, yes.

Court: All right, go ahead.

Q. Dr. Self, with reference to the Court's question about gerrymandering, are there any zones or school attendance districts known to you which were developed on racial lines to perpetuate segregation?

Mr. Chambers: Objection.
Court: Overruled.

A. I think our attendance lines reflect natural boundaries. There are in most instances natural boundaries between white and black neighborhoods. I think the net result of this has been to draw out attendance areas that produce, in some instances, all white schools and all black schools.

[514] Q. Now, with reference to pupil desegregation, in the present desegregation as it pertains to pupils what do you expect to accomplish by the beginning of the school

year September 1969? A. Our tabulation in terms of pupil assignment thus far indicates that 1816 pupils have requested change of assignment. Of this 1816 requests, 1484 are what I term regular assignments; 332 are majority to minority transfers.

Court: How many of the 332 are white children asking to go to black schools?

A. Two at the present time.

Q. Dr. Self, as I understand it, it would be impossible to construct and equip the new Metropolitan High School prior to the beginning of this school year. Do you have a target date in mind for the availability of the new facility? A. We had hoped the fall of next year, not this year but next year. I would anticipate some difficulty in meeting that schedule right at the moment.

Q. What effect do you expect the pupil plan to have on the all black schools that exist in this system? A. The only effect that I can see that it would have would be to slightly decrease the enrollment in some of the all black schools.

Q. Is this circumstance of having all black schools peculiar to the Charlotte-Mecklenburg School System?

Mr. Chambers: Objection.

[515] Court: Overruled. It's a well known fact but it won't hurt to prove it again.

A. No.

Q. Now, with reference to the varsity athletics prohibition of engaging in sports where you transfer to a new high school, what is the rationale for this rule? A. I think the previous testimony on this has been correct. It was

actually an attempt to prevent pirating of star athletes from one school to another.

Q. Do you feel that this particular provision of the plan would act to the detriment of desegregation? A. I do not feel so. If it developed that it was proving to be a detriment, then I think it should be reviewed.

Court: Can you tell what the effect of it is when people don't apply that may be subject to the rule?

A. The only way that I can think of that you would be able to tell, Your Honor, would be that people who do not apply because of this rule would have a tendency to speak out.

Court: You assume they would.

A. Yes, sir.

Court: If you have only two requests from white students to transfer to black schools, whatever effect this athletic rule has is not one that is going to prohibit the freedom of choice for white students, is it?

[516] A. That's right.

Court: Because they're not choosing to go to black schools anyhow.

A. That's right.

Court: So the only prohibiting effect that rule has, as a practical matter, is on black ninth graders, isn't it? . . . ninth and tenth graders.

A. It would have a tendency to be more inhibitive to the students in eleventh or twelfth grade because this is where the student begins to make the varsity. He could participate on the other teams.

Court: If an athlete is required by this rule to choose between playing football and going to a school otherwise of his choice, the effect of the rule is to discourage him from exercising his theoretical freedom of choice, isn't it?

A. Yes, it would be.

Court: And it's only black people who would be deterred by this, isn't it?

A. According to the present facts, yes, sir.

Court: Are these facts substantially any different than they have been through the last four years?

A. No, they are not.

Court: You've never had more than a tiny handful of white students choosing to go to black schools, have [517] you?

A. That's right.

Court: How has that figure run through the years? Has it been two or three, a dozen or two?

A. I don't recall. I would agree it's been only a handful.

Court: Well, if it should develop that the restriction prevents the exercise of a constitutional right,

do you think that the constitutional right or the orderliness of the athletic recruiting program is more important to the community?

A. I think the constitutional right is, of course, more important.

Court: Did you ever play football?

A. Yes, sir.

Court: If you had to lay out a year, would you have chosen to go to a school as a first year high school when you had a school you could go to and play freshman football?

A. That's been a long time ago, sir, I don't know.

Court: You don't think you would, do you?

A. No, sir.

Q. Dr. Self, this varsity athletic transfer rule, what was the basis for originally formulating it, what circumstance? A. Well, it had to do with an attempt on the part of an aggressive coach to recruit athletes of known ability from other schools and it was a rule that was attempted to deter that [518] sort of practice.

Q. As an educator do you regard athletics as a major portion of the students education? A. Yes.

Court: You recommended striking that thing out of the plan in your first draft, didn't you?

A. Yes, sir.

Court: You still think it ought not to be in there?

A. I think it's subject to some question and I think that we might come up with some provision for having our athletic director to review cases where someone is being penalized in this case.

Court: You still consider it a penalty, though, don't you?

A. Yes, sir.

Court: And you so said in the plan.

A. Are you referring to the staff plan, sir?

Court: Well, this plan says this penalty will be lifted if he goes back to the school he was told to go to originally, doesn't it?

A. Yes, sir.

Q. Dr. Self, you're familiar with the language of the Court in the order of April 23 in which it says one point on which the experts all agree and the statistics tend to bear them out is racial mix in which black students heavily predominate tends [519] to retard the progress of the whole group. Do you recall this statement? A. Yes, sir.

Q. Now, referring to the data submitted to the Court . . .

Court: There's another piece of that sentence.

Mr. Waggoner: All right, sir, I'll read the entire sentence: Whereas if students are mingled with a clear white majority, such as a 70-30 ratio, approximately the ratio of white to black students in Mecklenburg County, the better students can hold their

pace, with substantial improvement for the poorer students.

Q. This is, as I understand it, the Court's language. Now, referring to the data submitted in connection with freedom of choice, do you have such a table? A. Are you referring to the statistics I just read out?

Q. No, sir. This is the preparation by Dr. Church consisting of three or four pages on the effects of a freedom of choice if it were abolished. A. Yes, I have that.

Court: Is that in the . . .?

Mr. Waggoner: In the report of May 28, I believe, Your Honor.

Court: This is Exhibit 71 or 73, whatever it was, that Mr. Belk was identifying . . . 71. All right, I'm with you.

[520] Q. Dr. Self, would you point out to the Court those schools which would tend to improve the ratio toward a 70 white-30 black population in the school.

Court: I haven't sustained many objections, but if you'll rephrase that so I can understand it, I would appreciate it.

Q. Will you point out those schools in which the black students heavily predominate to which a few whites would be returned? A. Well, to do this we would have to turn to the second page where the schools are actually listed. If I might just go across the top of the first line just to sort of get my own mind focused on the question, Mr. Waggoner. Albemarle Road Elementary School, which is indicated by the W as a predominantly white school—in the

next two columns we see that there are 72 pupils attending Albemarle Road from outside of their school district. 70 of these are white and 2 are Negro. In the next two columns, we see that there are 19 white pupils, no Negroes, who are from that district but who are attending other schools in the school system. If you eliminated freedom of choice and if you returned all of these pupils to their original school, it would have the effect of taking those 70 white pupils who are attending outside of the district. It would also have the effect of sending from Albemarle Road the two Negro pupils and bring back no Negro pupils. So [521] that the net effect in terms of the minority race at Albemarle School would be the loss of 2 Negro pupils and that's the last column, minus 2N.

Q. With reference to Barringer School, what effect would abolishing freedom of choice have on this school? A. It would have the net effect of sending 19 white pupils back into Barringer School.

Q. Barringer is a school that is heavily predominantly black, is this correct? A. It is predominantly black.

> Court: Is it a fair summary of all this data that if you eliminated freedom of choice you would return to mostly black schools some twelve or fourteen hundred white students and most of this would be in the north and west parts of town, most of it in low income areas?

A. That's true. The summary, Your Honor, is on the preceding page.

> Court: I'm asking the question primarily with reference to the places where this would take place.

Dr. William C. Self—for Defendant—Direct

Is it generally true that freedom of choice has tended to enable white people in low income areas to get out of black schools?

A. It has had that tendency.

Court: Such as in Amy James 216; Tryon Hills 89; Villa Heights 42; Piedmont 110; Hawthorne 144, and [522] so on.

A. Yes, sir.

Court: And York Road 190. Is this one of the problems that the Court called to the Board's attention in the previous opinion.

A. In that section, Your Honor, where you said that freedom of choice could be permitted if it did not have the effect of perpetuating segregation.

Q. Dr. Self, with reference to the beneficial effect or detrimental effect of the freedom of choice plan, has it had any substantial influence on creating a favorable educational condition for certain students?

Mr. Chambers: Objection.
Court: Overruled.

Q. Would you like the question restated? A. Please.

Q. With reference to the freedom of choice plan, from a sound educational standpoint, has it been beneficial or detrimental to retain it under the plan of desegregation?

Mr. Chambers: Objection.
Court: Well, you've got another element in there but I'll overrule it.

A. I think it's been beneficial to retain it for reasons other than educational.

Court: You mean that people have raised less cain about [523] the situation because it's been in there?

A. I think it's proved to be an outlet, pop-off valve, yes, sir. I think that there might be education reasons associated with the assignment of a small handful of a minority race in another school, but to generalize on that topic, I don't think I can.

Q. Well, in the vast majority of schools there is a small handful or no students of the other race effected under this, is that correct? A. That's correct.

Q. Dr. Self, the Court has been puzzled by the free transportation provision of the plan. Could you elaborate on how the plan actually operates? A. Well, the plan states that if they are majority to minority transfers the Board of Education will provide transportation. The details of the plan have yet to be worked out. The administration assumes that if there are three pupils who elect to go from West Charlotte to Harding High School that it's our responsibility to furnish them with transportation, the same manner as we furnish transportation to the student going from a section of the county to Independence High School.

Q. All right, now, with reference to school capacities, would you explain how the mechanics of how the plan works with reference to determining which students will be accepted under free transfer? [524] A. The plan calls for the acceptance of majority to minority requests at any school up to a number which exceeds the maximum capacity by 20%. These transfer requests are to receive considera-

tion before any regular transfer requests receive consideration, so they are given priority.

Court: Suppose your school is already closed?

A. Then we would have to resort to a second or third choice if one were given and if second and third choices are not given, it's been our custom to communicate with the applicant and say the school is closed, would you care to select another one. This was the purpose of our publishing in the paper the names of the fifteen closed schools. We hoped to save some people some trouble in terms of applying for them.

Court: So those schools can be filled up already before any outside choices are made to go to those schools.

A. There are fifteen schools that are filled up already. By that we mean they are 20% over their capacity. There are two schools in which majority to minority requests would be effected. They are Ranson and Albemarle Road Junior High School. There were thirty requests to Ranson Junior High. 16 of the 30 requests listed a second choice so that we can accommodate them. 14 did not list a second choice and we would have to communicate with these parties and see if they would care to have another school. One request was made to [525] Albemarle Road Junior High School which is one of the 15 closed schools. They also had a second choice and we can grant their request to the second choice.

Court: So that freedom of choice means freedom of choice if they happen to have room over there under these rules.

A. Yes, sir, but it's a rather liberal interpretation or if they happen to have room.

Q. Dr. Self, do you feel that there is sufficient space in the white schools to accommodate the blacks who may request transfer?

Mr. Chambers: Objection.

Court: Objection overruled.

A. There is space, according to my previous statement, to accommodate all but fourteen of the majority to minority requests that I enumerated earlier. These may be accommodated in terms of second choices.

Court: Well, you're not going to get any more requests, are you?

Mr. Waggoner: No, sir.

Court: Do you expect any more?

A. No, sir.

Q. Dr. Self, what means of notice to students and parents was given with reference to the free transfer provision from majority to minority schools?

[526] Mr. Chambers: Objection, it's already in the record.

Court: What's in the record?

Mr. Chambers: The provisions or degree of notice the School Board gave to the parents. I call the Court's attention to the document filed with the Court on Monday, and we indicated at the time that we didn't have any objection to the document being introduced.

Court: Well, he may have something else in mind. Go ahead.

A. Notice was sent home with the children the last day of school and the notice had a letter which told of the assignment plan. One paragraph in the letter did state that free transportation would be furnished majority to minority transfers. Public notice was also given in the newspapers. These public notices were printed by the Board of Education as it had stated it would do in the plan.

Court: Is that the fine print ad that ran in the classified section?

A. Yes, sir.

Q. Dr. Self, was any prominence given in all notices with reference to the free transportation? A. If you mean was it set apart in bold type, yes. It was also set apart in bold type in the public notice but it was scarcely discernible.

[527] Court: The headlines in the public advertisement I believe were about two-thirds of the size of a typewriter, weren't they?

Q. Dr. Self, do you believe the measures employed to get notice to these students and their parents were reasonable means to communicate?

Mr. Chambers: Objection.

Court: I guess that's a matter I'll have to decide. Go ahead and answer the question.

A. Yes.

Court: Do you feel a fine print ad between the obituaries and classified ads is reasonably calculated to notify school children of anything, or are you

relying on the letter that was handed to them at school?

A. The letter would attract a good bit more attention, Your Honor. I think also that the attention surrounding this whole field and the news articles which have been written about it would attract more attention than the public notice.

Court: You're not including the published fine print advertisement in your feeling that a notice was reasonable, are you, as a part of it?

A. I think this was a satisfaction of a sort of a pseudolegal requirement that the Board felt it had to do.

Court: But as practically giving notice to a school [528] child, that printed notice in the paper wasn't worth much, was it?

A. It would be of much more value to the parent than the child.

Q. Dr. Self, have you had an opportunity to review Dr. Finger's proposed plan of desegregation of pupils? A. Very briefly.

Q. Did you find it to be substantially the same proposal he had made previously? A. It did seem to me to be a blending together of the three reports that were presented in earlier testimony.

Q. Did your office or your staff give consideration to redrawing some school attendance lines? A. Yes.

Q. And I assume that you rejected this idea, is that correct? A. At this time.

Q. For what reason? A. Well, the staff plan as it was proposed placed heavy emphasis on faculty desegregation. We had hoped to have a period of preparation of the community for further steps in pupil desegregation. So since the pupil desegregation major move was postponed, that particular type of intervention was not considered in the staff plan.

Court: When was it first postponed, was that at the first meeting?

A. As a part of the staff plan, sir.

[529] Court: Well, did the first staff plan make a staff decision to postpone everything but faculty desegregation?

A. Yes, sir.

Court: Was that pursuant to instructions from the Board or members of the Board?

A. No, sir.

Court: Was that decision postponed or understood when you started to work on the plan?

A. It was an understanding that developed as we worked on it, Your Honor. There were two major reasons I think for it. One of them was the tremendous amount of work that would need to be accomplished, and the second was the tremendous need that was apparent at that time for preparing the community for such steps.

Court: You're saying, then, that sometime shortly after the first meeting of the School Board the 25, 26, 27 or 28 of April, shortly after that the staff stopped work on the details of any possible plan for pupil desegregation.

A. We laid heavy emphasis on the faculty desegregation.

Court: I was asking you about the pupils. Your plan was prepared for presentation about the first of May, wasn't it, and withheld for presentation until the 8th of May?

[530] A. No, sir. It was almost a deadline job. We were coming off the press with it, I believe, about May 8.

Court: May 8 was the date of the Board meeting, wasn't it?

A. Yes, sir. We didn't finish it much before that date.

Court: And between the 23 of April and the 8 of May you had concentrated on the faculty desegregation question?

A. We had concentrated, our major emphasis was there. We had not overlooked student desegregation.

Court: And you had done no work on student desegregation plans since you reached that conclusion before firming up the May 8 plan, is that correct?

A. That's correct.

Colloquy

Mr. Waggoner: No further questions.

Mr. Gage: Your Honor, there are a few questions I'd like to ask for the same purpose as before either now or after cross examination.

Mr. Chambers: Objection.

Court: What do these questions relate to?

Mr. Gage: Concerning the allegations made about the Chairman of the School Board by Mrs. Betsy Kelly.

Court: Mrs. Kelly came to this hearing with a lawyer and she doesn't have one now.

Mr. Waggoner: Mrs. Kelly presented me with a note. [531] She would like to go on the stand as a witness. She has not released me as counsel and I will represent her to the best of my ability.

Mr. Chambers: Your Honor, I submit that this case is not involving a problem that counsel now proposes to go into. As the Court set forth at the beginning of the hearing, the question was whether or not a plan submitted by the Board complied with the Board's constitutional requirements. I understand now there's some question whether counsel wants to inquire whether some threat has been made against Dr. Self. I submit that has no relevance whatever to this matter now in controversy.

Mr. Gage: Your Honor, I'm puzzled that counsel for the plaintiff now wishes to limit the scope of the inquiry when he first broached the subject on cross examination of the Chairman on the witness stand and it was on his examination of Mrs. Betsy Kelly that all this came out. I believe that Mrs. Kelly has conferred with him. I believe Your Honor ought to strike all of this testimony out of the record if the scope of inquiry is to be now restricted.

Colloquy

Court: As I told you a while ago, I am not going to restrict the inquiry because we've been into it before. Mrs. Kelly, you may cross examine Dr. Hanes if you [532] want to recall him for that purpose and you may cross examine Dr. Self if you want to and if you now have a lawyer, which I thought twenty minutes ago you did not have, you may want to confer with him.

Mrs. Kelly: Do you want me to do it now?

Court: Do what, talk to Mr. Waggoner?

Mrs. Kelly: Yes.

Court: If you wish.

Mr. Waggoner: May we have a short recess, Your Honor?

Court: Take a ten minute recess.

SHORT RECESS

Court: Gentlemen, the Court yesterday was perhaps concentrating too much on what was being heard and not enough on the proportions of something that happened, I believe innocently, but it happened nevertheless. When your client is called by the opposite party and he gets through asking questions, the attorney who represents that client has a right to cross-examine his own client if he chooses to. This right does not extend to impeaching questions or suggestions. I overlooked this situation yesterday and I believe Mr. Waggoner overlooked it also and it did not come back to my attention until a moment ago when I interrupted the proceedings. Mr. Waggoner is in the position of having received confidences from two people who are in this [533] matter of impeachment on opposite

sides of the fuss and he has not been released by the School Board or by Mrs. Kelly and is in an impossible position. The Court has advised him on this subject to have nothing further to do with it by way of conducting the hearing or conferring with clients. The Court advises Mr. Gage that if his examination of the witness on the subject he is talking about is based upon information that came in any way from Mr. Waggoner, he must not ask questions based on that information. This is the reason I interrupted the conference between Mrs. Kelly and Mr. Waggoner a while ago because I thought for their mutual protection they ought to become separated immediately. A lawyer cannot have clients with interests which conflict and I am sorry I didn't see this when it first came up yesterday. This is probably not a matter of substance in the final conclusion of the case because, as I said a while ago, I expect to hear everything that may be pertinent and to make my decision on what I believe the facts to be. It is of importance to Mrs. Kelly and Mr. Waggoner that we get our amenities straightened out and proceed with some care from now on. She will be accorded the right to cross-examine Dr. Hanes, cross-examine Dr. Self if she chooses and to testify further or offer further [534] evidence if she wishes to after they conclude their testimony. Do the attorneys think that this now leaves us in a position to proceed without any further confusion?

Mr. Gage: Your Honor, I'd like to say that the information on which I now propose to proceed came to me directly from Dr. Self and Mr. Poe. I have not been briefed by Mr. Waggoner.

Dr. William C. Self—for Defendant—Cross

Cross-Examination by Mr. Gage:

Q. Dr. Self, would you state to the Court, please, sir, whether your job has ever been threatened by Mr. Poe. A. It has not. I think, as Dr. Watkins testified this morning, this is a time of tension. We have some very traumatic questions before the Board of Education and the staff. It is to be expected that the questions under consideration will produce differences of opinion and there have been differences of opinion among Board members, among the staff and among the Board and staff. At no time in my relationship with Mr. Poe have any differences of opinion which we have had reached the point where either of us felt that they must be resolved by my leaving the job.

Mr. Gage: Thank you, that's all.

Court: Mrs. Kelly, do you want to ask him some questions now?

[535] Mrs. Kelly: I would like to cross examine Dr. Hanes.

Court: Do you want to ask Dr. Self any questions?

Mrs. Kelly: No.

Court: If you're going to be asking questions, come up and sit at one of these tables so you can be heard a little better. Anybody else want to ask Dr. Self any more questions?

Cross Examination by Mr. Chambers:

Q. Dr. Self, you assisted in the preparation of the plan that was submitted to the Board on May 8, 1969? A. I did.

Q. The proposal submitted by the staff provided for the complete desegregation of teachers effective 1969-70. A. It did.

Dr. William C. Self—for Defendant—Cross

Q. In your professional opinion, Dr. Self, would it be feasible for this school system to completely desegregate the staff beginning September 1969? A. Yes, but I would qualify it by saying it would be extremely difficult at this point.

Q. It would, however, be feasible? A. Yes.

Q. Dr. Self, in answer to some questions from the Court you intimated that the staff early stopped consideration of combining any school districts, pairing of any schools or changing [536] or establishing a feeder system. Did you hear the testimony of one of the Board members yesterday —Mr. Poe, I believe it was—that the staff understood from the first Board meeting that the Board did not want to consider any changing in the student assignment which would require busing? A. I heard the testimony.

Q. Will you tell the Court, Dr. Self, whether when you began the preparation of your plan you proceeded with this understanding? A. Yes.

Q. Now, you testified about extensive consideration that the staff gave in the preparation of the plan it presented to the Board. A. Yes.

Q. Despite your extensive study, the Board saw fit to modify your plan and, in fact, water it down considerably. A. Acting within their authority, yes.

Q. So all of the study that you made with respect to teachers was changed by the Board. A. Again within their authority, yes.

Q. Did they spend half as much time as the staff in the staff's preparation of the plan? A. I do not know.

Q. From the time that you spent in the preparation of that plan, did you spend comparable time as Secretary to the Board with the Board in its consideration of the plan? [537] A. No.

Dr. William C. Self—for Defendant—Cross

Q. Did you hear Dr. Finger's testimony? A. Yes.

Q. And I think that you testified earlier that you had had a chance to glance at the proposal he submitted. A. Very briefly, yes.

Q. In your study or consideration of the Court's order, did you have a chance to consider some desegregation efforts in other communities? A. Not extensively. Some, but not extensively.

Q. Did you have a chance to consider some proposals dealing with pairing of schools? A. I did not read any information of this sort. I know generally about the pairing technique.

Q. Do you also know generally about consolidation of school districts? A. Yes.

Q. Do you also know generally about feeder systems? A. Yes.

Q. Are you familiar with the boundary lines for the Eastover Elementary School. A. Yes.

Q. Are you familiar with the boundary lines for Chantilly? A. Yes.

Q. Cotswald? A. Yes.

[538] Q. Is it Oakhurst? A. Oakhurst, yes.

Q. Approximately how far would Elizabeth be from Chantilly? A. In the neighborhood of two, two and a half miles.

Q. It would be feasible, would it not, Dr. Self, to combine these two school districts effective September 1969? A. From an administrative point of view it could be done. I think that a great deal of discussion has to go on regarding the use of transportation since I think transportation would have to be employed to do this.

Q. Now, if the districts of Eastover, Billingsville, Oakhurst and Cotswald were combined, approximately what

would be the mileage in diameter of those combined districts? A. I would estimate four to four and a half miles.

Q. Is it true that Eastover district presently has a diameter running north and south of approximately three and a half miles? A. I think that's a close estimate. It's elongated.

Q. Do you provide bus transportation in that district? A. No, we do not.

Q. Now, your combined district of Chantilly and Elizabeth would be about two miles. Would it be necessary to provide bus transportation within that district if they were combined? A. I think it would if you think in terms of the extremes of the district.

Q. Now, would it be feasible effective September 1969 to combine [539] the districts of Eastover, Billingsville, Cotswald and Oakhurst? A. Again, from an administrative point of view it could be accomplished. From the amount of community preparation standpoint, there is a tremendous amount of that that has yet to be done.

Q. Did you hear Dr. Finger's testimony about combining Marie G. Davis with Sedgefield and Collingswood? A. Yes.

Q. In your professional opinion would it be feasible to combine these districts effective September 1969? A. I would answer in the same way.

Q. You also heard his testimony about combining Bruns Avenue, Enderly Park and Ashley Park. A. Yes.

Q. Would your answer be the same with respect to doing that effective September 1969? A. I believe it would.

Q. You also heard his testimony about Thomasboro and Lakeview. A. Yes.

Q. Would your answer be the same with respect to combining those two school districts effective September, 1969?

A. It would be.

Q. You also heard his testimony about combining Tryon Hills and Hidden Valley. [540] A. Yes.

Q. Would your answer be the same with respect to combining those two school districts effective September 1969? A. Yes.

Q. Did you hear his testimony about the school districts of Plaza Road, Highland, Villa Heights, Alexander Street, Midwood, Shamrock Gardens and Merry Oaks? A. Yes, I did.

Q. Would you agree that the diameter, if these districts were combined, would be approximately two miles? A. I believe that would be a little bit on the slight side. I'm not sure.

Q. Would your answer be the same with respect to combining those school districts effective September 1969? A. That was not as clearcut as some of the others.

Q. It's not as clearcut? A. Yes.

Q. Did you hear his testimony about Wilmore, Dilworth and Myers Park? A. I did.

Q. Would it be administratively feasible to combine these districts effective September 1969? A. Administrative details could be accomplished.

Q. Now, did you look at the proposal with respect to establishing a feeder system for desegregating the junior high schools [541] and the senior high schools? A. Yes.

Q. Would it be administratively feasible to effect that proposal in your professional opinion effective September 1969? A. There are some points, I think, that would need clarification. I wasn't able to detect where Dr. Finger was proposing to send the children of the closed out schools, Fairview into McClintock, for example. I'm confused over that part.

Dr. William C. Self—for Defendant—Cross

Q. Otherwise, assuming that we found a place to put those children, would it be administratively feasible to implement the proposal with respect to the junior high schools and senior high schools? A. Yes.

Q. Now, is it true the Board presently proposes to close Bethune, Isabella Wyche and Zeb Vance Schools in September 1969? A. No. It is true that these schools that you mentioned are marked for abandonment but the final decision on that has not been made yet and before that can be done, the matter of whether or not they would be replaced by a school in locale or whether these students would be transported to outlying schools has yet to be made.

Q. Well, now, there was some consideration given to building a school to replace these schools when they were closed. A. That's correct.

Q. And I don't believe that the Board has yet decided where to [542] place this school to replace these three schools. A. That's correct.

Q. Now, would the schools in the adjacent districts be able to accommodate the students if these schools were closed effective September 1969? A. I am not certain of my facts but I doubt it.

Q. Well, we don't know the figures or the capacities of the schools in the adjacent districts? A. I could look that up, yes, sir.

Q. Do you have the figures with you? A. (No answer given.)

Q. Do you have a copy of Plaintiff's Exhibit #5? A. If I do, I don't know the number of it, Mr. Chambers.

Q. This is a copy of the proposal submitted by the plaintiff. A. Yes.

Q. Would you look at Page 2 of that proposal? In the

last paragraph would you look at the sentence beginning on the last line.

Court: What are we looking at now?

Mr. Chambers: This is the plan submitted by the plaintiffs.

Q. Would you read whether this plan requires the closing of those three schools we were talking about? A. The sentence begins: The Schools are Bethune, Wyche, Zeb Vance and Fairview. There are approximately 1,000 students [543] involved. The plan is not contingent upon the closing of these schools but if they are not closed, some modification in the plan will be required.

Q. It would be possible, therefore, to implement this plan and maintain those schools even next year? A. If I read this correctly, yes.

Court: Dr. Self, I have some recollection of hearing you or reading about you telling the Second Ward students to put in a request to go somewhere else next year. Where are the high schools with room for those 1,100 or so students? Where is it contemplated they'd go?

A. Your Honor, that was Dr. Hanes, I believe, that spoke to the Second Ward students. The high schools, though, would be those that surround the Second Ward district, they being Harding, Myers Park, Garinger and West Charlotte.

Court: Well is the Second Ward building substantially more decrepit now than it was sixty days ago? I just wondered.

A. No, sir.

Court: Is it the intention of the Board to close that school regardless of whether Metropolitan is built or not?

A. As I understand the intention of the Board, it is to establish a specialized school on that site.

[544] Court: I'm asking about the operation of Second Ward School in 1969-70. The inference from the urging of students to go somewhere else and this was the last graduating class was there would be no school there next year. Has that been decided?

A. Not fully, sir.

Mr. Chambers: I have nothing further.

Mr. Waggoner: I have nothing further, Your Honor.

A Tentative Plan for the Integration of the Charlotte-Mecklenburg Schools

For Discussion Purposes
Self Plan

Introduction

In accordance with the educational philosophy adopted by the Board of Education on December 18, 1968, it is the belief of the Board that the democratic way of life contributes the most benefit and happiness to members of society and that the school, as an agency of society, should be dedicated to the development, improvement, and preservation of democratic ideals. It is the feeling of the Board that all individuals should be given an equal opportunity to develop to the greatest possible extent their capacities for happy, useful, successful lives.

We feel that all individuals regardless of their abilities, past experiences, race, place of residence, social or economic status should have the right:

1. To share the skills, values, and knowledge of the human race.
2. To develop initiative and the ability to weigh facts, make judgments, and act cooperatively.
3. To attain a reasonable standard of living.

Note: The Board of Education is engaged in the process of developing a plan to comply with the District Court order of April 23, 1969. It should be emphasized that the statements made in this document are not final and should be regarded as such.

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A Tentative Plan for the Integration of the Charlotte-Mecklenburg Schools

4. To enjoy the widest share of freedom compatible with the equal freedoms of other people.

The schools have been recognized as the workshops of democracy. For generations the basic principles of American life have been introduced through the schools. By the effective use of the democratic processes, we believe that the complete integration of the Charlotte-Mecklenburg Schools can become a reality.

We are convinced that integration has provided and will continue to provide a more complete, realistic education for all individuals. It is our intent to present a reasonable plan for integration, which is designed to maintain and improve the quality of education in the Charlotte-Mecklenburg Schools.

As indicated in the District Court order of April 23, 1969, the Board of Education has "achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and has exceeded the performance of any school board whose actions have been reviewed in appellate court decisions. The Charlotte-Mecklenburg Schools in many respects are models for others." In this order the Court directed that the Board "submit by May 15, 1969, a plan for the active and complete desegregation of teachers in the Charlotte-Mecklenburg school system, to be effective with the 1969-70 school year. Such plan could approach substantial equality of teaching in all schools by seeking to apportion teachers to each school on substantially the same ratio (about three to one) as the ratio of white teachers and black teachers in the system at large." The Court further directed the Board to "submit by May 15, 1969, a

plan and a time table for the active desegregation of the pupils, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970."

In order to implement the Court order, we are prepared to take significant steps in achieving complete faculty integration beginning with the 1969-70 school year. In so doing, however, we realize that support must be given to faculty members through an intensive in-service education program. We intend to revise the present pupil assignment plan for the 1969-70 school year in order to promote further integration of pupils. It should be recognized that significant moves in pupil integration must be accompanied by a period of time during the 1969-70 school year in which the entire community will study and evaluate ways in which this might be accomplished. We are prepared to make some recommendations as alternatives for additional pupil integration to begin with the 1970-71 school year. Therefore, the objectives of the plan shall be as follows:

- To prepare the school system for complete integration.
- To achieve complete faculty integration.
- To revise the present pupil assignment plan.
- To prepare the community for additional pupil integration.
- To present some alternative plans for pupil integration.

Preparation of the School System

Much careful planning must be done to be certain that additional staff and pupil integration is accomplished with a minimum of disruption. The main thrust of this planning will call for significantly greater attention to the student's

individual needs and will require sustained and creative effort on the part of educators as they seek to cope with this problem. The planning must also deal with the employment of additional staff, the provision of a much broader range of curricular offerings, and the production of learning materials to reach pupils of varying levels of educational maturity.

In seeking to improve their own effectiveness, educators must gain a better understanding of pupils of both races. They must better understand individualized learning approaches and gain an appreciation of personal values and feelings. To accomplish these things during the 1969-70 school year, the staff must have time to plan adequately, especially for activities involving other staff members. Teachers must also have time to evaluate the effectiveness of newer teaching techniques. To accomplish the above:

a. Teachers who are transferred will be offered a two weeks summer workshop. Those who participate will receive a stipend of $100 per week. The cost of such a program is estimated as *$200,000*. An extensive effort will be made to underwrite the cost with funds from federal or state sources. If this attempt is unsuccessful, the project will be supported by local funds.

b. The Board of Education will renew the request for curriculum planning time for teachers which was approved by the Board of Education on October 8, 1968. The original plan which provided for planning time twice a month will be amended to provide for dismissal of pupils at approximately 1:00 p.m. one day

per week. If necessary, the Board will petition the legislative delegation for emergency enabling legislation.

c. The in-service education department will be assigned a sum of $10,000 for the employment of substitute teachers. The substitutes will be used to free experienced and highly qualified staff members for a period of time so that they may give added support to their fellow teachers through in-service workshops.

Other approaches to educational improvement involve staffing, curriculum, and supplies and materials. To facilitate improvement in these areas, supplementary support will be assured through the use of a special formula as follows:

Number of pupils in system two years or more below C-M median on paragraph meaning	times	$100 =	Supplementary allocation

Approximately 13 per cent of the pupils in the system have scores which are two years or more below the Charlotte-Mecklenburg median on paragraph meaning. In order to bring the expenditure for these pupils up to the national average per pupil expenditure will require an additional $100 per pupil. The total expenditure will be approximately $1,100,000. A small percentage of this amount will be used to employ support staff not assigned to a specific school, and the remainder will be apportioned among the schools on the basis of the percentage of qualifying pupils enrolled in each school. The principal and his teachers will

be asked to submit a plan outlining how the allocation is to be spent.

Faculty Integration

The integration of all Charlotte-Mecklenburg school faculties is a highly complex task in which the system has already had a great deal of positive experience. The degree of integration within respective schools has varied, but all schools have had some experience. In order to achieve an approximate three to one white to black racial balance in all grades and departments insofar as possible will require the cooperative effort of all teachers and administrators throughout the system. Based upon the experience of the past and the acceptance of professional responsibility by the members of our staff, we feel that complete faculty integration can be accomplished.

The school system will actively seek those teachers who have a high degree of motivation and are interested in volunteering for service to help in achieving this objective. Since the future will require a broad base of experience for all teachers, it is felt that most teachers will wish to become involved for a reasonable period of time in a variety of teaching opportunities.

The elementary, junior high, and senior high schools will be grouped geographically into clusters of schools in order to expedite the reassignment of teachers on the present staff for the 1969-70 school year. Such an arrangement will create smaller units within which there can be more cooperative effort and greater convenience of travel to those being reassigned.

The procedure for reassigning the present teaching staff will be as follows:

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1. Each principal will be provided a professional staff allotment for his school.
2. On the basis of this allotment, each principal will determine a table of organization for the 1969-70 school year.
3. Each principal will retain all teachers on his present staff who will have reached their sixtieth birthday by July 1, 1969, and who wish to remain in that school.
4. Each principal will retain all teachers on his present staff who are members of the black race in that school provided this number does not exceed the approximate desired ratio.
5. Each principal may retain on his staff such other teachers as he may believe to be absolutely essential to the continued efficient operation of the educational program in that school. The principal is urged to limit the number of teachers retained in #5 to a minimum. The total number retained in #3 and #5 may not exceed 25% of the total professional allotment.
6. Each principal will determine the number of volunteers on his present staff who wish to be reassigned for the purpose of helping to create a racial balance in all schools.
7. The principal of each predominantly black staff will determine the number of vacant positions in his school by reason of resignation, voluntary reassignment, or growth in pupil enrollment. He will then

determine the number of remaining teachers who must be reassigned in order to create the proper racial balance. The teachers to be reassigned will be determined by the principal and his staff using a procedure that they feel will be most effective for their particular school. This procedure may recognize factors such as seniority, travel, etc.; or the teachers to be reassigned may be chosen by random selection.

8. The principal of each predominantly white staff will determine the number of vacant positions in his school by reason of resignation, voluntary reassignment, or growth in pupil enrollment.

9. Volunteers from both races will be the first teachers placed in vacancies. Consideration will be given to allow teachers to move with co-workers wherever possible.

10. Black teachers who have been declared eligible for reassignment will be placed in vacancies in each predominantly white staff created in #8 above.

11. Those black teachers whose teaching assignment does not match vacancies created in #8 above will be assigned to each predominantly white faculty to provide the total proper number of black teachers on the school staff. White teachers will be reassigned to match the teaching assignment of the incoming black teachers. If more than one white teacher holds such assignment, the teachers to be reassigned will be determined by the principal and his staff using a procedure that they feel will be most effective for

their particular school. This procedure may recognize factors such as seniority, travel, etc.; or the teachers to be reassigned may be chosen by random selection.

12. All other vacancies will be filled by newly employed teachers.

13. All personnel to be reassigned will be notified in writing of their assignment for the school year 1969-70 prior to June 5, if possible.

14. A procedure will be established through which teachers may appeal their assignments.

Revision of Present Pupil Assignment Plan

At the present time, pupils are assigned to the various schools in the system under the provisions of the *Charlotte-Mecklenburg Schools Pupil Assignment Guidelines* officially adopted on June 13, 1967. The 1967 plan is based upon geographic zones surrounding each school. It permits freedom of transfer within the limits of available space.

It is the intention of the Board to revise the present pupil assignment plan as follows: (A copy of the revised plan is attached.)

A. "Attendance Areas," Item 1, Page 1

Eliminate the phrase "with the temporary exceptions hereinafter noted under the article entitled 'Exceptions'."

B. "Free Choice of Transfer," Item 4, Page 2

Alter the section to read as follows:

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"The right to exercise free choice of transfer is limited to any pupil who requests transfer out of a school where his race is in the majority, and to any school where his race is in the minority. Free transportation will be provided to any pupil who exercises and is granted a transfer under these conditions."

C. "Transfers Limited in Case of New Schools," Item 5, Page 3

Eliminate this section.

D. "Varsity Athletics," Item 6, Page 3

This section needs to be reviewed thoroughly (Eliminate, if possible).

E. "School Capacity to Be Determined," Item 7, Page 4

Eliminate this section.

F. "Transportation," Item 8, Page 4

Add the following after the first sentence:

"The only exception to this provision will be that for pupils who have exercised free choice of transfer as outlined in Item 4 (Revised), free transportation will be provided."

G. "Enrollment Continues for School Term," Item 9, Pages 4-5

Add the following after the third sentence:

"Rising 12th grade pupils for the school term 1969-70 may request to remain at the school to

which they were assigned and attended for the school term 1968-69. For the school term 1970-71, all pupils shall be assigned to the school serving the area in which they reside. A free choice of transfer will be considered as outlined in Item 4 (Revised)."

H. "Effective Date and Duration of Rules and Regulations," Item 12, Page 7

Change the first sentence as follows:

"These policies and guidelines shall control the assignment and reassignment of pupils for the forthcoming 1969-70 school term. . . ."

I. In addition to the above revisions the Board of Education will reassign all students (except 12th graders) now attending a school outside their geographic area to the school serving that area.

Preparation of the Community

In recent years the schools have become the focal point of action in connection with many broad social issues and a number of problems facing the community. Some examples are as follows: Providing for national defense education, teaching health and safety education, offering driver education, providing food for hungry children, combating poverty, lessening unemployment problems, easing social and racial tensions, caring for the mentally and physically handicapped, resolving civil rights issues, etc. As the most visible institution of community life, the schools have had to undertake these responsibilities with very little assistance from the community. In considering additional pupil

integration, it is imperative that the schools solicit the cooperative efforts of all, for the solution to this problem is complicated yet dependent upon finding answers to segregated housing, public transportation, employment practices, better financial support, a more tolerant attitude toward integration, and a real concern for all children.

In order to develop the pupil integration plans for the school year 1970-71 and succeeding years, the following procedures will be implemented immediately:

1. In assuming its leadership role, the Board of Education will solicit active help from all community groups. These groups will include the County Commissioners, City Council, Chamber of Commerce, news media, churches, civic clubs, PTA groups, real estate agencies, etc.

2. In order to involve the community, the Board will arrange to hold a number of public hearings at various locations throughout the county beginning at the earliest date possible. These meetings will be operated under strict guidelines in order to obtain the best thinking from every person or group who wishes to make a contribution. The guidelines for public hearings will be as follows:

   a. The time and place will be announced publicly at least five days prior to each meeting.

   b. Each individual who wishes to speak will make a written request to be heard to a designated person prior to the meeting.

   c. The time for each individual speaker will be limited to five minutes except in the case of a group which will be allowed one spokesman who may speak for

ten minutes. A timekeeper will be provided by the Board of Education. Each person will be allowed to speak only once.

d. Each speaker will be asked to give his name and state whether he is speaking as an individual or in behalf of a group.

e. For the benefit of those who wish to speak and have not made a written request, they will be asked to come to the front and talk with a screening committee prior to the beginning of the meeting. If the request is legitimate, they will be given an opportunity to speak after the others have been heard provided there is sufficient time.

f. The speakers will be divided into proponents and opponents. Time will not be allowed for a rebuttal.

g. It will be stated at the beginning of the meeting that there will be no demonstrations, no applause, etc. If there is disruption during the meeting, the chairman may close the meeting at any time.

h. The Board members will not question individuals as they speak, but instead, will make notes, and after all have been heard, will ask questions.

i. The length of the meeting will not exceed 2½ hours.

j. These guidelines will be announced at the beginning of the meeting.

3. The Board will arrange to hold meetings with local school committees and with their help develop a plan for involvement of each local school community.

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4. The Board will call on such groups as the Chamber of Commerce, League of Women Voters, Junior League, and American Association of University Women to organize a committee or committees to receive calls from citizens who would like to make suggestions. These suggestions would then be organized and submitted to the Board of Education for study and action.

5. The Board will identify school systems such as Evanston, Illinois; Shaker Heights, Ohio; Berkeley, California; White Plains, New York; and Hartford, Connecticut that have in operation plans for integration of teachers and pupils and will arrange to visit and study these systems. It is highly recommended that other governmental, civic, and community leaders visit these places along with the Board.

6. The Board will request that individual schools develop innovative ways to bring about additional pupil integration. School principals, teachers, and school committees might work in integrated clusters or groups in geographic areas in order to find the most effective ways to integrate the schools in that particular cluster or group.

Some Alternative Plans for Pupil Integration

With positive action on the part of the community, the school system will be able to move in the direction of additional pupil integration. It should be recognized that there are no easy solutions to the problem and that the final outcome of any plan can not possibly be known in advance. Some of the alternative plans that have been used successfully in other communities that might be discussed and

evaluated through the involvement of the local community are the following:

1. *Redrawing of present geographical attendance areas.* This plan would accomplish some additional pupil integration and would reduce overcrowded conditions that now prevail at certain schools.

2. *Providing student exchange programs.* Students would be temporarily assigned to another school for a specified period of time, not to exceed one semester.

3. *Pairing of certain schools.* Students in grades 1-3 would attend one school, and students in grades 4-6 would attend the other school.

4. *Clustering specific schools.* There would be open enrollment to any of the schools within a cluster in which the student is enrolled provided the approximate desired white-black ratio ....

5. *Utilizing the educational park concept.* Under this plan, students would be brought together from elementary school through high school. It would require extra large sites and adequate building space.

6. *Providing students with the opportunity to go to another school for a specific type of program.* This would be particularly suitable for secondary students whose interests, aptitudes, and needs have been highly defined. At the elementary level the plan could be adopted for reading and other specialized instruction.

7. *Transporting students to another school.* Under this plan students would be bussed to another school in

order to obtain an approximate desired white-black ratio.

8. *Other alternatives.* Plans other than these might be developed for consideration.

In order to develop the most acceptable plan for further pupil integration, the Board of Education requests additional time for study and evaluation. A plan for pupil integration would be submitted to the court for its review on or before January 1, 1970. Elements of this plan may be tried out experimentally during the 1969-70 school year in order to gain practical experience. The approved plan will be put into effect beginning with the 1970-71 school year.

Summary

In summary, the Board of Education has made considerable progress in the integration of schools. In order to continue this positive approach and to carry out the Court order, the Board of Education will take the following action by the year indicated unless otherwise stated:

1969-70 school year

1. Achieve complete faculty integration.
2. Carry on an intensive in-service education program in order to assist teachers in their new assignments.
3. Provide staff, materials, and learning experiences to reach pupils of varying levels of educational maturity.
4. Revise the present pupil assignment plan to promote further pupil integration.

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5. Involve the entire community in the study and evaluation of ways in which additional pupil integration may be accomplished.
6. Submit a plan to the Court on or before January 1, 1970, which will provide for increased pupil integration.

1970-71 school year

1. Put into effect a plan which will provide for increased pupil integration.
2. Continue a program of teacher assignment which will maintain the same approximate racial balance in each school as that existing in the total school system.
3. Continue to offer an in-service education program to assist teachers in their new assignments.
4. Continue to provide staff, materials, and learning experiences to reach pupils of varying levels of educational maturity.

Opinion and Order dated June 20, 1969

Pursuant to notice dated June 4, 1969, a hearing was held in Charlotte on June 16, 17 and 18, 1969, on various matters including (1) the motion of the individual defendants for dismissal; (2) the motion of the plaintiffs for contempt citations against the individual defendants; (3) the proposals offered by the defendants pursuant to the April 23, 1969 order as a plan for desegregating the Charlotte-Mecklenburg schools; and (4) the motion of the plaintiffs for an order restraining further school construction until the segregation issue has been satisfactorily resolved.

I.

The Motion of the School Board Members to Dismiss.

The motion of the individual defendants, members of the school board, to dismiss was and is denied. This is a suit under the Civil Rights Act involving questions of equal protection of laws and racial discrimination and segregation in the public schools. The individual defendants are proper parties and their presence is appropriate and desirable.

II.

The Motion for a Contempt Citation.

The motion of the plaintiffs that the individual defendants be found in contempt of the court is on this record denied. The board is badly divided and many of its recent decisions appear to be made by a five to four vote. Supreme Court judges now and then make five to four decisions. (Fortunately their votes in all major school segregation cases appear to have been unanimous.) The members of

the board have had uncomplimentary things to say about each other and about the court, and many of them obviously disagree with the legality and propriety of the order of the court; but these latter sentiments may be regarded by the court as evidence of disagreement with rather than contempt for the court who is himself not far removed from active participation in the time-honored custom of criticizing a judge who has ruled against him. Moreover, on an issue of such significance, the amount of foot-dragging which has taken place, up to now at least, should not be considered as contempt of court.

III.

The Plan of the Defendants.

1. *The history of the plan.*—The order of this court directing a further plan for desegregation was entered April 23, 1969. Within hours, various of the defendants expressed sharp views pro and con. The board met on April 28, 1969, and for the first time briefly discussed the order. By a five to four margin, apparently, they decided informally not to try to appeal immediately, upon the basis that the right of appeal from the order to prepare a plan was doubtful. The school superintendent was instructed to prepare a desegregation plan. No express guidelines were given the superintendent. However, the views of many members expressed at the meeting were so opposed to serious and substantial desegregation that everyone including the superintendent could reasonably have concluded, as the court does, that a "minimal" plan was what was called for, and that the "plan" was essentially a prelude to anticipated disapproval and appeal. In a county and city criss-

crossed by school bus routes for 23,000 pupils, more than twenty thousand citizens, mostly from affluent suburbia, many of whose children undoubtedly go to school on school busses, signed petitions against "involuntary" bussing of students. The frenzy of parents received a ready forum in televised meetings of the board. The staff were never directed to do any serious work on re-drawing of school zone lines, pairing of schools, combining zones, grouping of schools, conferences with the Department of Health, Education and Welfare, nor any of the other possible methods of making real progress towards desegregation.

The superintendent revealed the general terms of his plan within a few days and later presented it formally on May 8, 1969. It provided for full faculty desegregation in 1969, which the superintendent said he considered feasible. It provided moderate changes in the pupil assignment plans; and it contemplated future study of the other methods of desegregation suggested in the April 23, 1969 order.

The board then met, struck out virtually all the effective provisions of the superintendent's plan, and asked for more time from the court, which had previously been promised.

The board's committee on buildings and sites, newly reconstituted, met and voted to cancel the long standing plans for Metropolitan High School, and voted to build it as only a specialty and vocational school without including the comprehensive high school which consultants and experts, including the school board's staff and superintendent, had recommended and still recommend. No new facts except the order of court had developed to account for the sudden change of plan. The stated reason for the change was that a general high school in Second Ward (though not a vocational or technical school) would necessarily be black and

therefore should not be built. [The Second Ward school site, where Metropolitan is scheduled to be built, is squarely in the center of the city's population; is a scant four blocks from the south boundary of its zone; and is apparently the easiest high school in town to desegregate; its boundaries could easily be re-drawn by extending its southern boundary (Morehead Street) and its eastern boundary (Queens Road) a few blocks.]

Thereafter, on May 28, 1969, the plan was filed. Volunteers were requested among the teachers; pupil transfer requests were set out; and data on the workings of the plan began to accumulate.

During the early debate over the court order, events transpired between the chairman and the superintendent which were thought by an assistant superintendent and others to threaten the superintendent's job if he pushed for compliance with the court's order. A few days before this hearing, the board committee on personnel declined to accept the superintendent's recommendation that Robert Davis, a Negro, be appointed principal of one of the schools. This was the first time such a recommendation had not been accepted. After some debate, the decision was postponed, with the superintendent requested to bring in alternate names. The publicly stated reasons for not approving the appointment were that Davis, whose training, experience and qualifications were unquestioned, is a plaintiff in this case and a member of the Negro Classroom Teachers Association and has spoken out publicly in favor of compliance wth this court's order—including one television appearance before the board itself to which the board had invited interested citizens. Davis, according to the press, was eventually confirmed for the job on June 19, 1969, but only after a "loyalty oath" had been exacted. The

effect of the so-called "job threat" and the Davis incident, following the public statements of board members, is a clear message: School employees voice opinion contrary to the board majority on desegregation at personal risk.

2. *The June 16, 1969 hearing.*—The defendants, under the law, had the burden of showing that their plan would desegregate the schools. To carry that burden they introduced a short written brief and some statistical data and rested their case without live testimony. The plaintiffs called all members of the school board and the Rhode Island expert, Dr. Finger, who testified at the March hearing, and a few other witnesses. There was some rebuttal from the board.

3. *Findings as to Generdl Board Policy.*—

a) The board does not admit nor claim that it has any positive duty to promote desegregation.

b) School sites and school improvements have not been selected nor planned to promote desegregation and the board admits no such duty.

c) Board policy is that the Constitution is satisfied when they locate schools where children are and provide "freedom of transfer" for those who want to change schools.

d) Despite its inclusion in the "Plan," the decision of the board about Metropolitan High School is not really a final one; several members consider the issue in doubt, and the full board has not formally considered it.

4. *The Pupil Assignment Plan.*—The plan now proposed is the plan previously found racially discriminatory, with the addition of one element—the provision of transportation for children electing to transfer out of schools where their races are in a majority to schools where they will be in a minority. Such provision of transportation is approved.

Another provision of the plan makes high school athletes who transfer from one school to another ineligible for varsity or junior varsity athletics until they have been a year in the new school. For the current year, with the returns almost complete, only two white students out of some 59,000 have elected to transfer from white schools to black schools. Some 330 black students out of some 24,000 have elected to transfer to white schools. Only the tiniest handful of white students have ever in any year asked to transfer to black schools. The effect of the athletic penalty is obvious—it discriminates against black students who may want to transfer and take part in sports, and is no penalty on white students who show no desire for such transfers. The defendants' superintendent considers athletics an important feature of education. This penalty provision is racially discriminatory. The board is directed not to enforce it any more and to give adequate individual notice to all rising 10th, 11th and 12th grade students that they may reconsider their previous choice of schools in light of the removal of the penalty.

Freedom of transfer increases rather than decreases segregation. The school superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished. The use of a free transfer provision is a decision for the board; it may make desegregation more palatable to the community at large; it is not, per se,

if the schools are desegregated, unconstitutional. Nevertheless, *desegregation of schools is something that has to be accomplished independent of freedom of transfer.* This is a fact which because of the complexity of the statistics has only become clear to the court since the previous order was issued.

5. *The Faculty Assignment Plan.*—The plan originally proposed by the superintendent would have desegregated the faculty as a routine matter in 1969. The plan proposed by the board however is not materially different from the already existing plan. It continues to rely upon voluntary transfers and it contemplates affirmative assignment of teachers to black schools only late in the day after a hopeful routine of filling vacancies (some of which do not exist) has been followed. The board has not taken a position of leadership with the teachers and the results are apparent. Only 28 out of 2,700 white teachers, and only 38 out of 900 black teachers, had on June 18, 1969 indicated a willingness to transfer to schools of the opposite race. Testimony of the board members who comprise the majority of the board suggests that they do not really contemplate substantial faculty desegregation and that they may consider figures of "10%"; or one black teacher to each white school and one white teacher to each black school; or filling vacancies from the opposite race as they arise, to be compliance with the needs of the situation. None of these ideas, of course, amounts to desegregation of the faculty. The evidence submitted by the board does not demonstrate that the faculty plan will work. Several board members said that the plan to assign teachers is not an "idle promise."

All that it takes to make the faculty plan work is timely decision by the board to implement the assignment of teach-

ers. Board members are requested in this connection to consider the latest unanimous Supreme Court decision, *United States* v. *Montgomery County Board of Education* (October Term 1968), Case No. 798, decided June 2, 1969, reversing the Fifth Circuit Court of Appeals and upholding a district court order for faculty desegregation under a mathematical formula. Ruling on the factulty plan will therefore be deferred until after August 4, 1969, by which time the board is directed to file a report stating in detail what the plan has done and what the status of faculty assignments then is. The court considers the faculty assignment plan to be important and agrees with the superintendent of schools that immediate desegregation of the faculty is feasible. This is a substantial improvement which is available without arousing ghosts of "bussing," "neighborhood schools," or additional expense.

IV.

Gerrymandering

This issue was passed over in the previous opinion upon the belief which the court still entertains that the defendants, as a part of an overall desegregation plan, will eliminate or correct all school zones which were created or exist to enclose black or white groups of pupils or whose population is controlled for purposes of segregation. However, it may be timely to observe and the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of "building schools where the pupils are" without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James, obviously serve school

zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not named as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true "neighborhood school" philosophy.

* * * * *

The findings of fact in the April 23, 1969 order and all statements in this opinion are treated as findings of fact in support of the order. All of the evidence in the case is considered in support of the order.

ORDER

Based upon the evidence and upon the foregoing findings of fact the orders of the court are as follows:

1. The motion of the individual defendants to dismiss is denied.

2. No citations for contempt are made.

3. Decision on the faculty assignment plan is deferred pending receipt of a progress report from the board on or before August 4, 1969.

4. The one year penalty on transferring high school athletes is disapproved with direction as above for appropriate personal communication to rising high school students.

5. The provision of transportation for students transferring from a majority to a minority situation is approved.

6. The board is directed to proceed no further with action on Metropolitan High School pending a showing by the board that the school if constructed will be adequately desegregated and a finding by the court to that effect. This is based upon the previous findings that the board's decision on Metropolitan was unduly affected by racial considerations and that the board has not accepted its affirmative legal duty to build school facilities so as to promote desegregation.

7. As to the other building projects referred to in the motion for restraint on construction, the burden remains upon the defendants to show that these programs will produce desegregation. The written material tendered by the defendants on this subject is lengthy, and does not appear to sustain that burden. However, decision on the request for injunction against projects other than Metropolitan will be delayed pending further study of the evidence.

8. It is further ordered that the defendants proceed to prepare and submit by August 4, 1969, a positive plan for desegregation of the pupils of the Charlotte-Mecklenburg school system, as originally directed on April 23, 1969. A witness, Dr. Finger, described in detail a plan for desegregation by changing certain school zone lines and merging certain schools into districts and using certain schools as feeders for others. This plan shows a high degree of realism in that it minimizes the necessity for long-range transportation and takes substantial advantage of location and makeup of populations. Local school administration consider such a plan feasible. The local school administrative staff are also better equipped than Dr.

Finger, a "visiting fireman," to work out and put into effect a plan of this sort. It is believed that if the resources of the board can be directed as originally ordered toward preparing a Charlotte-Mecklenburg plan for the Charlotte-Mecklenburg schools, desegregation of both faculties and students may be accomplished in an orderly fashion. Counsel are requested to notify the court promptly if more time beyond August 4, 1969 is needed.

This is the 20th day of June, 1969.

JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Supplemental Findings of Fact in Connection With the Order of June 20, 1969 (Dated June 24, 1969)

The relatively complete extent of the segregation of the schools in this system is demonstrated by study of the defendants' statistics which were attached to and included in the original opinion of this court of April 23, 1969. There are about 24,000 black students in the county. As near as can be estimated, approximately 21,000 of these attend schools within the City of Charlotte. When *Brown v. Board of Education* was decided in 1954, the City of Charlotte had less than 7,500 black students. Today within the City of Charlotte 14,086 black students attend 21 schools which are totally black or more than 99% black. An additional 2,895 black students attend six schools whose black population is between 50% and 86% black. These schools are all rapidly moving to a totally or near-totally black condition under present policies. When all this is put together and understood, it becomes clear that of the City's 21,000 or so black students, nearly 17,000 of them according to the figures, and certainly more than 17,000 when the population trends are considered, are attending racially identifiable black schools.

This the 24th day of June, 1969.

JAMES B. McMILLAN
James B. McMillan
United States District Judge

Motion for Leave to File Supplemental Complaint, to Add Additional Defendants and for Temporary Restraining Order

(Filed July 22, 1969)

Plaintiffs, by their undersigned counsel, respectfully move the Court for leave to file a Supplemental Complaint and for a temporary restraining order restraining the defendants from giving consideration or effect to and from enforcing, administering, or applying certain provisions of North Carolina General Statutes §115-176.1 and as grounds therefor show the following:

1. Plaintiffs seek, by this motion, leave to file a Supplemental Complaint, copies of which are being forwarded this day to the Court together with summonses for service upon the North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina, parties which the plaintiffs seek to add as defendants to this action. Plaintiffs have served copies of the Supplemental Complaint upon counsel for those defendants now parties to this action.

2. The Supplemental Complaint seeks injunctive and declaratory relief against the following prohibitions contained in North Carolina General Statutes §115-176.1[1]

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio

[1] North Carolina General Statutes §115-176.1 was enacted as Chapter 1274 of the Session Laws of the 1969 North Carolina General Assembly which was ratified on July 2, 1969. A copy of the Ratified Bill is attached to the Supplemental Complaint as Exhibit A.

of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited and public funds shall not be used for any such bussing."

3. For reasons stated more fully in the Supplemental Complaint, plaintiffs allege that the purpose, motive and effect of the statutory provisions complained of therein is to forbid the defendants, now parties to this action, and other school officials in the State of North Carolina from complying with existing lawful orders of this and other courts and to forbid them from complying with the requirements of the Thirteenth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs allege that this is so because compulsory assignments and involuntary bussing, prohibited by North Carolina General Statutes §115-176.1, are necessary devices for complying with the orders of this Court entered on April 23, 1969, and June 20, 1969, and for complying with constitutional requirements.

4. Plaintiffs seek to add as parties-defendant, the North Carolina State Board of Education and Dr. A. Craig Phillips, the Superintendent of Public Instruction. These parties are charged by the constitution and laws of the State of North Carolina with the general supervision and administration of the public schools and the disbursement of public funds to the various public schools in North Carolina. They are thus required by North Carolina law to insure that public funds are not spent for involuntary buss-

ing and pupil assignments. They are therefore proper and necessary parties to an adjudication of the constitutional issues raised by the plaintiffs in the Supplemental Complaint. In addition, they are proper parties to this proceeding because, they, together with local school officials have an affirmative duty to take active steps to disestablish the dual school system in Charlotte-Mecklenburg County and other administrative units throughout the State.

5. Plaintiffs, in their Supplemental Complaint, request that a three-judge Court be constituted to determine their constitutional challenge to a statute of state-wide application. This motion for a temporary restraining order is addressed to the single District Court judge hearing this case pursuant to 28 U.S.C. §2284(3).

6. Plaintiffs allege that, unless immediately restrained, the defendants will apply the statutory provisions complained of herein and will thereby fail to comply with the orders of this Court of April 23 and June 20, 1969, thus causing plaintiffs irreparable damage. In support of this allegation, the plaintiffs attach hereto the affidavit of Reginald A. Hawkins, the next friend of plaintiffs in this action.

WHEREFORE, plaintiffs respectfully pray that they be granted leave to file their Supplemental Complaint, that they be allowed to add the North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina as defendants in this action and that all defendants be restrained

Motion for Leave to File Supplemental Complaint, to Add Additional Defendants and for Temporary Restraining Order

from enforcing the complained of provisions of North Carolina General Statutes §115-176.1.

Respectfully submitted,

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Order Granting Leave to File Supplemental Complaint and Adding Defendants

Upon motion by plaintiffs for leave to file a supplemental complaint and add The North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction for the State of North Carolina as defendants and it appearing to the Court that good cause is shown therefor

It is ORDERED that plaintiffs' motion for leave to file a supplemental complaint and to add The North Carolina State Board of Education and Dr. A. Craig Phillips, Superintendent of Public Instruction of the State of North Carolina as defendants is granted.

The United States Marshal is directed to serve the supplemental complaint and summons upon the above named defendants.

This 22nd day of July, 1969.

JAMES B. MCMILLAN
United States District Judge

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Supplemental Complaint

(Filed July 22, 1969)

I

This Supplemental Complaint is a proceeding for a temporary restraining order and a preliminary and permanent injunction against the enforcement of the portions of North Carolina General Statutes §115-176.1, (Chapter 1274 of the Session Laws of the 1969 General Assembly of North Carolina, ratified on July 2, 1969, a copy of which is attached hereto as Exhibit A) which reads:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

In addition, plaintiffs seek a declaratory judgment that the statutory provisions complained of are unconstitutional on their face and as applied.

II

A. Jurisdiction of this Court is invoked under 28 U.S.C. § 1343, this being a suit in equity authorized by 42 U.S.C. § 1983 to redress the deprivation, under color of North Carolina Law, of rights, privileges and immunities guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

B. Jurisdiction is further invoked under 28 U.S.C. §§ 2281 and 2284, this being a suit for a temporary restraining order, an interlocutory and permanent injunction restrain-

ing the enforcement, operation and execution of portions of North Carolina General Statues §115-176.1 and requiring the convening of a three-judge Federal Court. Jurisdiction is further invoked under 28 U.S.C. §§ 2201 and 2202, this being a suit for a declaratory judgment declaring the unconstitutionality of portions of North Carolina General Statutes 115-176.1.

III

A. The plaintiffs bringing this Supplemental Complaint are those plaintiffs who originally brought this action styled *James E. Swann, et al.*, v. *Charlotte-Mecklenburg Board of Education*, Civil Action No. 1974, which was filed on January 12, 1965.

B. This Supplemental Complaint, as the original complaint, is brought on behalf of the individual plaintiffs and other black students and parents similarly situated, pursuant to Rule 23 (a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of such other black students, who are and have been limited, classified, segregated or otherwise discriminated against in ways which deprive or tend to deprive them of equal educational opportunities because of race or color. The members of the class are so numerous as to make it impracticable to bring them all before the Court. A common relief is sought and plaintiffs adequately represent the interests of the class.

IV

The defendants in this action are:

(a) The Charlotte-Mecklenburg Board of Education, the original defendant in this case, and the individual members

thereof heretofore added as defendants by order of the Court dated June 4, 1969;

(b) The North Carolina State Board of Education, a public body corporate of the State of North Carolina, which is charged by the State Constitution and laws with the duty and responsibility of the general supervision and administration of the public schools and educational funds of the State of North Carolina; and

(c) Dr. A. Craig Phillips, who is the elected State Superintendent of Public Instruction of the State of North Carolina, the administrative head of the Public School System of the State and by force of law, a member and the Secretary of the State Board of Education.

V

Plaintiffs initially commenced this action on January 12, 1965, (Civil Action No. 1974) against the Charlotte-Mecklenburg Board of Education seeking to obtain the elimination of racial segregation in the public schools in Mecklenburg County.

VI

On July 14, 1969, the Court entered an Order approving a plan submitted by the Board for the desegregation of the schools. The plaintiffs appealed and the decision was affirmed by the United States Court of Appeals for the Fourth Circuit. (*Swann* v. *Charlotte-Mecklenburg Board of Education*, 369 F.2d —— (Fourth Circuit 1966).)

VII

A. On September 6, 1968, the plaintiffs moved the Court for further relief contending that the Board was required

to take further steps to disestablish the dual school system in Mecklenburg County.

B. On April 23, 1969, the Court, following several days of testimony heard in March, 1969, entered an Opinion and Order Regarding the Desegregation of the Schools of Charlotte and Mecklenburg County. The Court found that the schools remained segregated, that the pupil assignment system and the placement of the schools continued to racially segregate the pupils, that the faculties had not been adequately desegregated as previously directed by the Court in 1965 and that the Board was to submit a plan for the desegregation of the schools by May 15, 1969.

C. The Order directed the defendants to submit a plan for the active and complete desegregation of the teachers within the system to be effective in the 1969-70 school year and that the plan should seek to apportion teachers to each school in substantially the same ratio (3 to 1) as the ratio of white teachers and black teachers in the system at large.

D. The defendants were also directed to submit a plan and timetable for the active and complete desegregation of the pupils within the system to be predominantly effective in the fall of 1969, and to be completed by the fall of 1970.

E. The Board was directed to consider several methods of desegregation which had been advanced by the plaintiffs, including pairing of grades and schools; feeding elementary schools into junior and senior high schools; combining zones and free choice where each method proceeds logically toward eliminating segregation; bussing and other trans-

portation; setting up large consolidated school units freely crossing city and county lines to serve larger areas; and to seek aid as may be available from State and Federal agencies.

F. The Court thereafter upon request of defendant, granted an extension of time until May 29, 1969, within which to file its plan.

VIII

A. On May 15, 1969, the plaintiffs filed a motion for a temporary restraining order seeking to restrain all school construction pending approval by the Court of a school construction plan designed to promote desegregation of the schools.

B. The Board filed its plan on May 28, 1969, as required by the Order of the Court.

C. On June 4, 1969, the Court entered orders setting a date for hearing on the adequacy of the defendant's plan and set forth certain questions to which the parties were to respond at the hearing. In addition, the Court ordered that all members of the Board of Education be added as parties-defendant.

D. On June 11, 1969, the plaintiffs filed objections to the plan submitted by the defendant and moved for civil contempt.

E. On June 11, 1969, the defendants moved to set aside the Order of the Court adding the individual Board members as defendants. On June 12, 1969, a similar motion was filed on behalf of the defendant, William E. Poe. The plaintiffs filed a response in opposition to these motions.

F. A hearing was held on the adequacy of the plan and on all pending motions on June 16, 17, and 18, 1969.

IX

A. The Court entered an Opinion and Order dated June 20, 1969, which was supplemented by additional findings on June 24, 1969.

B. The Court denied the motions of the individual Board members to dismiss and denied plaintiffs' motion for contempt.

C. The Court found that a desegregation plan had been submitted to the Board by the Superintendent, but that the Board struck out virtually all the effective provisions of the plan; that the plan filed as to pupils and teachers was nearly identical to the one previously found racially discriminatory; that the attendance areas of several of the schools were racially gerrymandered; that the defendants had not met their burden to show that the school construction plan would promote the desegregation of the schools.

D. The Court found that desegregation of schools is something that has to be accomplished independent of freedom of transfer.

E. The Court ordered the defendants to prepare and submit by August 4, 1969, a positive plan for the desegregation of the Charlotte-Mecklenburg School System as originally directed on April 23, 1969.

Supplemental Complaint

X

A. The April 23, 1969 Order of the Court contained the following findings by the Court:

"The 'Neighborhood School' Theory . . .

. . .

The neighborhood school concept may well be invalid for school administrative purposes even without regard for racial problems. The Charlotte-Mecklenburg School Board, today, for example, is transporting 23,000 students on school busses. First graders may be the largest group so transported. If a first grader lives far enough from school to ride a bus, the school is not part of his neighborhood.

When racial segregation was required by law, nobody evoked the neighborhood school theory to *permit* black children to attend white schools close to where they lived. The values of the theory somehow were repudiated by the 1955 North Carolina General Assembly and still stands repudiated in the Pupil Assignment Act of 1955-56, which is quoted above. The neighborhood school theory has no standing to override the Constitution.

Bussing. Under North Carolina General Statutes, §§115-180, the Board is expressly authorized to operate school busses to transport school children. The state pays bus expenses only for rural children and for some who have been annexed into the city in recent years. This apparent discrimination against city dwellers is reportedly under attack in another Court. This Board already transports 23,000 students to school every day out of the 32,000 who live in the

area presently eligible for bus service. The present cost of school bussing is about $19 for bus operation plus the cost of the bus which is $4,500 per bus should not exceed $20 per pupil a year. In other words, it costs about $40 a year per pupil to provide school bus transportation, out of total per pupil school operating costs of about $540. The income of many black families is so low they are not able to pay for the cost of transportation out of segregated schools to other schools of their choice.

The Board has the power to use school busses for all legitimate school purposes. Busses for many years were used to operate segregated schools. There is no reason except emotion (and I confess to having felt my own share of emotion on this subject in all the years before I studied the facts) why school busses can not be used by the Board to provide the flexibility and economy necessary to desegregate the schools. Busses are cheaper than new buildings; using them might even keep property taxes down."

B. The Court found that 95% of the blacks were concentrated in the western portion of the City of Charlotte and that official action taken on schools, zoning and planning had contributed to this concentration.

XI

A. On May 7, 1969, a member of the Mecklenburg County House delegation of the North Carolina General Assembly introduced a bill (House Bill 990, a copy of which is attached hereto as Exhibit B) entitled "AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROTECT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN

WHICH THEY RESIDE." The Bill, as subsequently amended, was ratified on July 2, 1969 (See Exhibit A), and is now codified as North Carolina General Statutes §115-176.1.

B. The ratified bill, which has the same title as the bill introduced on May 7, 1969, provides:

1. Students cannot be excluded from any school on account of race.

2. Students shall be assigned to the school within the geographical district where the pupil resides, except for children attending special schools or except for any reason the local board deems sufficient.

3. *"No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing."*

4. The article does not apply in temporary situations of unsuitability of schools or over-crowding.

5. Nor does it apply to "any assignment made pursuant to a choice made by any pupil . . . pursuant to . . . a freedom of choice plan voluntarily adopted by the Board."

XII

The defendants State Board of Education and State Superintendent of Public Instruction are responsible to insure that the prohibitions against involuntary student assignments and bussing contained in North Carolina General Statutes §115-176.1 are complied with in the Charlotte-

Mecklenburg School System and other administrative units throughout the State and that public funds over which they have control not be used for any such bussing.

XIII

Involuntary bussing and pupil assignments which are prohibited by North Carolina General Statutes §115-176.1 are necessary devices to carry out the existing orders of this and other Federal Courts in North Carolina and to comply with the duties imposed by the Constitution upon defendants herein and other school officials in North Carolina. The purpose, motive and effect of provisions of North Carolina General Statutes §115-176.1 complained of herein, is to forbid these defendants and other school officials in North Carolina from complying with existing lawful orders of this and other Federal Courts and to forbid them from complying with the requirements of the Thirteenth and Fourteenth Amendments to the Constitution in the State of North Carolina. The provisions thus violate the constitutional rights of plaintiffs and other similarly situated.

XIV

Plaintiffs and those similarly situated and affected, on whose behalf this action is brought are suffering irreparable injury and will suffer irreparable injury in the future by reason of the provisions of the Statute complained of herein. They have no plain, adequate or complete remedy to redress the wrongs complained of herein other than this action for a declaratory judgment and injunction. Any other remedy to which plaintiffs could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits and would cause further irreparable injury.

Supplemental Complaint

WHEREFORE, plaintiffs respectfully pray that, upon the filing of this Supplemental Complaint, the Court:

1. Issue a temporary restraining order restraining the defendants, their agents and other persons acting in concert with them from giving consideration or effect to and from enforcing, administering, or applying the provisions contained in North Carolina General Statutes §115-176.1 complained of herein;

2. Convene a three-judge District Court as required by 28 U.S.C. §§2281 and 2284;

3. Advance this cause on the docket and order a speedy hearing of this action according to law and upon such hearing:

a. Enter judgment declaring the statutory provisions complained of herein void as repugnant to the Thirteenth and Fourteenth Amendments to the Constitution of the United States;

b. Enter a preliminary and permanent injunction restraining all defendants, their agents and other persons acting in concert with them from giving consideration or effect to and from enforcing, administering, or applying the complained provisions of North Carolina General Statutes §115-176.1;

c. Allow plaintiffs their costs herein, reasonable attorneys fees and such other and further relief as to the Court may appear equitable and just.

Supplemental Complaint

Respectfully submitted,

/s/ ADAM STEIN

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Durham, North Carolina

CHAMBERS, STEIN FERGUSON & LANNING
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Attorneys for Plaintiffs

Exhibit A Attached to Foregoing Supplemental Complaint

NORTH CAROLINA
GENERAL ASSEMBLY

1969 SESSION

RATIFIED BILL

CHAPTER 1274

HOUSE BILL 990

AN ACT TO PROTECT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter 115 of the General Statutes to be codified as G.S. 115-176.1 and to read as follows:

"G.S. 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil

may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the School Board, require assignment or reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Exhibit A Attached to Foregoing Supplemental Complaint

Sec. 4. This Act shall be in full force and effect upon its ratification.

In the General Assembly read three times and ratified, this the 2nd day of July, 1969.

H. P. Taylor, Jr.
H. P. Taylor, Jr.
President of the Senate.

Philip P. Godwin
Philip P. Godwin
Speaker of the House of Representatives.

Amendment to Plan for Further Desegregation of Schools

(Filed July 29, 1969)

Pursuant to the order of the Court dated June , 1969, the Board of Education proposed to amend and modify the amended plan submitted to the Court on May 28, 1969, by adding thereto the following:

Policy Statement

Equal opportunity to develop all capabilities to the fullest potential is the right of every individual in a democratic society. Since this right is a basic precept of education, it becomes the responsibility of those who make educational decisions to see that equality of opportunity is provided for all.

The Charlotte-Mecklenburg Board of Education affirms the long held principle that equality of educational opportunity for all children without regard to socio-economic, ethnic, religious, or racial differences is essential to the continued growth of our community and is basic to a free and open American democratic society.

The Board further believes that equality of educational opportunity can best be provided by attempting to free individuals from the burden and handicaps imposed by varied circumstances, backgrounds, and environmental differences. To this end the Board has devised an educational program which will to the greatest extent possible, provide for the equal development of all students regardless of such burdens and handicaps.

In this light, the Board of Education firmly believes further desegregation of students and professional staff will contribute to the educational and social development of all children. Based on its own experience and the experiences of other school systems, the Board is further of the belief

that desegregation of students should be coordinated with desegregation of teachers, principals, and staff members, both of which should be accomplished at the earliest possible date.

The section which follow outline the immediate plans of the Charlotte-Mecklenburg Board of Education for accomplishing this goal.

Close Schools and Temporarily Re-assign Pupils

The Charlotte-Mecklenburg School System has certain schools which are unsuitable for the continuation of an educational program because of the obsolescence of the physical plant and location, declining enrollment and other factors. The Board of Education will close the following schools and temporarily reassign students previously assigned to such schools to other schools more suitable for the quality of education of the students involved. Transportation will be provided pupils who are reassigned. The schools to be closed are:

Elementary Schools	*Projected Enrollment*
Alexander Street	260
Bethune	195
Fairview	330
Zeb Vance	235
Isabella Wyche	215
	1,235

Junior High Schools	*Projected Enrollment*
Irwin Avenue	630

Senior High Schools	*Projected Enrollment*
Metropolitan	1,135

Amendment to Plan for Further Desegregation of Schools

The schools to which the 1,235 pupils from the five closed elementary schools will be reassigned are as follows:

1.

Elementary

Receiving School	Number Reassigned	Projected Enrollment White	Negro	% Negro
Ashley Park	75	575	75	11
Beverly Woods	75	550	75	12
Huntingtowne Farms	60	570	70	11
Idlewild	90	573	92	14
Lansdowne	75	770	75	9
Merry Oaks	45	460	45	9
Olde Providence	90	535	100	16
Park Road	60	540	60	10
Sharon	100	425	100	19
Myers Park	50	437	73	14
Albemarle Road	50	500	50	9
Briarwood	45	670	50	7
Selwyn	75	615	80	12
Shamrock Gardens	60	535	60	10
Westerly Hills	75	605	75	11
Windsor Park	75	770	75	9
Winterfield	75	715	75	9
	1,175*	9,845	1,230	

* The differential between students from the closed schools and the number of students reassigned will be filled by special education students reassigned to nearby schools.

Nine of the above schools have sufficient capacity to accommodate the students assigned. The capacity at eight schools would have to be increased by the use of mobile units. These mobile units would be transferred from three schools which are presently receiving additions: Matthews—2, Statesville Road—5, and Tryon

2.

Junior High

Irwin Avenue Junior High students would be reassigned on the basis of the elementary schools they attended to schools having a low percentage of Negro enrollment. This reassignment would be as follows:

Receiving School	Number Reassigned	Projected Enrollment White	Negro	% Negro
Smith	90	1470	90	6
McClintock	150	1325	200	13
Eastway	180	1360	183	12
Wilson	75	1140	135	11
Alexander Graham	135	1045	144	12
	630	6,340	752	

Students whose parents object to involuntary transportation at Irwin Avenue Junior High School will be instructed

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Hills—7. By reopening Woodland Elementary School and housing the fifth and sixth graders from Paw Creek at this facility, an additional eight mobile units may be picked up from Paw Creek for use in the above schools.

The Board is aware of the fact that some parents may oppose the transportation of their children to distant schools which have the capacity to receive them. Should this occur, the following action will be taken: A program will be operated in the Zeb Vance building for elementary students from the former Zeb Vance, Isabella Wyche, and Bethune areas on a first come first served basis for students whose parents object to involuntary transportation. Students from Fairview and Alexander Street whose parents object to involuntary transportation will be instructed to enroll in the school nearest their place of residence. Zeb Vance and such nearby schools upon reaching a maximum capacity will not be permitted to receive additional students and such students will be assigned as previously reassigned.

to enroll their students in the junior high school nearest their place of residence as long as space is available and will be reassigned on a first come first served basis. If space is not available, such students will attend the junior high school to which they were previously reassigned.

3.

Senior High

The Metropolitan Senior High School attendance area would be eliminated and the area divided among the surrounding senior high schools. Description of the revised attendance areas are as follows:

East Mecklenburg—Begin at the intersection of Central Avenue and Briar Creek Road. Proceed westward on Central Avenue to McDowell Street. Proceed south on McDowell to East Fourth Street. Proceed eastward on East Fourth Street and Randolph Road to Briar Creek.

Myers Park—Begin at Randolph Road on Briar Creek. Proceed west on Randolph Road-East Fourth Street to McDowell Street. Proceed north on McDowell to East Eleventh Street. Proceed west on Eleventh Street to North Tryon. Proceed south on Tryon Street to the intersection of South Tryon and Independence Boulevard.

Garinger—Begin at the intersection of Central Avenue at Briar Creek Road. Proceed westward on Central Avenue to the intersection of Central and McDowell Street. Proceed north on McDowell to East Eleventh Street and west on Eleventh Street to North Tryon, north on Tryon to Dalton Avenue. West on Dalton to North Graham.

Amendment to Plan for Further Desegregation of Schools

Harding—Begin at the intersection of Summit Avenue and South Tryon Street. Proceed north on South Tryon to West Trade. Proceed west on West Trade to Irwin Creek.

West Charlotte—Begin at the intersection of North Graham and Dalton Avenue. Proceed southeast on Dalton Avenue to North Tryon. Proceed south on North Tryon to the intersection of Tryon and Trade. Proceed west on West Trade to Irwin Creek.

South Mecklenburg—Begin at the intersection of South Boulevard and Scaleybark Road. Proceed north on South Boulevard and Camden Road to the intersection of South Tryon. Proceed southwest on South Tryon in a line to connect with Griffith Street. From Griffith Street, proceed in a line south to Nations Ford Road and the present South boundary. Continue southward on the present boundary.

Metropolitan Senior High School students would be reassigned in this manner:

Receiving School	Number Reassigned	Projected Enrollment White	Negro	% Negro
Harding	240	831	409	33
West Charlotte	185	0	1660	100
Garinger	85	2350	250	9
East Mecklenburg	250	2100	280	12
Myers Park	200	1802	308	15
South Mecklenburg	175	2084	231	10
	1135	9167	3138	

Amendment to Plan for Further Desegregation of Schools

Transfer Some Students From All Or Predominantly Negro Schools To All Or Predominantly White Schools

The Board of Education has determined that the following schools will experience substantial overcrowding during the 1969-70 school year. The Board of Education therefore propses to reassign temporarily a portion of such students as follows:

Schools	*Number Reassigned*
Double Oaks	110
Amay James	225
Lincoln Heights	140
University Park	140
Barringer	280
Villa Heights	225
Lakeview	50
Wilmore	75
	1245

Transportation for these 1245 pupils will be provided. The facilities and other factors of the following schools would provide more desirable educational conditions, and, therefore, such students would be reassigned to receiving schools as follows: Cotswold, Sedgfield, Thomasboro, Chantilly, Devonshire, Enderly Park, Hidden Valley, Midwood, Montclaire, Oakhurst, Pinewood, Rama Road, Starmount, Steele Creek.

Facilities, student body growth and other factors make it impossible to determine at this time the precise allocation of such reassigned students to the receiving schools.

Amendment to Plan for Further Desegregation of Schools

Restructure Of Attendance Lines

The Charlotte-Mecklenburg Board of Education has conducted a preliminary review of school attendance lines. This review has revealed that it is possible to further pupil desegregation by a restructuring of attendance areas. Indeed, this restructure may well be the best long-range solution to the further desegregation of the schools.

Thus, the Board intends to undertake the extensive study immediately. The study will require approximately six months to complete. The procedure which the Board intends to use is based upon the concept of systems analysis assisted by computer calculations.

The results of the study will be incorporated in the pupil assignment plans for the 1970-71 school year.

Review Of Construction Program

The Board of Education will institute a comprehensive review of the entire school construction program. The objective of this study will be to locate, construct, and organize school facilities in such a way as to promote desegregation to the extent possible. The study of the current construction program will be completed by February 15, 1970, and a more general long range study will be completed by June, 1970.

In addition to the study of the building program itself, the Board will point out to the Planning Board, the Housing Authority, the Urban Redevelopment Commission, real estate interests, local government officials and other interested parties the extent to which they share the responsibility for bringing about desegregation in this community. This study will also clarify for the community additional building funds which will be needed by the school system in the immediate future.

Amendment to Plan for Further Desegregation of Schools

While the total review of the building program is underway, the Board will conduct specific studies on all sites which it may be necessary to purchase and as each construction project which it may be necessary to begin before the study is completed. The purpose of each specific review is to be assured that each site or project is so developed as to produce the greatest degree of desegregation possible.

Support Programs

It is the opinion of this Board of Education that students and staff members called upon to make adaptations to change should be given support and reinforcement. To this end, the Board plans to initiate, within the funds available, a program of compensatory education for certain students. This program, to be initiated during the 1969-70 school year, will be aimed at assisting those pupils who are behind their classmates in academic achievement.

Furthermore, the Board is well aware that an increase in faculty desegregation will require a more extensive program of in-service education aimed at better teacher orientation and adjustment. To meet this need, the Board has instructed the central office staff to look carefully at the resources available for the task, the obstacles to be overcome, and the specific steps to be taken to see that this task is accomplished during the 1969-70 school year. The objectives of such a program would be to (1) create a willingness to study and change one's own behavior and develop the ability to do this more scientifically, (2) improve the teacher's knowledge of the environment, background, and special learning problems of students in a desegregated setting, and (3) improve the teacher's professional competence—subject matter, knowledge, teaching skills, and classroom performance.

Amendment to Plan for Further Desegregation of Schools

Grouping Of Schools For Student Exchange

Many schools have experienced significant desegregation moves the past several years. The Board of Education feels that all segments win the school community should share in the tremendous changes encountered in further moves toward desegregation. The Board has sought in the preceding steps to involve large numbers of schools which to this point have been little affected. For the remaining schools which have not been so involved, the Board plans to implement during the 1969-70 school year student exchange programs. Predominantly Negro schools will be paired as matched with predominantly white schools and intensive efforts to produce student contacts through class projects, intramural games, field days, the exchange of students and similar activities will be initiated.

I, William C. Self, Superintendent of the Charlotte-Mecklenburg school system and Secretary to its Board of Education, do hereby certify that the foregoing is a true, perfect and correct copy of the Amendment to the Plan for Further Desegregation of the Mecklenburg School Unit as adopted by the Board of Education on the 22nd day of July, 1969, and spread upon its minutes.

Amendment to Plan for Further Desegregation of Schools

This the 29th day of July, 1969.

/s/ WILLIAM C. SELF
William C. Self
Secretary to the Board

Respectfully submitted,

/s/ BROCK BARKLEY
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/s/ WILLIAM J. WAGGONER
William J. Waggoner
1100 Barringer Office Tower
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Attorneys for Defendant,
Charlotte-Mecklenburg
Board of Education

Report in Connection With Amendment to Plan for Further Desegregation

(Filed August 4, 1969)

On July 29, 1969, the Charlotte-Mecklenburg Board of Education submitted its amendment to plan for further desegregation of the schools of the Charlotte-Mecklenburg School Administrative Unit as approved by the Board of Education by official action on July 22, 1969.

The following information is submitted for the information of the Court in consideration of the plan.

Following entry of the order of the Court on June 20, 1969, the Board met, reviewed the order and appointed a subcommittee of five members to investigate, prepare and recommend to the full Board a possible plan for further desegregation of the schools served by the system. The committee met on frequent occasions and several of its members, along with staff members, traveled to Syracuse and Buffalo, New York, to review desegregation procedures employed by those systems. All plans of desegregation submitted in reported cases subsequent to the New Kent County decision were reviewed in search of ideas for possible further desegregation within the system. The staff independently and in conjunction with the committee held numerous meetings and explored various alternatives. Subsequently, on July 22, the committee made its formal recommendation to the Board. The Board of Education adopted the recommendation for amendment to its plan for further desegregation of the schools in the system which was filed herein.

The Board of Education expected to file the plan of desegregation and this report contemporaneously and selected the target date of July 29 for the filing date. By

reason of difficulty in correlating statistical information, it was determined that the plan of desegregation should be filed as scheduled to prevent further public speculation concerning its contents and that the report should be filed as soon as the information was reasonably available. Accordingly, this report is submitted for the information of the Court for consideration in conjunction with the plan of desegregation.

It is most important that at all times the plan of desegregation be considered in light of the policy statement which commits the Board to a course of desegregation to be accomplished at the earliest possible date.

Admittedly, the first two provisions of the amendment to the plan are interim measures to be utilized during the 1969-1970 school term. In the past, and with Court approval, the Board of Education has closed a substantial number of schools and consistent with its policy of phasing out obsolete schools, the plan provides for closing five elementary schools, one junior high and one senior high school. All students will be reassigned for one school term pending development of a comprehensive restructuring of attendance lines and review of the construction program, which should result in substantial further desegregation.

A similar situation will exist with reference to transfers from overcrowded schools. On restructuring attendance zones, the overcrowding should be remedied for the school term beginning 1970-1971.

The factual data concerning desegregation in the schools for the year 1969-1970 discloses that 13,000 Negro students out of 24,843 will be assigned to schools in which the white student enrollment is ten per cent or more, which percentage was acknowledged by plaintiff's experts to constitute

a desegregated school. Thus, a predominance of the Negro students in the system will be assigned to desegregated schools this year. At this point, the Board cannot specify the number of students or parents who may object to assignment outside of their former attendance area. Exhibit "A" relating to projected racial composition of pupils and faculty for statistical purposes assumes complete acceptance of reassignment. It is hoped the communities affected will respond in such manner as to assure success of this interim measure.

Prior to reaching the decision to transfer Negro students from their neighborhoods on a temporary basis, the Board of Education found from studies of the school systems in Syracuse and Buffalo, New York, one-way bussing of Negroes was generally acceptable to all segments of those communities.

With reference to transportation of students from closed schools including the junior and senior high schools, Page 2 of the Plan provides: "Transportation will be provided pupils who are reassigned." Students formerly attending Irwin Avenue Junior High and Metropolitan Senior High will be advised prior to the opening of schools of the assembly points for transportation to their new assignment.

At the prior hearing in this matter, the Board of Education advised the Court that transfers from majority to minority racial situations amounts to 332 students, all of whom are black. By reason of the closing of schools, this number will be reduced to 227 as 105 students, though attending the school of their choice, will not be leaving a school in which their race is in the minority by reason of reassignment. Nevertheless, transportation will be furnished for the 105 students.

Report in Connection With Amendment to Plan for Further Desegregation

Attached marked Exhibit "B" is a summary of the actions taken with respect to free choice of transfer requests processed during the period expiring June 15, 1969. Assignment will be made in conformity with the requests granted.

In its order of June 20, 1969, the Court disapproved the provision of the plan relating to disqualification of athletes on transferring from one school to another. The notice attached as Exhibit "C" will be distributed to all coaches at senior high schools for distribution to all junior and senior varsity athletes. To assure that all freshman athletes entering high school will receive notice, junior high school coaches will distribute the notice to all former ninth grade junior and senior varsity athletes. Attempts will be made to obtain newspaper publicity.

The most significant of the provisions of the Plan relates to the restructuring of attendance lines. The Board's policy in the past has been to establish school lines on a non-racial basis. It is most significant that the Board will undertake to restructure attendance lines for the purpose of achieving further pupil desegregation. Restructuring of attendance lines coupled with a revision of the policy on building schools to promote desegregation should offer the most beneficial and least disruptive method for achieving further desegregation and indeed may offer the best long range solution to the problem.

As an aid in restructuring attendance lines, the Board will utilize a new concept in desegregation. A computer assisted systems analysis approach was suggested to the Board by an interested citizen. He presented a manually prepared illustration which admittedly did not consider all

of the options available to a computer. However, it indicates that dramatic changes in racial composition of many schools may be achieved.

The Board recognizes that the systems analysis approach is merely one of the aids to assist in restructuring of school attendance lines. However, it will provide extremely helpful information in conforming school lines to natural boundaries which will promote further desegregation. It is expected that this approach will provide even more dramatic desegregation in junior and senior high schools which have larger attendance areas.

Attached marked Exhibit "D", the Court will find the revised building construction program dated July 30, 1969, which reflects the latest revision of this program and is based upon the same criteria employed in formulating prior programs. Attention is called to the fact that it does not reflect any implementation of the Board's new policy of promoting further desegregation. Upon approval of the plan, immediate review of the entire construction program will be initiated to promote the stated Board policy.

Attached marked Exhibit "E" is a copy of the statement made by Dr. Self in making presentation of this plan to the news media.

With reference to faculty desegregation, substantial changes have been made as indicated on Exhibit "A". With few exceptions, schools having black or nearly all black students have white faculties ranging from 40 to 50 per cent of the faculty of such schools. All other schools have significant desegregation. By the school term 1970-1971, further faculty desegregation will be experienced. With respect to the seven closed schools, all members of the

teaching faculty have been reassigned within the school system. Three of the principals of the closed schools will move to new principalships, two of which will be in predominantly white schools. Four of the principals have been assigned to positions which have equal or greater responsibility on the central staff of the school system. Attached marked Exhibit "F" reflects the new assignments of such principals.

This the 4th day of August, 1969.

Respectfully submitted,

/s/ Brock Barkley
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Charlotte, North Carolina

/s/ William J. Waggoner
William J. Waggoner
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Charlotte, North Carolina

Attorneys for Defendant

Report in Connection With Amendment to Plan for Further Desegregation

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

Dr. William C. Self, of lawful age, being first duly sworn, on his oath states that he is the Superintendent of Defendant named in the above and foregoing matter and that the facts stated herein are true according to his best knowledge and belief.

/s/ WILLIAM C. SELF
Dr. William C. Self

Sworn and subscribed to before me
this 4th day of August, 1969.

/s/ FAYE JALLEY
Notary Public

My commission expires: 3-27-71

The Charlotte-Mecklenburg Schools

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
October 1, 1968-69 and 1969-70 (Estimated)

School	Pupils 1968-69			Pupils 1969-70, Est.			Staff 1968-69			Staff 1969-70, Est.		
Elementary	B	% B	W (other)	B	% B	W (other)	B	% B	W (other)	B	% B	W (other)
Albemarle Rd.	4	1%	499	*53	10%	502	6	32%	13	6	30%	14
Alexander Street	257	100%		Closed			11	100%		Closed		
Allenbrook	50	10%	452	55	11%	465	2	10%	18	5	24%	16
Ashley Park	0	0%	553	*75	12%	575	2	9%	20	6	23%	20
Bain	25	3%	699	25	3%	735	1	3%	28	5	15%	25
Barringer	668	84%	131	500	90%	55	13	41%	18	14	44%	18
Berryhill	119	15%	685	100	12%	715	2	6%	32	6	16%	27
Bethune	223	99%	3	Closed			11	100%		Closed		
Beverly Woods	0	0%	286	*75	12%	550	1	8%	12	6	29%	16
Billingsville	619	100%	2	605	100%		25	100%		15	60%	10
Briarwood	8	1%	640	*55	9%	665	3	12%	22	6	21%	22
Bruns	740	99%	4	793	100%	2	26	93%	2	21	70%	9
Chantilly	2	0%	491	*42	8%	503	1	5%	21	4	19%	17
Clear Creek	58	20%	225	60	19%	260	1	8%	12	3	23%	10
Collinswood	72	13%	490	70	12%	510	1	5%	21	4	17%	19
Cornelius	239	49%	252	230	48%	250	7	33%	14	5	26%	14
Cotswold	11	2%	567	*75	12%	595	1	5%	21	4	19%	19
Davidson	101	35%	186	100	36%	190	1	8%	11	2	15%	11
Marie Davis	705	100%		695	100%		29	100%		14	50%	14
Derita	165	18%	728	140	16%	720	3	9%	32	6	17%	29
Devonshire	0	0%	889	*110	11%	935	4	10%	37	7	17%	34
Dilworth	223	39%	355	225	43%	295	4	15%	22	6	24%	19
Double Oaks	800	100%		700	100%		32	100%		19	61%	12
Druid Hills	504	99%	3	512	99%	3	20	100%		12	60%	8
Eastover	49	8%	580	50	8%	570	1	4%	24	4	16%	21
Elizabeth	270	58%	194	310	67%	150	2	9%	21	4	19%	17
Enderly Park	2	1%	374	*57	13%	393	1	6%	15	3	19%	13
Fairview	363	100%		Closed			19	100%		Closed		
First Ward	749	100%		825	100%		30	100%		16	52%	15
Hickory Grove	80	13%	531	80	14%	505	1	4%	23	4	19%	19

Does not include staff assigned to more than one school per HEW r
% N is nearest whole per cent that N is of total
* In 1969-70 as increased by schools which are closed
____ During 1969-70 as increased to relieve overcrowded schools (which are underlined)

(WCC)

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
(Continued)

ool	Pupils						Staff					
	1968-69			1969-70, Est.			1968-69			1969-70, Est.		
entary	B	% B	W (other)	B	% B	W (other)	B	% B	W (other)	B	% B	W (oth
den Valley	0	0%	977	*140	12%	1025	2	5%	35	7	17%	34
hland	47	13%	324	70	19%	305	1	7%	14	2	13%	14
kins	18	6%	261	25	10%	235	2	15%	11	2	17%	10
tersville	162	22%	560	165	23%	560	2	7%	25	5	19%	22
tingtowne Farms	7	1%	695	*67	10%	573	1	4%	26	5	19%	21
lewild	2	0%	521	*92	14%	573	1	4%	22	6	23%	20
y James	477	100%	1	300	100%		19	100%		13	65%	7
eview	269	65%	147	345	84%	65	14	74%	5	12	60%	8
sdowne	0	0%	758	*75	9%	770	1	3%	30	6	18%	27
coln Heights	817	100%	2	625	100%		30	100%		16	55%	13
g Creek	250	35%	466	255	35%	480	2	7%	26	5	18%	23
thews	93	11%	742	95	11%	765	1	3%	32	6	19%	26
ry Oaks	0	0%	469	*45	9%	460	1	5%	19	4	17%	17
wood	1	0%	522	*65	11%	505	2	9%	21	4	17%	19
tclaire	0	0%	722	*95	10%	730	1	4%	27	5	16%	23
rs Park	23	4%	543	*70	13%	435	1	4%	23	4	17%	19
ions Ford	63	10%	585	65	9%	660	1	4%	25	5	17%	22
ell	73	15%	423	60	11%	435	1	5%	18	4	20%	16
dale	72	13%	480	70	12%	505	1	5%	21	4	17%	17
thurst	2	0%	615	*53	8%	647	1	4%	23	4	16%	21
lawn	650	100%		575	10%		25	93%	2	11	48%	12
le Providence	102	21%	434	*100	16%	535	1	6%	17	6	24%	19
k Road	0	0%	551	*60	10%	540	1	5%	21	7	30%	16
Creek	63	11%	861	40	6%	707	1	3%	31	6	18%	28
eville	168	32%	363	170	31%	330	1	5%	21	4	17%	19
ewood	0	0%	707	*120	14%	735	1	4%	26	5	19%	22
za Road	99	19%	409	115	23%	375	1	5%	21	4	19%	17
a Road	2	0%	777	*82	9%	795	2	7%	27	5	17%	24
gefield	7	1%	545	*70	11%	570	2	9%	20	4	18%	18
wyn	5	1%	598	*78	11%	617	1	4%	22	5	19%	21
mrock Gardens	0	0%	539	*60	10%	535	1	5%	20	6	25%	18
ron	0	0%	519	*90	18%	410	1	5%	20	5	24%	16
rmount	25	3%	713	*95	11%	775	1	3%	28	5	16%	26
tesville Road	295	36%	534	300	36%	525	3	9%	29	6	19%	25
ele Creek	12	2%	531	*80	13%	550	1	5%	20	4	18%	18
Gate Cuney				15	6%	180						

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
(Continued)

School	Pupils 1968-69			Pupils 1969-70, Est.			Staff 1968-69			Staff 1969-70, Est.		
Elementary	B	% B	W (other)	B	% B	W (other)	B	% B	W (other)	B	% B	W (other)
Thomasboro	0	0%	705	*140	19%	690	2	7%	25	5	19%	22
Tryon Hills	241	50%	245	240	51%	230	1	5%	20	3	14%	16
Tuskegee Jee	61	10%	553	60	10%	540	1	4%	23	4	17%	19
University Park	777	100%		610	100%		30	97%	1	21	92%	1
Zeb Vance	257	100%		Closed			11	100%		Closed		
Villa Heights	796	86%	126	650	92%	60	23	62%	14	21	55%	17
Westerly Hills	0	0%	569	*75	12%	570	1	4%	22	5	19%	22
Wilmore	145	33%	293	200	43%	265	8	40%	12	10	43%	13
Windsor Park	2	0%	737	*77	9%	768	1	4%	27	6	18%	27
Winterfield	0	0%	699	*75	9%	715	1	4%	26	6	19%	25
Isabella Wyche	222	100%		Closed			12	100%		Closed		
Child Development (Ele. Centers)												
Davidson, #1	3	9%	117	60	40%	120	3	30%	7	3	30%	7
Grenville, #2	166	82%	37	165	83%	35	2	20%	8	8	80%	2
Seversville, #3	174	87%	26	176	88%	24	8	80%	2	7	70%	3
Morgan, #4	193	97%	6	190	95%	10	8	80%	2	2	20%	8
Total Elementary	13,930	30%	31,816	14,183	31%	31,991	501	27%	1356	510	27%	1330

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
(Continued)

ool / ior High	Pupils 1968-69 B	% B	W (other)	Pupils 1969-70, Est. B	% B	W (other)	Staff 1968-69 B	% B	W (other)	Staff 1969-70, Est B	% B	W (oth
earle Road	66	9%	801	60	6%	960	4	9%	43	7	17%	35
xander	347	31%	755	375	33%	775	6	12%	44	8	16%	42
hrene	765	35%	1444	75	5%	1495	6	10%	55	11	17%	53
lwood	119	14%	727	110	12%	785	4	11%	34	6	17%	39
tway	30	1364		*183	12%	1357	3	5%	55	11	17%	52
x. Graham	9	1%	1014	*145	12%	1045	4	9%	43	8	17%	40
thorne	492	52%	447	535	49%	540	12	27%	33	13	27%	35
in Ave.	656	100%		Closed			32	97%	1	Closed		
Clintock	464	34%	122	*200	13%	1325	2	4%	49	10	16%	52
rtlwest	932	100%		1050	100%		39	100%		22	55%	19
edmont	428	89%	53	430	92%	35	15	52%	12	13	46%	15
il Hollow	171	12%	1261	172	12%	1318	3	5%	61	10	16%	53
ndolph	272	26%	711	255	24%	750	2	5%	38	9	20%	35
son	253	30%	576	280	34%	550	6	16%	31	9	24%	27
dgefield	199	19%	802	200	22%	730	5	11%	39	8	19%	35
ith	0	0%	1379	*90	6%	1470	3	5%	57	9	14%	54
ush	136	15%	771	200	18%	935	6	12%	43	10	22%	36
lliams	993	100%		850	100%		37	100%		22	56%	17
lson	605	31%	1332	*135	11%	1140	4	8%	45	9	18%	40
ck Rd. Kennedy)	727	99%	6	850	99%	5	32	99%	1	20	55%	16
arning Academy - 7th & 8th grades counted in JH, above,							5	19%	21	4	30%	9
Total Junior High	5,934	29%	14,741	6,195	29%	15,215	228	24%	706	219	30%	697

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
(Continued)

School	Pupils				Staff			
	1968-69		1969-70, Est.		1968-69		1969-70, Est.	
Senior High	B % W B (other)		B % W B (other)		B % W B (other)		B % W B (other)	
West Mecklenburg	1555 7% 1739		*330 14% 2050		6 7% 85		17 16% 92	
Garinger	2027 % 2157		*335 13% 2265		6 6% 102		20 17% 99	
Harding	1691 7% 814		*450 36% 800		4 5% 49		10 16% 50	
Independence	92 9% 962		115 10% 1035		6 9% 59		12 18% 55	
Myers Park	1585 % 1855		*345 16% 1765		6 6% 87		17 17% 84	
North Mecklenburg	4100 % 109		490 30% 1170		6 9% 63		13 19% 66	
Olympic	259 33% 522		320 38% 520		5 11% 39		10 22% 36	
Second Ward	1139 100% 3		Closed		57 95% 3		Closed	
South Mecklenburg	1066 % 1712		*260 11% 2055		4 5% 78		17 19% 65	
West Charlotte	1569 100%		*1650 100%		74 93% 6		55 66% 29	
West Mecklenburg	118 8% 1340		160 10% 1415		4 5% 73		14 19% 6	
Total Senior High	4,377 26% 12,313		4,465 25% 13,075		178 22% 644		219 24% 697	

CORRECTED JULY 28, 1969

CHARLOTTE-MECKLENBURG JUNIOR HIGH SCHOOLS

	Enrollment	Requests to enter granted	Requests to leave	Net change	Back to original assg.	Granted as 2nd choice	Summary July 1	Final Summary
ARLE ROAD	1032	0	10	-10	7	0	-3	1029
NDER	1174	0	20	-20	4	0	-16	1158
ANE	1566	0	2	-2	1	0	-1	1565
OOD	869	24	10	+14	4	10	+28	897
AY	1353	0	4	-4	5	0	+1	1354
NDER GRAHAM	991	55	2	+53	0	8	+61	1052
ORNE	1079	16	126	-110	103	3	-4	1075
AVENUE	619	14	27	-13	0	0	-13	606
T F. KENNEDY	932	21	111	-90	15	0	-75	857
NTOCK	1320	0	9	-9	4	0	-5	1315
WEST	1014	32	55	-23	37	1	+15	1059
ONT	501	15	59	-44	9	0	-35	466
HOLLOW	1476	7	9	-2	4	2	+4	1480
LPH	996	14	58	-44	27	12	-5	991
N	873	0	3	-3	2	0	-1	872
FIELD	840	30	43	-13	0	0	-13	827
	1452	21	7	+14	3	0	+17	1469
	1089	49	29	+20	9	26	+55	1144
MS	855	15	32	-17	9	3	-5	850
N	1204	0	5	-5	0	0	-5	1199
NG ACADEMY								

Schools closed out for transfer requests:
Code: * - All Requests
** - Regular Requests

CHARLOTTE-MECKLENBURG SENIOR HIGH SCHOOLS

	Enroll. Beg.	Requests to change	Requests to leave	Net change	Back to original assn.	Granted after change	Summary July 1	Final Summary
EAST MECKLENBURG	2057	41	32	+9	16	2	+27	2[illegible]
GARINGER	2648	37	62	-25	5	0	-20	2528
HARDING	994	132	24	+108	3	2	+113	1107
INDEPENDENCE	1121	25	6	+19	1	2	+22	1143
METROPOLITAN	956	29	127	-100	2	0	-98	858
MYERS PARK	1914	23	34	-11	5	0	-6	1908
NORTH MECKLENBURG	1618	20	26	-6	6	0	0	1618
OLYMPIC	899	38	31	+7	4	3	+14	863
SOUTH MECKLENBURG	2152	3	24	-21	9	0	-12	2140
WEST CHARLOTTE	1518	49	103	-59	0	2	-57	1461
WEST MECKLENBURG	1572	22	21	+2	0	1	+3	1575

CHARLOTTE-MECKLENBURG ELEMENTARY SCHOOLS

	Enrollment	Requests to enter granted	Requests to leave	Net change	Back to original assg.	Granted as 2nd choice	Summary July 1	Final summary
marle Road	506	11	14	-3	0	2	-1	505
ander Street	141	57	3	+34	0	0	+34	175
nbrook	513	12	3	+9	0	0	+9	522
ey Park	522	37	4	+33	0	1	+34	556
	768	0	6	-6	0	0	-6	762
ringer	870	0	34	-34	3	0	-31	839
yhill	776	14	4	+10	3	1	+14	790
une	166	0	4	-4	0	0	-4	162
erly Woods	546	15	10	+5	0	0	+5	551
lingsville	617	0	16	-16	0	0	-16	601
rwood	749	0	7	-7	2	0	-5	744
s Avenue	800	2	5	-3	0	0	-3	797
ntilly	449	11	4	+7	0	0	+7	456
r Creek	304	0	3	-3	0	0	-3	301
linswood	554	7	7	0	0	0	0	554
elius	462	8	7	-4	2	0	-2	460
swold	532	29	4	+25	0	0	+25	557
idson	289	2	0	+2	0	0	+2	291
ie Davis	699	17	2	+15	2	0	+17	716
ita	836	12	8	+4	7	2	+13	849
nshire	902	0	7	-7	3	0	-4	898
orth	500	5	22	-17	0	0	-17	483
le Oaks	802	6	6	0	0	0	0	802
d Hills	518	5	8	-3	0	0	-3	515

Schools closed out for transfer requests:

Code: * - All Requests
** - Regular Requests

506a

	Enrollment	Requests to enter grant.	Requests to leave	Net change	Back to original assignment	Granted as 2nd choice	Summary July 1
Eastover	610	11	13	-2	0	0	-2
Elizabeth	515	14	73	-59	1	0	-58
Enderly Park	388	22	9	+13	0	0	+13
Fairview	321	4	1	+3	0	0	+3
First Ward	821	5	0	+5	0	0	+5
Hickory Grove	579	0	4	-4	1	0	-3
Hidden Valley	1005	0	1	-1	2	0	+1
Highland	367	4	4	0	0	0	0
Hoskins	263	2	20	-18	0	0	-18
Huntersville	644	11	2	+9	0	0	+9
Huntingtowne Farms	557	5	4	+1	0	0	+1
Idlewild	650	9	12	-3	0	0	-3
Amay James	544	0	24	-24	2	0	-22
Lakeview	476	1	21	-20	0	0	-20
Lansdowne	737	11	3	+8	1	1	+10
Lincoln Heights	704	4	12	-8	3	1	-4
Long Creek	736	0	31	-31	5	0	-26
Matthews	457	7	6	+1	0	0	+1
Merry Oaks	445	2	10	-8	0	0	-8
Midwood	485	14	13	+1	4	0	+5
Montclaire	718	13	4	+9	1	5	+15
Myers Park	490	14	9	+5	0	0	+5
Nations Ford	713	14	10	+4	3	0	+7
Newell	553	3	16	-13	2	3	-8

Schools closed out for transfer requests:
Code: *- All Requests
**- Regular Requests

507a

	Enrollment	Requests to enter granted	Requests to leave	Net Change	Back to original assignment	Granted as 2nd choice	Summary Jul 21	Final Summary
dale	543	29	2	+27	2	0	+29	572
hurst	591	12	7	+5	3	0	+8	599
lawn	574	2	13	-11	2	0	-9	565
Providence	482	5	2	+3	0	0	+3	485
k Road	530	16	9	+7	0	1	+8	538
Creek	930	0	4	-4	0	0	-4	926
eville	547	1	8	-7	0	0	-7	540
ewood	714	4	11	-7	0	0	-7	707
za Road	490	9	20	-11	5	1	-5	485
a Road	739	0	2	-2	0	0	-2	737
gefield	542	3	7	-4	0	0	-4	538
wyn	581	19	2	+17	0	0	+17	598
nrock Gardens	495	27	7	+20	3	0	+23	518
ton	387	8	33	-25	0	0	-25	362
rmount	743	2	3	-1	0	0	-1	742
tesville Road	825	7	12	-5	2	0	-3	822
ele Creek	534	0	10	-10	0	0	-10	524
masboro	681	17	21	-4	0	1	-3	678
on Hills	482	5	21	-16	2	0	-14	468
kasegee	594	9	2	+7	1	0	+8	602
versity Park	751	11	4	+7	0	0	+7	758
Vance	227	0	2	-2	0	0	-2	225
la Heights	938	0	16	-16	0	0	-16	922
terly Hills	527	0	9	-9	2	0	-7	520
more	603	4	16	-12	0	2	-10	593
ndsor Park	799	13	8	+5	1	0	+6	805

Schools closed out for transfer requests:
Code: * - All Requests ** - Regular Requests

	Enrollment	Requests to enter granted	Requests to leave	Net change	Back to original assignment	Granted as 2nd choice	Summary July 1	Final Summary
Winterfield	702	25	5	+20	0	0	+20	72
Isabella Wyche	197	0	4	-4	0	0	-4	19
Davidson C.D.C.								
Morgan C.D.C.								
Pineville C.D.C.								
Severnville C.D.C.								

CHARLOTTE-MECKLENBURG SCHOOLS
CHARLOTTE, N. C.

August 4, 1969

NOTICE TO ALL STUDENTS PARTICIPATING IN HIGH SCHOOL ATHLETICS

Under the revised pupil assignment guidelines adopted by the Board of Education, that section dealing with varsity athletics which requires a student exercising freedom of choice to lose his eligibility to participate in varsity or junior varsity athletics during his first year at the school of assignment is revoked. Under the new provisions a student who exercises freedom of choice will be eligible to participate in varsity or junior varsity athletics immediately upon enrollment at the school to which he is assigned. In the case there was a student who did not exercise freedom of choice last spring because of this reason, he may now do so by contacting the principal of the school where he has been assigned.

C

PROJECT STATUS REPORT

March 5, 1968
Revised June 27, 1968
Revised Nov. 11, 1968
Revised Jan. 27, 1969
Revised July 30, 1969

Charlotte-Mecklenburg Schools

Five-Year Construction Program (1967-72)

1. There are 91 building projects to be undertaken in the 1967 bonds.

2. At the present time these projects may be divided into stages as follows:

A.	Projects completed	$ 8,805,000
B.	Projects under construction	7,600,000
C.	Projects approved for bidding	3,050,000
D.	Projects approved and in the planning stage	3,950,000
E.	Projects approved by Board	4,600,000
F.	Projects approved by staff	2,865,000
G.	Projects not yet acted upon	4,800,000
		535,670,000

A. Projects completed — $ 8,905,000

1. Huntingtowne Farms
2. Hidden Valley
3. First Ward
4. Starmount
5. Quail Hollow Jr.
6. Pineville
7. Olde Providence
8. Albemarle Road Elem.
9. Steele Creek
10. Bruns Avenue
11. Alexander Jr.
12. Idlewild
13. Collinswood
14. Corhrane Jr.
15. Huntersville
16. Lansdowne
17. Chantilly
18. Westerly Hills
19. Beverly Woods
20. Statesville Road

B. Projects under construction $ 7,600,000

1. Northwest Jr.
2. Independence Sr. Hi.
3. Matthews
4. Smith Jr.
5. East Mecklenburg
6. Bain
7. Tryon Hills
8. Allenbrook
9. Harding
10. Long Creek
11. Clear Creek
12. Hawthorne
13. Project 600
14. Enderly Park
15. Wilson Jr.

C. Projects approved for bidding $ 3,050,000

1. Myers Park Sr.
2. Coulwood
3. Amay James
4. Barringer
5. Hickory Grove
6. Ranson Jr.
7. Albemarle Rd. Jr.
8. North Mecklenburg
9. South Mecklenburg

D. Projects approved and in planning stages $ 3,950,000

Elementary	Junior	Senior
1. Center City *	1. Alex. Graham	1. Metropolitan
	2. Spaugh	

* Hold action

otals	$ 750,000	$1,200,000	$2,000,000

E. Projects approved by Board $ 4,600,000

1. Lincoln Heights
2. University Park
3. Villa Heights
4. Highland
5. Fairview *
6. Moores Chapel
7. Allen Hills
8. Wilora Lake

* Hold action

F. Projects approved by staff

Elementary		Junior	
	$ 2,865,000		
1. Lakeview		1. Sedgefield	
2. Druid Hills		2. McClintock	
3. Briarwood			
4. Billingsville			
5. Shamrock Gardens			
6. Marie Davis			
7. Cotswold			
8. Ashley Park			
9. Sedgefield			
10. Nations Ford			
11. Montclaire			
12. Pinewood			
13. Tuckaseegee			
14. Oakhurst			
15. Merry Oaks			
Total	$ 2,065,000		$ 800,000

6. Projects not yet acted upon $ 4,800,000

Elementary

1. Paw Creek
2. Cornelius
3. Newell
4. Derita
5. Berryhill
6. Midwood
7. Wilmore
8. Elizabeth
9. Eastover
10. Myers Park
11. Davidson
12. Thomasboro
13. Park Road
14. Selwyn

Junior

1. York Road
2. Irwin Avenue *
3. Piedmont
4. J. H. Gunn

Total - $ 1,450,000

* Hold action

al $ 3,350,000

Exhibits Attached to Foregoing Report, Etc.

The Charlotte-Mecklenburg Board of Education is about to file its plan for further desegregation of the School System. The Board is aware of the tremendous impact which this action promises to have on the community. Board members also know that the matter of how the plan is received is, in large measure, dependent upon how well it is understood by the community. It is imperative, therefore, that the community know the plan and its implications. The Board knows of no way to engender support for an idea superior to the simple act of "telling it like it is." It is in this spirit that these words are offered in answer to three questions in the minds of responsible Charlotte-Mecklenburg citizens as this time. They are:

I. What does the plan seek to do?

II. What are the implications of the plan?

III. What will it take to make the plan work?

Speaking to the first question, "What does the plan seek to do?"

1. The first part of the plan is most significant for in this section the Board states a policy regarding desegregation. The policy statement begins by reasserting an old belief that every individual should have equal opportunity to develop his capabilities to the fullest. It affirms the long held principle that equality of educational opportunities should be without regard to socio-economic, ethnic, religious, or racial differences. It states that equality of educational opportunity can best be provided by attempting to negate the burdens and handicaps imposed upon people by varied circumstances, backgrounds, and environmental differences. And then the Board makes a very

important statement which I quote, "In this light, the Board of Education firmly believes further desegregation of students and professional staff will contribute to the educational and social development of all children." Finally, the Board commits itself to a course of action by stating that "the desegregation of students should be coordinated with desegregation of teachers, principals and staff members and that the desegregation should be accomplished at the earliest possible date." Next, the plan outlines the steps which are to be taken to achieve this goal.

First, the Board proposes to close several schools and reassign the students (parents permitting) to other schools in the system so as to achieve the twin purposes of better educational offering for those reassigned and further desegregation for the system.

Next, the plan proposes to draw off from overcrowded all or predominantly Negro schools a number of students and reassigning them to other schools presently experiencing minimal desegregation.

Third, with the help of local experts skilled in the art of systems analysis, the Board proposes to begin an extensive study of attendance areas. The purpose of this study would be to determine whether or not alteration of certain attendance areas would result in more desegregation.

The Board proposes to undertake an extensive study of the school system's construction program to determine the effect of planned new construction on the racial composition of the schools. The Board plans to coordinate this study with other groups within the city which have a share of this responsibility.

The Board plans to initiate certain programs which would give support and reinforcement to students and teachers called upon to make adaptations to change. The aid to pupils will be through a compensatory education program. Teachers will have support through an orientation and in-service education program whose objectives will be to improve the teachers' knowledge of the environmental background and special learning problems of students in a desegregated setting.

Lastly, the Board of Education feels that the burden of this problem should be shared by all sections of the school community. To accomplish this purpose, the Board has asked the staff to explore the possibilities of student exchange programs, school pairing, and other techniques aimed at involving those schools in the system which, at this point, have had only minimal contact with members of the opposite race.

Now to the second question, "What are the implications of the plan?"

This question could be approached from several different directions. Let's approach it statistically first. Seven center city schools will be closed and approximately 3000 students will be reassigned. This is not the first round of school closings. Up to this point, 16 other schools in the city and county have been closed. By and large these schools served a dual school system. They are ill-adapted to a unitary school organization. As a group they are old to the point of being obsolete. Bethune, for example, is 57 years old. While the youngest, Irwin Avenue, is 34. They stand on small sites which someone in the past managed to wrestle away from a growing city—1.17 acres at Isabella Wyche, 2.30 acres at Bethune, 7.26 acres at

Second Ward, etc. Their combined enrollment has dwindled sharply from 4442 in 1965 to less than 3000 projected for this fall—a 33⅓% loss in four years. Certainly the closing of these schools can be defended administratively.

But what are the implications of the plan from the standpoint of the cost? The Board intends to offer the transferred students transportation. This will cost money both to buy the equipment and to operate this equipment. The Business Service Department estimates that we would need to spend an additional $98,000 for the extra vehicles needed and that the operating cost would be about $30 per pupil or about $90,000. By comparison, commercial transportation costs are estimated at $45 per pupil or $135,000 for the year. A maximum estimate of transportation cost for the 3000 pupils from the seven closed schools using our own department would be about $188,000.

It is estimated that 39 additional reloctable classrooms would be needed to increase the capacity of the receiving schools. The cost of purchasing and equipping these units is estimated at $330,000. Delivery on these units will take 6 to 8 weeks. The first 5 to 10 units could be in operation by the middle of September and we might expect a one per day delivery rate from that point.

There are, however, some figures which might be examined on the other side of the ledger. The $383,000 slated for purchase of a few additional acres for the Metropolitan High School site could be used for other purposes. The $100,000 used to add to the Zeb Vance property could be reclaimed through sale. Bond monies tentatively allocated to some of these schools could be restudied. Much of the property could be declared surplus and sold.

But the question, "What are the implications of the plan?" could be approached from still another point of view—the student's and the school program.

The students who are being moved from center city schools will have some adjustment problems. The system is proposing to help them make this adjustment. The students in the receiving schools will find some adjustments necessary. Again, every effort will be made to help make this transition a smooth one.

The students from the center city have generally been achieving below the students in the receiving schools. This move will make it possible to attack the problem. Nevertheless, we should not expect a dramatic improvement in achievement during the first year. Some improvement will be registered but the main effect will take place over a period of years. On the other hand, the achievement of youngsters in the receiving schools will not be adversely affected. There is ample evidence that this does not occur in spite of the fears on the part of some that this might happen.

The PTA's and school committees in the receiving school will need to make plans to incorporate new parents in their activities and programs else the very objectives of any move toward desegregation will be lost.

Finally, the net result of this move will be to place some 3000 youngsters from closed schools and 1200 youngsters from overcrowded schools in learning environments where their chances for success will be greatly enhanced.

And now, finally, let's consider the important question, "What will it take to make the plan work?"

Certainly, it will take commitment to action by the Board of Education—united action, if possible—action by a democratic majority, if necessary. But the community must know that the Board is willing to lead the way. I feel events of the past month demonstrate that the Board is ready to do this.

Commitment on the part of the Board must be matched by commitment on the part of the professional staff. I am convinced by the tremendous support offered by principals and central office staff members and by the very favorable progress we have made in faculty desegregation that the commitment is there.

Certainly, the plan will have a better chance of success if it is generally accepted by those who are directly affected. Parents of students who are involved must see in this plan a better educational opportunity for their child.

In order for this plan to succeed there must be an outreach on the part of the receiving school. This must be more than a casual letter of greeting. Vital programs must be developed which will at one and the same time demonstrate true concern and insure incoming students and parents that they will not be regarded as outsiders but will have a place in the school's life and program.

Finally, in order for the plan to succeed there must be a commitment on the part of the community as a whole. The policy adopted by the Board of Education must be adopted by the community and by certain agencies and forces within the community. The majority of the people must truly believe that it is in the best interest of a democratic society to afford equal opportunities to all people regardless of race, creed, color or economic circumstances.

Exhibits Attached to Foregoing Report, Etc.

Approved
7-31-69

PROPOSED ADMINISTRATIVE CHANGES

	From	To
E. E. Waddell	Prin.-Second Ward	Asst. to Superintendent
Gerson Stroud	Prin.-Kennedy	Prin.-P-600*
Asaac Graham	Prin.-Irwin Ave.	Prin.-Kennedy
John Kibler	Prin.-Bethune	Prin.-Lakeview
Mrs. Mathilda Spears	Prin.-Zeb Vance	Prin.-Park Road
B. G. Whisnant	Prin.-Elizabeth	Prin.-Hidden Valley
B. D. Roberts	Prin.-Isabella Wyche	Prin.-Elizabeth
O. N. Freeman	Prin.-Lincoln Heights	Adm. Asst.-Personnel
Louis Hughes	Prin.-Alexander Street	Prin.-Lincoln Heights
W. G. Byers	Prin.-Fairview	Adm. Asst.-Elem. Ed.

* Mr. Stroud will serve as Administrative Assistant until such time as the school is completed.

Transcript of August 5, 1969 Proceedings (Excerpts)

[4] • • •

DR. WILLIAM C. SELF, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

[5] *Direct Examination by Mr. Waggoner*:

Q. Dr. Self, you are Superintendent of the Charlotte-Mecklenburg Board of Education? A. I am.

Q. Dr. Self, are you familiar with the order of the Court dated June 20, 1969? A. Yes.

Q. Did the Board of Education meet to review the order of the Court? A. Yes, it did.

Q. What meetings were held by the Board of Education and any committees? A. There was a meeting of the Board of Education a few days after the Court order was issued. As I recall, the major objective of this meeting was to ask the Board attorney to review the Court order. It was discussed thoroughly by the Board of Education at that time. A second meeting of the Board of Education was set, at which time the Board directed the staff to take the plan for desegregation prepared by the plaintiffs, referred to as the Finger plan, and present it to the Board of Education for their study. There was this second meeting, then, following it at which time the staff endeavored as best it could to interpret the Finger plan for desegregation to the Board of Education, using audio-visual slides, overlays, maps, things of this nature. After [6] considerable discussion by that Board of Education at that meeting, it was determined that the Board should attempt to devise a plan for desegregation and they also determined that this work should be assigned to a committee of the Board rather than to the Board as a whole. Five members

of the Board of Education were appointed to this committee and three staff members worked with the committee. The committee itself held quite a few meetings. The first one that I recall was on July 3. There was another meeting on the 11th, the 19th, the 21st and 22nd. Most of these meetings were for long periods of time, lasting for half a day or thereabouts. Meanwhile, the committee, or at least members of the committee, visited other school systems to see what was going on there and also spent a good bit of time studying other court cases, the objective being to identify for further study some of the approaches used to achieve desegregation.

Q. Which systems did you study? A. We communicated by telephone with several school systems in an attempt to determine whether or not the approaches they were using could say anything to us. In contacts with Buffalo and Syracuse, New York, we did determine that it probably would be worth our while to pay them a visit, an on site visit.

Q. How much time was spent on these visits? A. As I recall, the trip took a little better than two days.

[7] Q. Did this special sub-committee report back to the committee as a whole? A. Yes, it did.

Q. Now, with reference to the plan of desegregation, the first portion deals with the policy statement. Did the Board spend much time on the policy statement? A. I feel the Board spent considerable time on the policy statement.

Q. Does this policy statement reflect any departure from former Board policy? A. Yes, it does.

Q. In what way? A. Well, I believe in the Court order of June 20 one of the findings was that the Board did not acknowledge a responsibility for bringing about the desegregation of schools, saying that children were assigned

by neighborhoods. In this policy statement the Board does acknowledge that it has a responsibility. I think that the key phrase in the policy statement is the one which is found in the fourth paragraph which says: The Board of Education firmly believes further desegregation of students and professional staff will contribute to the educational and social development of all children. A statement of belief. And then a statement which, at least in my opinion, in a commitment: The Board is further of the belief that desegregation of students should be coordinated with [8] desegregation of teachers, principals and staff members, both of which should be accomplished at the earliest possible date.

Q. Now, the first actual implementation of this policy statement appears to be with reference to closing some seven schools. A. That is correct.

Q. Now, what was the reasoning of the Board for closing these particular schools? A. I feel that there are some administrative reasons. The schools themselves are old to the point of being obsolete. Bethune is the oldest one and it's 57. Irwin Avenue is the youngest and it's 34 years old. All of the schools sit on inadequate sites, sites which could be expanded only at rather sizeable cost. The enrollment of the schools has decreased over the past several years. I believe that statistics show that the enrollment of all of the seven schools combined has decreased by approximately 33⅓% since 1965.

Q. Now were the schools selected to which these students would be reassigned? A. Some of the schools that were selected had some space but by and large the criteria which was used was to find schools in some of the sections of Charlotte which had experienced up to this particular point minimum desegregation and which had good educational programs into which these youngsters might fit.

Dr. William C. Self—for Defendant—Direct

Q. From an educational standpoint is this a desirable move? [9] A. In my opinion, it is.

Q. Why do you feel this is educationally desirable? A. Well, I think from the standpoint of an educator moving youngsters from one geographic area to another has been defended down through history on the basis of improving his educational opportunity. I think that this is the rationale that prevailed in the Mecklenburg County system when Bain and Matthews and Sterling and some of the smaller schools were replaced by larger consolidated schools. Here the movement was from an environment which offered limited educational opportunity to one that offer a greater potential, and I think that the same rationale could be applied here.

Q. Under this plan that's proposed, primarily blacks would be the only ones bused. Why are only blacks bused under this plan? A. Well, the predominant number, of course, would be Negro youngsters. There is one provision that might pick up some youngsters from the disadvantaged neighborhoods who are white and bus them to other areas as well, but I think it's because the blacks are found in this particular area of the disadvantaged.

Q. What is the motivation from an educational standpoint for busing these blacks out of these disadvantaged neighborhoods? A. To provide a better educational opportunity and at that same time accomplish further desegregation of the system.

[10] Q. Will these schools to which they are transferring operate better educational programs? A. I think that for the youngsters who are moved into these schools, the educational opportunities will be enhanced. I certainly do not think that the educational program for the youngsters who are already there will be lessened in any degree.

Court: Mr. Marshal, it may be that these people in the hall can keep order among themselves if I tell them they will have to close the doors unless the noise from the hall is kept down. Can you people in the back of the hall hear me? We will have to close the doors unless there is less noise in the hall.

Go ahead.

Q. Dr. Self, with reference to the black schools which are being closed, could they be operated for another year? A. Yes, they could be operated another year. I think that you'd have to take into account, again, some of the things which I mentioned, the age of the building, the limited facilities, but yes.

Q. Have most of these schools been on the drawing board for closing out for sometime in the school system? A. Yes. As a part of the thirty-five million dollar construction program it was anticipated that these schools would be [11] abandoned.

Q. Are you familiar with the recommendation of Dr. Finger with reference to these schools? A. I believe I recall his recommendation, yes.

Q. What was his recommendation, if you recall? A. I believe that he recommended closing Zeb Vance, Isabella Wyche, Bethune, Alexander Street. I do not believe he mentioned Fairview but mentioned in its place Elizabeth. The plan did not deal with Irwin Avenue Junior High School. As a matter of fact, I don't think Irwin Avenue was mentioned, and it did not mention Metropolitan High School.

Q. Did Dr. Finger's plan make any specific disposition of the students who formerly attend those schools? A.

These students were assigned to other schools although I cannot recall exactly what schools.

Q. Now, the next feature of the plan provides for transportation of blacks from overcrowded black schools. On what determination was this provision reached? A. I feel the objective is the same as in the closing of schools, to achieve further desegregation and to afford better educational opportunities for the pupils involved.

Q. Aren't there some white schools that have fairly severe overcrowding? A. Yes. As a matter of fact, our physical facilities as a whole in the school system are overcrowded.

[12] Q. Is it your feeling, then, that the educational advantages of this move outweigh the disadvantages that would be experienced from moving whites to other schools? A. Yes, it is.

Q. Now, the next feature of the plan provides for restructuring of attendance lines. Why hasn't the School Board restructured the attendance lines prior to this time? A. Well, I think that probably the major reason would be that the Board of Education did not adopt a policy on desegregation officially until just several weeks ago. With that policy adopted, it then became necessary for the Board of Education to examine its present method of redrawing attendance lines and respect this matter of desegregation while they did so.

Q. From an administrative standpoint, would it be possible to restructure the school attendance lines for the year 1969-70? A. I do not feel that it would be. I'd have to qualify that by saying that you could take a map and draw a circle around schools, but this would be a very shallow way of treating a very, very difficult problem. I view the drawing of the attendance lines as a mammoth undertaking,

one which would have to update the statistics of the school system, arrive at some guidelines for drawing the new attendance lines, subject these to numerous review by the Board of Education and, to the degree that it's possible, to the school community, and then interpret this in terms of administrative action.

[13] Q. This is not a job that could be accomplished by one or several people, is this correct? A. I think it might be supervised by one or several people, but many people would be involved in the actual work.

Q. How long would it take to restructure the attendance lines for the school served by the system? A. Well, again, we can only make an estimate. We have estimated it would take six months. I believe that's the wording of the plan.

Q. What is the basis for the six months estimate? How do you reach the six months estimate? A. I think on the basis of knowing how much work there is to be accomplished and on the experience that we have had in terms of drawing attendance lines in the past where new schools were built, additions to schools were completed, that sort of thing.

Q. I understand that the Board of Education proposes using a system analysis approach as an aid to restructuring of attendance lines, is this correct? A. The possibility has been investigated, yes.

Q. Basically what would be involved in this approach? A. Well, my impression is more or less a lay impression because I'm certainly not versed in the field of system analysis. It's a systematic approach where you determine what criteria you're going to use to redraw an attendance line, you look at [14] the data and statistics that are available and you come out with some sort of determination where that line is going to be. I think that the possibility

of adapting all this to a computer for the purpose of handling the tremendous amount of logistics which would be involved has also been explored.

Q. Have you had an estimate as to how long it would take to do the systems analysis and programming work for a computer printout of the schools? A. I believe that that's where we got the six months, Mr. Waggoner.

Q. Now, there's been a reported plan, called a plan by the press, presented to the Board by a Mr. Weil. Are you familiar with this illustration? A. Yes.

Q. Could this illustration prepared by Mr. Weil be implemented for this fall? A. No, I do not believe it could be.

Q. Why could it not be? A. I'm basing my answer on that more from the standpoint of Mr. Weil's comments than I am on any intimate knowledge of the situation, but I believe he himself indicated that it would take six months to work it through.

Mr. Chambers: Objection.

Court: The objection to what he said would be sustained.

[15] Q. Do you feel that any further substantial degree of desegregation could be accomplished by restructuring of attendance lines? A. Yes.

Q. What criteria would you basically use in restructuring these lines? A. Well, I think that much of the criteria you would use would be the same we have used in the past, the distance from school, major highway arteries, grade levels involved, capacity of the school, things of this nature, and one new criteria, that of achieving a racial mix in the student body would be introduced.

Q. This is a criteria not formerly used, is this correct?

A. That's correct.

Q. What would be the effect of changing one or two attendance zones for this current year on the proposed total restructuring for next year? A. It would be my opinion that it would produce an uproar on the part of the community that was involved, that we would be immediately charged with singling them out for action and not taking any action as far as the rest of the school system is concerned.

Q. When you restructure a school attendance line, is merely one line involved or does it involve other lines? A. All the lines in the school probably would be involved. Of [16] course, if this is true, you're studying the attendance lines of the neighboring schools as well.

Q. Now, there's been some discussion and testimony concerning pairing of certain schools and there are two schools that are urged more often than others, Billingsville and Marie Davis. Could these schools be paired for this year? A. Yes, they could, but I think the same comments that we made about singling out a particular area for action in attendance lines would be applicable if a single school was singled out for pairing.

Q. What effect would this have on your restructuring of lines for next year? A. Rephrase your question, please.

Q. You have just stated that we were discussing the pairing of Billingsville and Marie Davis for this year. What effect would the restructuring for next year have on the pairing that might be accomplished for this year? A. It's possible that in these same schools desegregation could be achieved through a redrawing of attendance lines. I believe that the committee, in its consideration of pairing, came to the conclusion that pairing should be resorted to after you've explored other possibilities for desegregation,

that attendance line restructuring holds more premise of a permanent solution than does the pairing of schools.

Q. The plan provides another departure, that the school [17] construction program will be reviewed. What effect do you expect this to have on desegregation? A. As I understand it, the construction program is to be reviewed with the objective being to locate, construct and organize school facilities in such a way as to promote desegregation to the extent that it can possibly be achieved through this technique, and I think that some progress toward further desegregation can be achieved through this technique.

Q. Do I understand this technique to be that the schools will be located so as to promote further desegregation? A. Yes.

> Court: Does that include giving attention to the size or population of the proposed schools as well as to the location with that purpose in mind?

A. I think it would although, Your Honor, I think that size of school is an optimum way of solving a desegregation problem. Both Syracuse and Buffalo have used many of the techniques we're using here but they are resting a good bit of their hope on the construction of campus schools where large numbers of pupils are housed and practically everyone except those living in close proximity to the campus are transported.

Q. Dr. Self, do you feel that the restructuring of school attendance lines and constructing schools and setting capacities so as to promote further desegregation offers any real solution to the desegregation problem? [18] A. I feel it offers very positive hope.

Q. Now, with reference to the report filed with the Court relating to faculty, have you reviewed the various schedules

relating to faculty assignments in the elementary schools for this year? A. Yes, I have.

Q. What do you find noteworthy in the report as filed with reference to elementary schools? A. Well, the Board and staff set as a goal 17% minority race representation on every faculty and with only one or two exceptions this goal has been reached. I find this noteworthy.

Q. What has the effect been with reference to formerly no all black or nearly black faculties. I think that we have no all black or nearly black faculties. I think that we have been able to desegregate faculty to the point where it is not a token number of members of the minority race.

Q. Do you have an opinion with respect to faculty desegregation for the school year 1970-71? A. I feel that it is our intention to continue to make progress in this area.

Q. What is the normal attrition of your faculty during the school year from year to year? A. Well, our turnover is rather high. That plus the fact that we grow by about 3000 pupils per year means that we will [19] employ around 650 new teachers every year.

Q. Do you feel that the number of vacancies created and new positions created will enable you to accomplish significant further desegregation of faculty? A. Yes, it will, but we have not relied upon that as the sole technique this year. We have moved some people.

Q. Has this been by assignment by the staff? A. This has been by design of the staff, yes.

Q. What has the faculty acceptance of these assignments been? A. I think on the whole it's been very good. Our Assistant Superintendent, I believe, reported to the Board of Education that there had been three resignations which could be attributed to the fact that these moves were made, but other than that I think it has been very well accepted.

Q. Has the Board taken any recent action with reference to Second Ward High School or Metropolitan, as it is now referred to? A. Yes. There was a motion made at the last Board meeting which was last Thursday afternoon. I can't recall the wording of the motion but in effect it reserved the bond money which had been designated for the center-city area for the Metropolitan High School for the construction on that site of an educational facility.

Q. Dr. Self, the plan makes mention of compensatory education. Would you tell the Court what is intended when we speak of compensatory education? [20] A. Well, if two students enter a particular classroom at the same time with the same teacher and one of them is behind the other in terms of his achievement, the chances are that he will get further behind his classmate as the year progresses. The only hope that he can catch up is through providing him with additional help and resources. This is the thinking that educators use when you plan a summer school program, help those who need additional help to catch up to their classmates. And actually the compensatory education program as we have it in mind would be the application of this same principle during the regular school year. If we can help the youngster who is in need of it through corrective or remedial programs or something of this nature, we feel that we ought to try to provide it within the limits of the funds that are available.

Q. There is further mention of the in-service training for teachers. What does this involve? A. Simply an attempt to improve the teacher's knowledge of the environment, background, special learning problems of students in a desegregated setting. It could apply to white as well as black.

Q. One of the last statements concerning the plan of

desegregation relates to further studies of grouping or pairing. What is the proposal of the staff with reference to implementing this provision? [21] A. We propose to do just that. I think that that provision is in the plan because the Board of Education recognizes that this problem is of such importance that every section of the school community ought to be touched by it and if there are some sections that are not touched by school closings or by attendance line alterations or something of this nature, then we would like to find some other way to bring them into contact with members of the opposite race.

Q. Do you have an estimate of the cost of the interim measures for transportation of the students during the school year 1969-70? A. I do. Our Business Service Department has given us estimates on this. They used a figure of $30.00 per pupil in terms of transportation. That means that if all of the children of the closed area accepted the assignment to another school that we would multiply the 3000 pupils by $30.00 and came up with $90,000.00 in terms of cost. In addition to this, it costs about $98,000.00 in terms of providing the equipment for use in the implementing the transportation program. Then in terms of the relocatable classrooms, which would be necessary in terms of housing the youngsters, our estimate is about $330,000.00.

Q. Dr. Self, what provision has been made for those students attending the schools being closed who do not wish to be transported? [22] A. The plan calls for the youngsters in the Zeb Vance, Isabella Wyche, Bethune areas who do not choose to take advantage of the transportation to be accommodated in the Zeb Vance Elementary School facility. The plan calls for those youngsters from the Fairview and the Alexander Street area who do not wish to be transported to be reassigned to adjoining schools.

The plan calls for the students from Irwin Avenue and Second Ward who do not wish to be transported to be assigned to adjoining schools.

Q. So what this basically means is that for these students who do not want to be transported, they won't have to be transported, is that correct? A. That's my interpretation of it, yes.

Q. Do you need community support for the success of this interim measure? A. Definitely.

Q. What support would be most helpful to you? A. Well, I think that the parents whose youngsters are effected by any move in terms of transportation, if they come to an awareness that their youngsters will profit by this, educationally speaking, it would be of great value to us. On the other hand, if the parents in the receiving schools could develop an understanding that their educational program would not be diminished by the move but really would be enhanced by the move, I think we would be helped mightily by [23] that as well.

Mr. Waggoner: I have no further questions.
Court: Cross examination?
Mr. Chambers: Yes, sir.

Cross Examination by Mr. Chambers:

Q. Dr. Self, you mentioned that after the Court's order in June the Board met and decided to appoint a five man committee to draw a plan. You also stated that the Board instructed you to review the Finger plan. Did you review the Finger plan? A. Yes, we did.

Q. Did you prepare a written report with respect to the Finger plan? A. Not in that sense, Mr. Chambers. We made a presentation. We had maps and overlays and went

through the Finger plan in detail. There was some written material but I would not call it a report.

Q. You did have some written material? A. Yes, sir.

Q. And you had some maps? A. Yes.

Q. Are those in your possession? A. They are not in my immediate possession. They are in the office.

Q. How many maps did you have? [24] A. We had the three maps, one for the elementary schools, the junior high and the senior high, three separate maps.

Q. How much written material do you recall that you had in this connection? A. I don't recall how much it was.

Q. However, the complete material is in your possession? A. Yes.

Q. Did you report on the possible pairing of Billingsville, Cotswald, Eastover and Chantilly? A. We did.

Q. Would you tell the Court what you stated about the possibility and feasibility of doing that for 1969-70? A. Mr. Chambers, as best I recall I reported the plan without interjecting any of my judgment into it at that particular time. I simply interpreted what I had understood the Finger plan to be without trying to interject any judgment into it.

Q. Did you state, Dr. Self, whether it was feasible to implement the pairing of those schools for 1969-70? A. No, I did not.

Q. Did you state whether it was possible to integrate those schools for 1969-70? A. No, I did not.

Q. Did you consider in your report the possible pairing of Marie Davis, Collingswood, Sedgefield, Pinewood and Montclaire? A. I reported on that pairing arrangement which, I believe, [25] Dr. Finger had drawn up around Marie Davis, yes.

Q. Did you state whether it was feasible to pair those schools? A. No, I didn't.

Q. Did you discuss the possible pairing of Hidden Valley and Tryon Hills? A. Again, I reported on the plan itself.

Q. Did you state whether it was feasible to pair those schools? A. No, I didn't.

Q. Did you report on the possible pairing of Bruns Avenue, Enderly Park and Ashley Park? A. I reported on the plan itself, yes.

Q. Did you talk about the feasibility of pairing those schools? A. No, sir.

Q. Did you report on the possible pairing of Thomasboro, Hoskins and Lakeview? A. Yes.

Q. Did you report on the feasibility of pairing those schools? A. No, I did not.

Q. Did you report on the possible alteration of the geographic zones for Second Ward or Metropolitan High School? A. I do not recall that.

Q. Did you subsequently, Dr. Self, prepare a report or some information for the Board relative to a plan for desegregation in compliance with the Court's order? A. No, Mr. Chambers, I did not. The committee itself elected to [26] avoid the technique of having the staff prepare a plan for consideration by the committee. The committee itself elected to be involved in the derivation of the plan as a body, not to ask that the staff make it in terms of recommendations to them.

Q. Did you work with the staff in the preparation of any plan? A. I worked with the committee itself.

Q. You worked with the committee? A. Yes.

Q. How many plans did you prepare? A. I believe there were several revisions, at least three that I know of.

Q. Were these revisions written up? A. They were.

The majority of them had to do with revision of the policy statement.

Q. Are those revisions in your possession? A. I have rough notes on them, yes.

Q. Do you recall whether the committee considered the possible pairing of the schools we just mentioned? A. Not of these schools specifically, no.

Q. Did they consider the pairing of any schools? A. I think in terms of school pairing the school committee concluded that the first alternative for desegregation which should be attempted was the alteration of attendance lines.

Q. Did the committee consider the pairing of any schools? [27] A. Not beyond what I have just stated.

Q. Now, you mentioned something in your direct examination about a Weil report. A. Yes.

Q. Do you know the name of the individual who prepared that report? A. That is his name, Mr. Jack Weil.

Q. Do you know whether he is in court at this time? A. No, sir, I do not.

Q. Did you contact Mr. Weil? A. No, sir, I did not.

Q. Do you know who contacted Mr. Weil? A. Mr. Weil's first contact with me was on his initiative.

Q. He contacted you? A. He did.

Q. What followed after he contacted you? A. He asked for a conference. He stated that as an interested citizen that he would like to talk with me about a technique for redrawing attendance lines. He did not know all of the problems that there would be involved and the conference that we had was for the purpose of trying to give him what data he would need to make some additional judgment.

Q. Did you give him that data? A. To the best of my ability, yes, I did.

Q. Did he subsequently prepare some report or some information for you? [28] A. He prepared a report and he presented it to some of the members of the committee working on the desegregation plan.

Q. This report was presented to the committee? A. Yes, it was.

Q. Were you present? A. I was.

Q. Now, you're supposed to have today a copy of that report.

Mr. Waggoner: If the Court please, if I may make a statement. With reference to the Weil plan or illustration or whatever it might be, we have some pencil notes that Mr. Weil turned over to us after his presentation at the Board meeting. He did not pass out any papers of any kind. It was merely his notes that he turned over to me as attorney for the Board.

Mr. Chambers: Your Honor, it's my understanding they also have a map.

Mr. Waggoner: There is a map in the back room.

Court: Are you objecting to the question?

Mr. Waggoner: I was just trying to shorten the testimony. It appeared there was some thought there was a formal report presented. It was an oral report from his notes. I have his notes and I have his map also.

Court: I have no intention of killing a lot of time [29] on the whereabouts or the custody of the Weil plan, but it has occurred to me listening to this examination that one of the things the Court has got to decide, if this plan in whole or in part is approved, is what kind of timetable needs to be followed in the preparation of plans and statements of intention for

further action. With that in mind, I think the Weil plan or any other plan that somebody might have worked up in whatever form it is would be relevant in trying to set a timetable. So I would be curious about the plan itself without attempting to pass judgment on it.

Mr. Waggoner: If the Court pleases, with reference to the plan, this was a manual plan. It doesn't consider all the options available to a computer. They were a layman's educational criteria applied to designing these boundaries and we feel that it would do a disservice to the community to put this map out for public speculation that the school line could run here or there or I may be in this school or I may be in that school. The Board has no intention of adopting this particular plan. It was merely an illustration. A great deal of mischief would be done to present this to the public.

Court: Well, nobody made an objection so far. What's the next question?

Mr. Chambers: I have filed with opposing counsel a copy of our objections and response to the defendant's plan. [30] We would like to get the map that was prepared by Mr. Weil to identify.

Mr. Waggoner: If the Court please, I object to the Weil map as being irrelevant to the conduct of this hearing. It does not represent any feature of the plan, any adoption of the plan.

Court: Mr. Waggoner, in view of the absence of a timetable which, as you know, the appellate decisions all require in such plan, it evolves upon the Court to set a timetable. The nature of work that may have been generated by Mr. Weil in whatever

time he worked on it is of some relevance in enabling the Court to decide what kind of time is reasonable for preparation of this kind of study. If you are, in substance, asking the Court to treat this so-called plan as confidential or to require it not to be released to the public, I'll hear both sides on that because that would make some sense.

Mr. Waggoner: If the Court please, I have no objection to revealing it to the Court and counsel. I just feel that a publication of it would not do this community any service.

Court: You see, Mr. Waggoner, you're in the position of asking the Court to accept the six months timetable for the submission of plan for the further action, but of concealing from the Court and opposing counsel the [31] information from the man who says six months is needed. I can't accept this position. I'll either have to disregard all that's been said about computer analysis or take a look at what Mr. Weil said and do some thinking of my own.

Mr. Waggoner: If the Court please, I believe Mr. Weil would be . . .

Court: You might be in more danger if I have to do my thinking on my own.

Mr. Waggoner: Well, the thing that hasn't been explored, and I think perhaps this would be in the nature of voir dire on determining whether or not this particular map would even relate to a method that would be a process for reaching a restructuring of lines. This was a manual preparation.

Court: They all start out that way.

Mr. Waggoner: And to develop this computer system, all of these hundreds of little boxes on the

map, they've got to be stored with the numbers of elementary, junior high and senior high by races and a system has to be designed that would give a computer printout. Mr. Weil has advised it will take three months to do . . .

Court: I can't cross examine you, Mr. Waggoner.

Mr. Waggoner: I know you can't, Your Honor, but I think that Dr. Self, with his familiarity with the difficulties . . .

[32] Court: Let's just put it this way; if you want the Court to pay any attention to the existence or probable contents or difficulty of preparing a computer plan, you have to put the plan up here for the Court to see. Otherwise I'd just have to make sort of a running guess about how long it would take Dr. Self, using the resources of the Board, to do what's necessary to carry out the undertaking that the plan embraces.

Mr. Waggoner: I would prefer to rely on the wisdom of the Court's guess.

Mr. Chambers: I would like to say one thing in reference to that. We would like to introduce this matter, not only because of the contention relative to the time necessary to present a plan for complete desegregation, but also because under Green the Court was to consider alternatives which would produce the most desegregation in the school system. Now, the Board has submitted this plan and it's before the Court on the condition that it's all the Board or the most feasible step the Board could take for 1969-70. We want the Court to consider what Mr. Weil has done to determine whether there should be some other step that the Board should

take to desegregate the system for 1969-70. We submit, therefore, that what evidence is presented on the Weil plan would be relevant on the matter of whether there should be some alternative plan or, if the Court accepts the plan that [33] is submitted, what time schedule should the Board be required to present the new plan.

Court: Mr. Waggoner said he wanted me to guess on that. I would rather not guess to the extent that this is necessary, but I don't think it's really a guess, it's an estimate based on the evidence in the case and in the absence of some evidence as to what it takes to do that the Weil plan or what the use of a computer would require, I will have to disregard the opinions that have been given about six months being required. We come out the same place whichever way we start. I'd rather get on to something else than to . . .

Mr. Chambers: I would like to offer this evidence on the feasibility of an alternate plan.

Court: As I recall the evidence already in the record, the evidence of Dr. Self in this court before was that all of these groupings and pairings about which you've ask him were feasible if politically accepted. That's substantially what you testified before, isn't it?

A. I used the qualification administratively feasible.

Court: Administratively feasible but it might make people mad. That's my recollection of what he said about all of Dr. Finger's plan except for a couple of areas that he ruled out.

Mr. Chambers: Well, Your Honor, I also understood him to say that he did not consider it educationally advisable [34] to pair those schools for 1969-70.

Court: He didn't say that in his previous testimony. What he said earlier today is that he did not recommend to the Board that they were feasible for 1969-70.

Mr. Chambers: There was a question about whether the children involved in those areas would be going to a disadvantaged area in connection with sending some white kids into black schools. Again, I simply go back to Green and we should, I submit, be able to show the Court that there are other feasible plans that this Board could utilize for 69-70 which would effectively desegregate the system better than the plan that is now before the Court.

Court: Don't you suppose the Court knows that? Don't you suppose everybody here knows that?

Mr. Chambers: If the Court is going to do what we request the Court to do, that is, to bring in another plan, if the Court requests the Board to do that, that's the only thing . . .

Court: If the evidence in the case already demonstrates to the satisfaction, I think, of everybody that's heard it that more could have been done than is proposed to be done here, I don't think we need to belabor that.

Mr. Chambers: It still leaves me hanging on whether the Court is going to require a new plan.

Court: The Court is still hanging on that point,

[35] Mr. Chambers. I don't believe a lot of information about the Weil plan is going to help us on that.

Mr. Chambers: May I make one further request, Your Honor. Since it has been indicated that the defendant would not like the plan to be offered in public that the Court allow us to offer this plan under Rule 46.

Court: If you've got it, you may offer it. I have no objection to its being offered, and I'll rule that it may be admitted if you've got it.

Q. Now, Dr. Self, you talked about the seven schools, the closing of the seven black schools. In the plan submitted by the Board in April the Board did not propose to close either of those schools for 1969-70. A. That is correct.

Q. Now, would you tell the Court what led the Board to decide to close those seven schools for 1969-70? A. Well, I think the starting point for such deliberations was the policy statement by the Board of Education. They felt that further desegregation of students was called for at this time. They saw this as a way of achieving it.

Q. Now, why did they decide that the closing of those schools was the way to achieve further desegregation? A. Well, I think that one thing that influenced their thinking was that it was a part of the proposal by the plaintiffs' expert in this area, and the second thing which called it to [36] their mind was that the technique of school closing had been employed before by this Board of Education and was employed by both Boards of Education in Buffalo and Syracuse.

Q. In your report you indicate that the Board considered it more feasible to consider the closing of black schools and

transportation of black students one way than to integrate both the black and white schools, is that correct? A. I think in my testimony I tried to indicate that the movement, educationally speaking, is more defensible if you can move a youngster from an area in which he may suffer educational deprivation into one where he is promised a better education.

Q. Did the Board determine that there was no black school in the system which would allow a student to advance educationally? A. No, the Board did not.

Q. Now, did the Board decide that there are some black schools in the system which would allow a student to advance educationally? A. I don't believe that the committee discussed this.

Q. All right. Now, you gave your opinion a moment ago about the educational advantage of transferring students from a disadvantaged area to a more advanced area. In your opinion is there a black school in this system which you would utilize to integrate students in the schools? A. Not at this time.

[37] Q. You stated that the objective of the Board was to proceed further with integration in 1970-71. Is it your intention as you understand the policy of the Board to close all of the black schools in this system? A. I believe I stated that it was our intention to proceed further with faculty desegregation in 70-71 but it is not my understanding that the Board of Education contemplates closing all black schools.

Q. Is it your understanding that the Board contemplates closing more black schools in 1970-71? A. That is not my understanding.

Q. Is it your understanding that it plans to close any? A. No, it is not.

Dr. William C. Self—for Defendant—Cross

Q. Then, despite the fact that you say there is no black school in this system which would offer any educational advantage for purposes of integration, you do not understand the Board of Education plans to close any more black schools? A. I did indicate that it was not my understanding that the Board of Education intended to close any additional black schools.

Q. Does the Board plan to integrate any of the remaining black schools? A. That matter was not discussed by the committee.

Q. Then is it your testimony, Dr. Self, that the Board excluded any consideration of integration of black schools for 1969-70? [38] A. For 1969-70, yes.

Q. Well, does the Board plan to integrate any of the black schools in 1970-71? A. I have no way of knowing that, Mr. Chambers. It has not been considered by the committee.

Q. Well, you filed a report here that said that you were going to draw new school zone lines and that you were going to use the objective of the Board of promoting integration. Now, is it your understanding of the policy statement of the Board that you are to integrate the remaining black schools? A. Well, it could be assumed from reading the policy that this would be an ultimate goal but this matter has not been discussed by the committee as yet.

Q. Well, you testified, Dr. Self, that you anticipated substantial integration of students in 1970-71. I want to know what standards of criteria you're planning to follow and if you are planning to integrate the remaining black schools or leave them like they are. A. Well, these plans have to be devised, Mr. Chambers, by the Board of Education working with the staff. I am not at liberty to say what it is that the Board of Education intends to do.

Dr. William C. Self—for Defendant—Cross

Q. You just testified about you anticipate a substantial integration of teachers, that you anticipated substantial integration of students as a result of the new zones and as [39] a result of the new school plan with respect to construction. Are you telling the Court now that you don't anticipate this integration? A. No, I am not. I am saying that we will try to use these techniques which have been identified as a part of the plan to achieve substantial further desegregation.

Q. Isn't it a fact, Dr. Self, that the committee discussed and you understood the committee and the Board as requiring no integration with white students going into black schools in 1969-70 or later? A. That is not my understanding.

Q. Did you understand them to require integration of these black schools? A. I understand from the declaration of the policy on the part of the Board that we will move in this direction.

Q. In integrating black schools? A. But what techniques will be used I have no way of knowing at this particular time.

Q. Dr. Self, did you consider it feasible to integrate West Charlotte in 1969-70? A. Did I or did the committee?

Q. Did you? A. No, I did not.

Q. Do you now consider it feasible? A. Not at this time.

[40] Q. What would be the educational reason for not integrating West Charlotte? A. The educational reason for not integrating West Charlotte?

Q. Yes. A. I don't know of an educational reason. There are certainly some political and economic reasons.

Q. What would be the political reason? A. I think that the technique for integrating West Charlotte would be a very marked change in the attendance lines of West Charlotte and that redrawing of an attendance line should be

accompanied by a reexamination of every other attendance line in the school system.

Q. Did you consider the feasibility of using a different feeder system for West Charlotte? A. No, we did not.

Q. It isn't necessary, therefore, to redraw the lines to integrate West Charlotte. A. If you used a feeder system.

Q. And is it feasible to use a feeder system and use transportation for white students into West Charlotte for 1969-70? A. Not in my opinion.

Q. What would be the reasons that would indicate educational disadvantages in bringing in white students by a feeder system into West Charlotte? A. Would you repeat your question?

[41] Q. In your opinion you say it would not be feasible to integrate West Charlotte in 1969-70. I'm trying to find out why you're saying that. A. I think I did indicate that I thought that the technique for integrating West Charlotte would be through the restructuring of attendance lines and to single out one school and draw its attendance line in a different way at this particular point would seem to me not to be feasible.

Q. Wlel, you have singled out seven schools. Are you saying that you can single out these seven but you should not single out any other?

Mr. Waggoner: If the Court please, this is argumentative rather than evidentiary.

Court: Objection overruled. How much longer do you think your examination of Dr. Self will last?

Mr. Chambers: About another hour, Your Honor.

Court: Let's take a ten minute recess.

* * * * *

[57] * * *

WHEREUPON, Dr. Self returns to the witness stand.

Dr. William C. Self—for Defendant—Cross

Cross Examination (Cont'd) by Mr. Chambers:

Q. Dr. Self, has the Board determined where it will assign the black students at Second Ward or Metropolitan High if that school is closed? A. Yes, it has.

Q. Would you tell the Court which schools these students would be assigned to? A. Harding, West Charlotte, Garinger, East Mecklenburg, Myers Park, South Mecklenburg.

Q. Has the Board determined how it's going to assign these students? A. Yes. The plan calls for dividing the Metropolitan district in such a way that part of it falls in the attendance areas of the schools that I named.

Q. Has that district been divided into the districts in the schools that you named? A. Yes.

Q. Did you do this by a map? A. Yes.

Q. Do you have a copy of that map? [58] A. No. The plan contains the description of the revised attendance lines.

Q. But you don't have a map? A. No, I do not.

Q. Approximately what is the average distance that these students will be bused? A. I could only guess at about three miles.

Q. Approximately how far is East Mecklenburg from the center part of Charlotte? A. I would estimate five and a half miles.

Q. Approximately how far is South Mecklenburg? A. Probably seven miles.

Q. Approximately how far is Harding? A. From the center of Charlotte?

Q. From the center of Charlotte. A. Again, I'm only estimating. I would estimate about two and a half miles.

Q. Approximately how far is West Charlotte from the center part of Charlotte? A. About the same.

Q. Now, have the faculty members at Second Ward or Metropolitan High already been assigned by the Board?

A. That's my understanding, yes.

Q. Do you know what was done with the principal of that school? A. Yes. Mr. Waddell was made Assistant to the Superintendent.

[59] Q. And what does that mean? A. Just as the name implies.

Q. What will he do? A. He will assist in whatever areas of work there are in the office which demand attention.

Q. That is a new position? A. Yes, it is.

Q. With no defined duties. A. None other than what I have said.

Q. Do you know what the football coach of Second Ward is to do for next year? A. I do not know.

Q. Are you familiar with the guidelines of the Department of Health, Education and Welfare pertaining to teachers? A. Not intimately, no.

Q. In your determination to assign the coaches at Second Ward or Metropolitan High School did you consider the qualifications of all coaches in the school system? A. I believe that pertains to dismissal of personnel, does it not? No one has been dismissed.

Q. Did you consider the qualifications of all coaches in the school system? A. No.

Q. He wasn't compared, for instance, with the coach at East Mecklenburg or South Mecklenburg? [60] A. I do not know. I do not believe so.

Q. Your policy doesn't provide for that, does it? A. No, it doesn't.

Q. So he will be assigned irrespective of his qualifications or ability. A. To a position as closely as possible as we can to the position he held at Second Ward.

Q. I gather coaches at various schools make additional money because of their coaching duties. A. They are supplemented.

Q. And if he does not get a coaching position he will lose this money for 1969-70. A. He will have a coaching position and he will receive his supplement.

Q. Do you know which school he will be coaching at? A. No, I do not.

Q. Do you know what school the basketball coach has been assigned to? A. No, I do not.

Q. Do you know if he will have a coaching position? A. He will.

Q. Is there a difference between the salary of an assistant coach and a head coach? A. There is.

Q. Will they have head coaching positions? [61] A. I do not know. If he does not, he will not suffer a penalty in salary. An exception will be made.

Q. This is similar to the practice you followed in 1965 in assigning the black principals to assistant principal positions. A. I don't believe it is the same.

Q. Now, did you have guidance counselors at the Metropolitan High School? A. Yes.

Q. Do you know what schools these guidance counselors have been assigned to? A. I do not.

Q. Did you have cheering leaders at Second Ward High School? A. Yes.

Q. Do you know what arrangements have been made for them at the schools to which they are being assigned?

> Mr. Waggoner: If the Court please, we are going to object to this. This is getting down to intimate details of assignments within a particular school. I don't think we're here this afternoon to get to individual personalities and where they may be placed. We made our statement and if they feel this is untrue, then the burden is upon them to come

forward and show that we have discriminated in reassignments.

[62] Court: Objection is overruled.

A. It is my understanding that this matter was discussed in the principals' meeting where the details were being planned and that the person who had the cheerleading position at the Metropolitan High School would be automatically a cheerleader in the receiving school, if they chose to transfer.

Q. Do you know about the student organizations at Second Ward? A. Not in detail, no.

Q. Do you know what accommodations have been made for the student leaders at Second Ward? A. They are to be accorded positions similar to this in the receiving school. If they are members of a National Honor Society, they are automatically members of the National Honor Society at the receiving school.

Q. What about holding offices in the organizations? A. I do not know that that detail has been discussed.

Q. Do you know whether any of the students at Second Ward presently were being considered for scholarship opportunities following graduation? A. I do not know.

Q. Do you know what arrangements, if any, have been made if any student at Second Ward was being considered for scholarship opportunities? A. Sorry, I don't understand the question.

Q. Do you know whether you have made any arrangements for the [63] coaches at Irwin Junior High School? A. The same arrangements made for the coaches at Metropolitan High.

Q. Before leaving Second Ward, I believe you have at each of the high schools you mentioned ability groupings.

A. Yes.

Q. Is it your intention to give additional tests to students at the receiving schools to determine which ability group the student should be in? A. No, it is not. We anticipate placing these youngsters in many of the classes in this school. We will definitely prevent the sectioning of these youngsters by themselves in a section.

Q. Well, do you plan to have ability groupings at these high schools, the receiving high schools? A. Yes.

Q. Do you plan to put these students in any of the groups? A. In all of the groups, not in one.

Q. Do you know how you will place them in the groups? A. I think the best determinate would be the marks which they scored at Second Ward and the teacher's judgment there.

Q. Now, have you decided on your bus routes? A. No, we have not.

Q. Have you purchased your buses? A. No.

[64] Q. Do you plan to purchase these buses before the beginning of school? A. We do if our plan is approved.

Q. When will school begin? A. September 2nd.

Q. Now, it's my understanding you don't have enough mobile units at all of the schools to accommodate the students who are going to be transferred. A. That's true.

Q. And you won't have the mobile units there at the beginning of the school term. A. That's true.

Q. And that it will take approximately six months in some cases to get sufficient mobile units there to accommodate the students. A. According to our conversation with the vendors, they can deliver a certain number, five to ten, early in September and that we might expect one or two units per month delivery schedule from that point on.

Dr. William C. Self—for Defendant—Cross

Q. Do you anticipate having enough mobile units at the various schools to accommodate all the students by January, 1970? A. I'm sure we would have by that time.

Q. Do you think you would have enough units by December, 1969? A. Probably.

Q. What do you plan to do with the students in the meantime? [65] A. Well, the section of the plan which anticipates movement of youngsters from overcrowded black or all black or nearly all black schools anticipates movement during the year and that provision was written into it, recognizing the fact that we could not have all mobile units immediately. The children from the closed schools will be accommodated, those of them who choose to exercise this privilege of moving into another school, in whatever fashion we can come up with. We will take mobile units wherever possible from schools where new construction makes them available once more. I think the Paw Creek situation was a technique for getting some mobile units to accommodate this purpose. Things of this nature. We have, on occasions, had to use classrooms on stages, auditoriums, partitioning larger than average classrooms, making them two, the same techniques we have used all along to try to accommodate the youngsters.

Q. Do you know the number of black schools in your system that will be underpopulated for 1969-70? A. No.

Q. Do you recall the testimony of Dr. Larsen about the number of black schools that had substantial space accommodations? A. I recall the testimony of Dr. Larsen but not in the detail you're requiring here.

Q. You don't recall the report that they submitted that was identified in evidence in this proceeding? [66] A. I recall their report but not the details of the report.

Dr. William C. Self—for Defendant—Cross

Q. Dr. Self, would you state whether in your opinion there are approximately 2500 spaces available in black or predominantly black schools in this system for 1969-70? A. I do not recall that detail, Mr. Chambers.

Q. Do you know approximately how many are available? A. No, I do not.

Q. Now, there are some overcrowded white schools, are there not? A. Yes, sir.

Q. And the Board has no intention of transporting any of the white students from those overcrowded schools to spaces available in black or predominantly black schools. A. That is not a part of the plan.

Q. Now, Dr. Self, did you study the Weil plan? A. Not in depth, no.

Q. Did it provide for the complete desegregation of the elementary schools in this system? A. It did not.

Q. Do you know which schools it left segregated? A. No, I do not.

Q. Did it leave any black school in the system racially identifiable as a black school? A. I don't recall.

Q. Now, in your report about faculty desegregation you state that in 1970-71 you will move further along in desegregating the [67] faculty members. A. Yes.

Q. Do you have a timetable for complete desegregation of faculty members in this system? A. I think it is generally understood that the task would be accomplished in the next school year.

Q. Did the Board decide to do that? A. The Board has made no definite decision in this direction.

Q. And it's not written in the plan. A. No, sir.

Q. Now, how did the Board arrive at the 17%? A. I believe that there was conversation which was introduced

relative to how much faculty desegregation could be expected and a review of a court case—I don't recall which case—indicated that a ruling had been made which ordered the system to move to a one to six ratio. I feel that this influenced our group to determine this as the goal which we would try to achieve this September.

Q. Now, in this document which has been referred to in this record as the Self plan you proposed to completely desegregate teachers 1969-70. A. It did, but it did not define completely desegregated.

Q. You did not state in your proposal that you would have the percentage of teacher desegregation as directed by the court? A. I don't believe that it did state a definite percentage.

[68] Q. You don't have a copy of your proposal with you, do you? A. No, sir.

Q. Are you telling the Court that you didn't state in April of 1969 that in your opinion you could achieve 33% desegregation in each school in the system? A. That ratio was not used to the best of my recollection.

Q. How did you determine that you couldn't do more than 17%? A. We set this goal and worked toward it, Mr. Chambers.

Q. And you stated that you had approximately three resignations which you could attribute to non-racial assignment of faculty. A. Yes.

Q. Dr. Self, did you prepare a report on the number of students who would be affected by the elimination of freedom of choice in this system? A. A report was prepared in the Research Department of the school system.

Q. Are you familiar with the Court's finding that freedom of choice in this system had promoted segregation of the schools in the system? A. I don't recall that finding.

Dr. William C. Self—for Defendant—Cross

Q. You don't recall that finding? A. No.

Q. Why didn't the Board eliminate freedom of choice for the next school year? [69] A. I can only conjecture that the Board members felt that freedom of choice had rather slight effect on the overall problem.

Q. Do you know how many white students would be at York Road if you eliminated freedom of choice? A. No, I do not.

Q. Do you recall whether your report showed 190? A. I don't recall that detail.

Q. Do you recall how many white students would be at Amy James if you eliminated freedom of choice? A. No, I do not.

Q. Do you recall how many white students would be at Marie G. Davis if you eliminated freedom of choice? A. No, I do not.

Mr. Waggoner: If the Court please, this is a matter of record. The exhibit is filed before the Court and it seems to me he's asking questions that he couldn't humanly be expected to recall such figures as this.

Court: Mr. Chambers, are you about through with this phase of your examination?

Mr. Chambers: About freedom of choice?

Court: If you're pursuing something that I ought to be listening to real hard, I want to hear about it.

Mr. Chambers: I would like, then, to get the report of Dr. Self regarding the effect of freedom of [70] choice in the school system.

Court: That's not at issue here. The Court found as a fact that freedom of choice does not promote

desegregation and that the constitutional purposes have to be accomplished totally without regard to freedom of choice.

Mr. Chambers: The plan they have now doesn't eliminate freedom of choice.

Court: The Court did not direct that freedom of choice be eliminated. It directed the School Board do the job regardless of whether they kept freedom of choice or not.

Mr. Chambers: Without it being eliminated in 1969-70 you will have 1200 or more white students transferring out of integrated schools.

Court: That's my recollection of the figure.

Mr. Chambers: And we contend that's an element that has clearly been ruled unconstitutional by the Supreme Court and that it should be ruled out in this plan, too.

Court: I made the clearest statement about it that I think has ever been made. I said freedom of choice promotes segregation. It does not promote compliance with the constitution and that the constitutional mandate has to be accomplished by methods other than [71] freedom of choice. But I also said if the Board wanted to operate a system in which people had some freedom to go from one school to another and could, in spite of that, comply with the constitution, that's their business, not mine.

Mr. Chambers: The evidence now before the Court, we submit—and that's the reason I was going into it now—clearly shows that freedom of choice promotes segregation in this system and without it being eliminated here and now, it would perpetuate

segregated schools in the system. There is no justifiable reason whatever for allowing freedom of choice in the system for next year, none whatsoever. They have not advanced one educational reason for leaving it in the system for next year, and I think the court decisions clearly hold that the school systems have to get rid of it now.

Court: Well, it may be the distinction or the difference that isn't apparent yet. It seems to me that some day you may be asking the Court to restore freedom of choice if the Court today rules it out.

Mr. Chambers: Your Honor, that might be true and it might be true that the Board will come in with a plan next year which will be acceptable to all parties and we might come back in years hence and ask that some alterations be made. We cannot control the housing patterns. We think that at this stage of the game, where the record clearly shows that freedom of choice perpetuates a segregated system, that the [72] decisions of the Supreme Court and the decisions of the Fourth Circuit require that it be eliminated now.

Court: Are you suggesting, for example, that the freedom of these 4200 children to stay where they are be abrogated by the Court?

Mr. Chambers: I am suggesting if the Board is going to use freedom of choice in any instance that it be only a majority to minority transfer of a student in a black school to a white school or a white student in a white school to a black school—as we referred to them, majority to minority transfers. Now, the Board proposed that in the plan considered by the Court in June and it also contained

in there the general open-ended freedom of choice provision and the Court spoke highly of the majority to minority transfer. But we think here now, if it's allowed, that the only way it should be allowed would be a situation where the students are allowed to transfer from a school where their race is in the mapority to a school where their race is in the minority. There is no justifiable reason at all for allowing general freedom of choice and it further emphasizes the point Rev. Leake was talking about, that we're always talking about moving black kids to white schools.

Court: Well, this reminds me of the story that one of the lawyers told me recently, one of the lawyers in this case. The very wise old Rabbi had a man and his wife come [73] in fighting, as husbands and wives do, and the wife told her story and the Rabbi said, "You know, you're right." Then the husband says, "I want to be heard.", and he said, "Yes, I'm going to hear you." Then he heard the husband and he said to the husband, "'Well, you're right." And his clerk said, "How can they both be right?", and the Rabbi turned to him and said, "You're right, too."

Now, that story merely illustrates the point that when you're dealing with a situation with so many hundreds of variables, you can't be perfect about it all at once. It was my judgment six days ago that what I found and ruled about freedom of choice in this system for this school year was substantially correct. It may not be right, but I get your point. It's still a live point but I don't know that we need any further evidence on it. Any ruling necessary

on that subject is amply covered by the evidence already introduced and by the finding that I've made which says that freedom of choice, to the extent of a thousand or 1200 students a year in this system promotes segregation of the races. That's true.

Mr. Chambers: If counsel for the School Board will stipulate that is the effect projected—

Court: That's been found as a fact. Nobody needs to stipulate that.

Mr. Chambers: Your Honor, I'm talking about the [74] effect in 1969-70. The evidence before the Court was talking about what occurred in 1968-69.

Court: All right. Isn't this covered by the statement in the report which says that the net effect of it is some—no, I guess it's not expressly covered.

Dr. Self, does that continue to be the general result of the free transfer provision, that it enables a goodly number of white students to get out of a mostly black school? Is that the net result of the free transfer provision?

A. Yes.

Court: It's still true that if any white children have requested transfer from a white school to a mostly black school your records don't reveal it?

A. That's true.

Court: And would you estimate that the number of white children who would be in mostly black schools this fall without free transfer provisions would be somewhere between a thousand and twelve or thirteen hundred?

A. I think that's about right, Your Honor. It's an estimate.

Court: O-K.

Mr. Chambers: Would the Court indulge me one moment?

Court: Yes, sir.

Mr. Chambers: I just have one or two more questions.

Q. What consideration did this Board give the anti-busing bill [75] in the drafting of its plan? A. I don't think it influenced the Board. It was not considered as a part of the plan.

Q. What was the purpose in the plan for the provision that if the black students objected to being assigned to the school to which they were assigned by the Board they would then be allowed to choose Zeb Vance or attend Zeb Vance? A. Well, I think in my own mind the provision was introduced because in educational fields we think that it is good to have some alternatives to a particular plan. On occasion, if you have that alternative, it may save your plan.

Q. What do you mean by that? A. To allow those who object vehemently to a particular course of action something else to choose from.

Q. Something— A. Something else to choose from.

Q. Is that why you used freedom of choice? A. I think that's one of the purposes of freedom of choice.

Q. And the reason for the provision that the students who were assigned to Irwin and Second Ward who did not want to go to the school to which they were assigned by the Board that they would be allowed to attend the next nearest school was to give them another chance or another alternative? A. To give a second alternative.

Dr. William C. Self—for Defendant—Cross

Q. Well, why did you limit them to the next nearest school? [76] A. I don't know.

Q. Can they request transfer to another integrated school? A. I would assume that these youngsters, upon being assigned could exercise freedom of choice to another school.

Mr. Chambers: I have nothing further.

Mr. Waggoner: No further questions, Your Honor.

Court: All right, come down, Dr. Self.

I have a statement which was supplied by the record of a specially called meeting of the League of Women Voters recently, expressing their belief that the community should assume the responsibility for desegregating the schools and improving the quality of education, expressing generally support for the point of view that the plan proposed by the Board is unfair and one-sided and that the Weil plan should be made public.

You may put this in the record, Miss McKnight.

Mr. Chambers: Your Honor, I'd like to correct the record. When I was discussing the Weil plan previously I made reference to it being admitted under Rule 46.

Court: Well, I don't remember the numbers of the rules, either, Mr. Chambers.

Mr. Chambers: I meant Rule 43(e). We would like to identify that map and the overlay, as Plaintiffs' Collective Exhibit # ——.

Mr. Waggoner: Your Honor, we would like the Court [77] to order that this be held confidentially in the Clerk's office.

Mr. Chambers: Does that mean we'll be excluded from looking at it, too?

Colloquy

Mr. Waggoner: No, sir. Just counsel will be permitted to review it and the Court.

Court: Do you want it to be confidential from the Court or do you want the Court to consider it in making up the timetable?

Mr. Waggoner: No, sir. As I understand, he is introducing this on the basis it's excluded testimony and it will be in the record in the event he appeals and, therefore, it is not properly evidence in the case. It's merely an offer of proof under Rule 43(e), and therefore it really does not constitute evidence in the case but the proof is offered.

Mr. Chambers: Your Honor, I don't recall the Court actually ruling that it could not be admitted. The Court was considering its relevance but never ruled that it was not admissable. I was tendering it really under the rules so that whatever determination the Court made, we would at least have it in case the matter were appealed to the Fourth Circuit.

Court: Well, in view of the fact that the Court is not going to consider what was said about the Weil plan in making any extended timetable for further action by the Board, the request that the Weil plan not be publicized will [78] be granted and it will be kept confidential by the Clerk except as to counsel, unless and until good cause is shown to the contrary. It will be open to all counsel who want to see it. It will be considered as evidence unrestricted in the event the record on appeal needs to be made up. I will not undertake to understand it myself and I will not consider in any further orders how long it would take to develop the Weil plan. Mr. Weil is getting a lot of free advertising. Does

that cover what everybody wants about the Weil plan?

Mr. Waggoner: Yes, sir.

Mr. Chambers: No. We'd like to tender that Weil plan as evidence to show that the Board could have adopted a different plan which would have resulted in more complete desegregation of the school system.

Court: Well, I can find that totally without regard to the Weil plan and I will, if need be, but I don't think that's our real problem here. We have a community problem that gets into this court because it raises questions of equal treatment of people under the law. Nobody here created the problem. We have all participated in it. When this case was last heard in 1965—I was just looking back at the original order—the Court could very properly proceed upon the assumption that teacher desegregation could be validly accomplished by having the same proportion of black teachers in a school as you have black pupils. They could proceed [79] upon the assumption there was no duty on the Board to increase or change the racial makeup of a school, and all that was good law under Briggs against Elliot, which Judge Parker decided about eight or ten years ago, and all of that law has been changed. But the fact that the Supreme Court has ruled as it did and that it's the duty of the School Board and the court to desegregate the schools now doesn't mean that they need to be hung if it doesn't happen this week. It takes a little time and a little patience and, frankly, I find in the policy change and in the faculty integration and in the somewhat disappointing one-way proposition a lot of action and a lot of implications

which I think are most favorable for the completion of this job in fairly short order.

I'd like to think, when I'm not mad with somebody myself, that everybody is right and is proceeding according to his own conscience, and with all of us this is true about 95% of the time. It will be helpful if we remembered that we are not just here grading papers on some rule that's been in existence forever, but we are here taking part in a change that nobody here started and nobody here will see the end of. I don't know at this moment what my duty is under the constitution about the approval or disapproval or modification of this plan, but if we can leave here with everyone feeling that he has been fairly heard and that there is time to achieve perfection, then all the [80] commotion may have been somewhat worthwhile.

Mr. Chambers: Your Honor, I'd like to say one thing. Rev. Leake has spoken about the black community reaction to the Board's plan and I must say that what the Court now has before it, I submit, is a plan—and even though an interim one—that should not be approved by the Court. I think for good reasons many of the black citizens in this community have expressed apprehension about the portent of this plan for 1970-71, even if the Court were to approve what we have now. I think the testimony of Dr. Self clearly demonstrates that what we're going to be doing in the future is moving black kids to white schools. Now, we contend in our objections to the plan not only that it is rank discrimination to have one-way busing, but unconstitutional discrimination . . . I mean to say more persuasive discrim-

ination when you have some clearly easily obtainable means for implementing the constitutional duty of this Board that the Board simply refuses to undertake because of race. I mean specifically that freedom of choice in this system has no constitutional justifications or even any pragmatic justification at this stage. There are many schools in this system, black, that could easily be integrated by this Board now, and to approve a plan now that provides for only one-way integration is only going to set the tone for the rest of the practices by the Board that it will carry out plans of [81] desegregation by moving blacks into white situations. I think that the Brown decision itself clearly pointed out the dilatorious effect this practice would have and I think that we aren't really accomplishing the objectives of Brown to just talk about the idea that we're going to get better educational settings for black students by putting them in white schools without considering also the effect that always moving blacks to white schools will have on the students. Now, we have here in this system, where we are trying to bring the people together as the Court intimated, an opportunity now for showing the black people that we're going to integrate the school system right even beginning 1969-70 by requiring that both black and white students be integrated into all schools in the system. And I think this is the opportunity for doing it and I respectfully request that the Court order that it be done.

We have, as the Court intimated at the beginning, for further consideration by the Board a statute pending and we have our motion for temporary re-

straining order before the Court and whatever future considerations are given by this Board to a plan, we think, would probably be effected by this statute and we would like to be heard.

Court: I don't want to shorten the discussion of the anti-busing law but it contains a provision in it that the anti-busing neighborhood school law does not apply to [82] any transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the School Board, require reassignment. That is an exception which makes the statute totally nill. It's a statute which attracted a lot of attention but which contains a statement in it that this statute doesn't prevent a School Board from doing what for any cause it chooses appropriate to do. As I read the plan which the Board has prepared, they have quite properly read all of the statute instead of its title and read the part that says they may make any transfer or assignment that, in their sole discretion, they desire and they have not considered it in doing what's being done here. I am assuming that they will continue to put that interpretation upon it and we don't really have to deal with the question of a temporary restraining order as far as the Charlotte-Mecklenburg School Board is concerned.

Mr. Stein: Your Honor, may I speak very briefly to that? I think that possibly the statute is not a paragon of clear legislative drafting, but I would suggest that a contrary interpretation to that which you have given it might be read into it and that as it stands it has the possibility of having a chilling

effect upon the prospects for integration. May we point out that the plan that they have provided for looks to the exceptions in the statute, not the general one you speak of, but the provision here which allows for [83] freedom of choice for everybody. I think that despite the testimony of the Superintendent, the fact they left Zeb Vance over there, giving all black students an opportunity to apply there, the fact that on Page 2 they talk about closed schools and temporarily reassigned pupils looks to the provision in the statute which says the provisions of this article shall not apply to temporary assignment due to the unsuitability of the school for its intended purpose. That's their claim here. You might be right, Your Honor, that there is a total escape clause here, but we would urge that in your order, which we expect shortly, that some language be in there directing the Board to do what you seem to suggest they have already done, and that is to ignore the statute.

Court: I suppose since you haven't paid any attention to it anyhow, it's not material what's done as long as there is no door being closed against a hearing by the State of North Carolina, which is not represented here today.

Mr. Weinstein: Your Honor, we have consulted with the Attorney General's office in view of the fact that they have, at least tentatively, the State Superintendent of Education, the State Board of Education, been made parties and we are informed by Mr. Ralph Moody, the Deputy Attorney General of North Carolina, that they intend to take a posi-

tion with reference to the statute now being discussed. Mr. Moody did not have notice that this might come up today until late [84] yesterday and he was in Washington and he asked us to convey the message to the Court that he would urge the Court to defer any action with reference to the statute until he had an opportunity to be heard.

Court: Certainly nothing done today will be binding upon the State and I'm just a little bit undecided whether to put any temporary restraint on the School Board in view of the fact that they've read the statute and it's not inhibiting their action here. I'm just going to have to think a little about whether to include any kind of restraint on the School Board. My inclination is really not to do it but I've got to think some about it.

Mr. Weinstein: Your Honor, as I read the statute I heard the words used with reference to some statutes that the exception swallowed the statute and we have testimony here that these exceptions, with reference to the plan pending before the Court, swallow the statute. There's no objection to what's been presented to this Court or what is contemplated for the future.

Court: Is there anything else that counsel wants to say? I would like to talk with all the lawyers as soon as court adjourns.

I'd like to express my thanks to all of you who came today and stood and sat so quietly through a right warm afternoon. Adjournment, please.

Answer of the Defendants, the North Carolina State Board of Education and Superintendent of Public Instruction of the State of North Carolina, to the Supplemental Complaint

(Filed August 11, 1969)

(1) Answering the allegations of Paragraph I of the Supplemental Complaint, these answering defendants allege that the order allowing the plaintiffs to file a supplemental complaint is based upon a motion which was filed in the Office of the Clerk of the Federal Court for the Western District on July 22, 1969, and the order of the Judge of the District Court was also filed on the same date, July 22, 1969, and said order allowing said Supplemental Complaint to be filed is void, invalid and contrary to due process of law for that the North Carolina State Board of Education and the State Superintendent of Public Instruction were never given an opportunity to appear before the Court and resist said Motion, but, to the contrary, the same is an ex parte order entered without service upon the said defendants of any notice or copy of said motion prior to the granting of said order; it is admitted that there is quoted in Paragraph I of the Supplemental Complaint a portion of Chapter 1274 of the Session Laws of 1969 of the General Assembly of this State; it is denied that the plaintiffs are entitled to any preliminary and permanent injunction as against these State defendants or that the plaintiffs are entitled to a declaratory judgment as against these defendants.

(2) Answering the allegations of Paragraph II of the plaintiffs' Supplemental Complaint, it is denied that this Court has jurisdiction as against these State defendants under Federal statutes cited in said paragraph or under the

constitutional provisions cited in said paragraph; it is denied that G. S. 115-176.1 is unconstitutional and invalid or that the plaintiffs are entitled to any declaratory judgment or the convening of a 3-judge federal court; the allegations of Paragraph II are, therefore, untrue, and are denied.

(3) The allegations of Paragraph II are untrue and are denied except the allegation as to the status of the plaintiffs being the same plaintiffs who instituted the original action; it is denied that the plaintiffs are entitled to maintain a class action as against these State defendants.

(4) Answering the allegations of Paragraph IV, these State defendants have nothing to do with the defendants named as the Charlotte-Mecklenburg Board of Education and the individual members thereof, and, therefore, are not required to answer the allegations of subparagraph (a) of Paragraph IV of the Complaint; it is alleged, therefore, that the duties of North Carolina State Board of Education and of Dr. A. Craig Phillips are fixed by State statutes, and, therefore, the allegations of subparagraphs (b) and (c) are denied.

(5) The allegations of Paragraph V are admitted.

(6) The allegations of Paragraph VI are admitted.

(7) Answering the allegations of Paragraph VII, these State defendants allege that the same relate to a motion for further relief filed against the Charlotte-Mecklenburg Board of Education, hearings on same, orders to submit plans of desegregation and matters with which these State defendants are not concerned, and these State defendants allege that they are not required to answer said Paragraph VII.

(8) The allegations of Paragraph VIII of the Complaint relate to matters with which these State defendants are not concerned and of which they have no knowledge or information sufficient to form a belief as to the truth of same, and as to these State defendants the allegations of said paragraph are, therefore, denied.

(9) Answering the allegations of Paragraph IX, these State defendants allege that said allegations relate to matters that these defendants are not concerned with and with which State defendants have not knowledge or information sufficient to form a belief to form the truth of same and as to these defendants said paragraph is, therefore, denied.

(10) Answering the allegations of Paragraph X, the State defendants allege that whatever appears in the orders of the Court previous to the filing of this Supplemental Complaint are matters of record, and, therefore, they are not required to answer as to same.

(11) Answering the allegations of Paragraph XI, these State defendants allege that the General Assembly of North Carolina at its Session of 1969 enacted into law an Act which is now codified as G. S. 115-176.1 and that said Act was ratified on July 2, 1969; that said Act speaks for itself as to its contents, and except as herein admitted the allegations of Paragraph XII are untrue and are denied.

(12) The allegations of Paragraph XII are untrue and are therefore, denied.

(13) The allegations of Paragraph XIII are untrue and are therefore, denied.

(14) The allegations of Paragraph XIV are untrue and are therefore, denied.

Answer of the Defendants, the North Carolina State Board of Education, Etc.

WHEREFORE, having fully answered, these State defendants pray the Court that this action as to the State defendants be dismissed, that the plaintiffs take nothing by their action as to these State defendants and that the State defendants have and recover their costs to be taxed by the Clerk of this Court.

/s/ ROBERT MORGAN
Attorney General of North Carolina

/s/ RALPH MOODY
Deputy Attorney General

/s/ ANDREW A. VANORE, JR.
Staff Attorney

P. O. Box 629
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Order dated August 15, 1969

Preliminary Summary

Pursuant to this court's June 20, 1969 order, the defendants submitted on July 29, 1969 an amended plan for desegregation of the Charlotte-Mecklenburg schools, including a highly significant policy statement accepting for the first time the Board's affirmative constitutional duty to desegregate students, teachers, principals and staffs "at the earliest possible date." On August 4, 1969, a report was filed in connection with the plan. A hearing was conducted on August 5, 1969. The plan is before the court for approval.

Because the schools must open September 2, and because the Board's plan includes both substantial action and genuine assurance of sustained effort toward prompt compliance with the law of the land, the plan of operation, for 1969-70 only, is approved and as indicated below, the defendants are directed to prepare and file by November 17, 1969, detailed plans and undertakings for completion of the job of desegregating the schools effective in September, 1970.

The Amended Plan—And Its Reception

The plan proposes, among other things, to close seven old all-black inner-city schools and to assign their 3,000 students to various outlying schools, now predominantly white, mostly in high rent districts.

This technique of school closing and reassignment has been employed in dozens of school districts to promote school desegregation. It is not original with the local School Board.

The school closing issue has provoked strident protests from black citizens and from others; evidence showed that

an estimated 19,000 names are listed on a petition denouncing the plan as unfair and discriminatory. The signers add their own brand of protest to that of the 21,000 whites who last May (though protesting their acceptance of the principles of desegregation) raised a "silk-stocking" community outcry against bus transportation except to schools of individual choice. Another 800 white Paw Creek petitioners have joined in protest against a part of the plan under which some 200 fifth and sixth grade pupils would be assigned to re-opened Woodland, a new unused (and formerly black) school. Comment from people who have not studied the evidence tends to ignore the law—the reason this question is before a *court* for decision—and to concentrate on public acceptance or what will make people happy. A correspondent who signs "Puzzled" inquires:

> "If the whites don't want it and the blacks don't want it, why do we have to have it?"

The answer is, the Constitution of the United States.

The Constitution—The Law of the Land—Requires Desegregation of Public Schools

North Carolina reportedly refused to ratify the United States Constitution until the Bill of Rights had been incorporated into it. The Fourteenth Amendment to that Constitution, now part of the Bill of Rights, guarantees to all citizens the "equal protection of laws." In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), 349 U. S. 294 (1955), the Supreme Court held that racial segregation in public schools produces inferior education and morale, restricts opportunity for association, and thus violates the equal protection guaranty of the Constitution and is unlawful. In *Green* v. *New Kent County School Board*, 391

U. S. 430 (1968), and two other simultaneous unanimous decisions, the Supreme Court held that school boards have the *affirmative duty* to get rid of dual school systems, to eliminate "black schools" and "white schools," and to operate "just schools." The Court said:

> "The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work *now*." (Emphasis on the word *"now"* was put in the text by the Supreme Court.)

For years people of this community and all over the south have quoted wistfully the statement in *Briggs* v. *Elliott* by Judge John J. Parker (who at his death was one of my few remaining heroes) that though the Constitution forbids segregation it does not require integration. Passage of time, and the revelation of conditions which might well have changed Judge Parker's views if he had lived, have left Judge Parker's words as a landmark but no longer a guide. The latest decision on this subject by the Fourth Circuit Court of Appeals (which is the court that first reviews my actions) contains this statement:

> "The famous Briggs v. Elliott dictum—adhered to by this court for many years—that the Constitution forbids segregation but does not require integration, is now dead." *Hawthorne* v. *Lunenburg*, Nos. 13,283, 13,284, Fourth Circuit Court of Appeals, *July 11, 1969*.

"Freedom of choice," as this court has already pointed out, does not legalize a segregated school system. A plan with freedom of choice must be judged by the same standard as a plan without freedom of choice—whether or not the plan desegregates the public schools. The courts are concerned primarily not with the techniques of assigning

students or controlling school populations, but with *whether those techniques get rid of segregation of children in public schools.* The test is pragmatic, not theoretical.

CONTINUED OPERATION OF SEGREGATED PUBLIC SCHOOLS IS UNLAWFUL

The issue is one of law and order. Unless and until the Constitution is amended it is and will be unlawful to operate segregated public schools. Amending the Constitution takes heavy majorities of voters or lawmakers. It is difficult to imagine any majority of Supreme Court, of Congress or of popular vote in favor of changing the Constitution to say that public school pupils may lawfully be kept in separate schools because they are black. A community bent on "law and order" should expect its school board members to obey the United States Constitution, *and should encourage them in every move they make toward such compliance.* The call for "law and order" in the streets and slums is necessary, but it sounds hollow when it issues from people content with segregated public schools.

The questions is not whether people like desegregated public schools, but what the law requires of those who operate them.

THE DUTY TO OBSERVE THE CONSTITUTION AND DESEGREGATE THE SCHOOLS CANNOT BE REDUCED OR AVOIDED BECAUSE OF SOOTHING SAYINGS FROM OTHER GOVERNMENT OFFICIALS NOR OUTCRIES FROM THOSE WHO WANT THE LAW TO GO AWAY.

The rights and duties of the parties to this suit are in this court for decision according to *law*—not according to HEW guidelines or public clamor. The court and the school board are bound by the Constitution. *So are the legislative and executive branches of government.* No one in Washing-

ton or Raleigh or local government is above or beyond the Constitution. None have power to change it except by lawful means. None have *or claim* the power to interfere with the courts in cases like this one. The malleable HEW "guidelines" put out by the President's administrator for educational affairs, and dubious inferences from statements of other officials, however highly placed, are irrelevant to the constitutional rights of the parties in this case. Also irrelevant are soothing sayings of the Vice President (who has the duty in this area) to black-tie political audiences, and the not-so-soothing sayings of citizens who erroneously talk as if the school segregation issue were a simple matter of political pressure and short-term public opinion. As for the Attorney General of the United States, he has just filed the biggest desegregation suit of all—*against the whole State of Georgia!* Segregation of children in public schools, whether they be black or white, and regardless of whether they do or don't want to stay apart, is unlawful. As the Supreme Court said in *Brown II*:

> ". . . the vitality of these constitutional principles can not be allowed to yield simply because of disagreement with them."

THE SCHOOL BOARD'S NEW PLAN REPRESENTS SUBSTANTIAL PROGRESS.

Against this background the Board's new plan is reviewed:

1. The most obvious and constructive element in the plan is that the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members "at the earliest possible date." It has recognized that whe people

live should not control where they go to school nor the quality of their education, and that transportation may be necessary to comply with the law. It has recognized that easy methods will not do the job; that rezoning of school lines, perhaps wholesale; pairing, grouping or clustering of schools; use of computer technology and all available modern business methods can and must be considered in the discharge of the Board's constitutional duty. This court does not take lightly the Board's promises and the Board's undertaking of its affirmative duty under the Constitution and accepts these assurances at face value. They are, in fact, the conclusions which necessarily follow when any group of women and men of good faith seriously study this problem *with knowledge of the facts of this school system and in light of the law of the land.*

2. In the second place, by the following actions the Board has demonstrated its acceptance of its stated new policies:

a) The desegregation of faculties and the non-racial reassignment of principals and employees from newly closed schools. In the formerly all-black faculties the Board has dramatically exceeded its goal. It is assumed by the court that this process of faculty desegregation will continue and that the goal for 1970-71 will be that faculties in all schools will approach a ratio under which all schools in the system will have approximately the same proportion of black and white teachers.

b) The closing of seven schools and the reassignment of 3,000 black pupils to schools offering better education.

c) The reassignment of 1,245 students from several overcrowded primarily black schools to a number of outlying predominantly white schools.

d) The announced re-evaluation of the program of locating and building and improving schools, so that each project or site will produce the "greatest degree of desegregation possible."

e) The Board correctly and constructively concluded that the so-called "anti-bussing law" adopted by the General Assembly of North Carolina on June 24, 1969, does not inhibit the Board in carrying out its constitutional duties and should not hamper the Board in its future actions. Leaving aside its dubious constitutionality (if it really did what its title claims to do) the statute contains an express exception which renders it ineffectual in that it does not prevent "any transfer necessitated by overcrowded conditions or *other circumstances which in the sole discretion of the School Board require reassignment.*"

f) The elimination without objection of the former provision which had the effect of inhibiting transfer rights of black would-be athletes.

g) Quite significantly, the Board calls upon the Planning Board, the Housing Authority, the Redevelopment Commission and upon real estate interests, local government and other interested parties to recognize and share their responsibility for dealing with problems of segregation in the community at large as well as in the school system.

h) The proposals for programs of "compensatory education" of students, and for teacher orientation and

exchange of activities among black and white students. The court assumes that these somewhat vaguely stated ideas will become implemented with concrete action.

3. *The Seven School Problem.*—The Board plan proposes to close Second Ward High School, Irwin Avenue Junior High School and five inner-city elementary schools (five of which were already marked for abandonment) and to reassign their 3,000 students to outlying white schools. This part of the plan has struck fire from black community leaders and some other critics. Counsel for the plaintiffs contend that it puts an unconstitutional and discriminatory burden upon the black community with no corresponding discomfort to whites. One spokesman for a large group of dissenting and demonstrating black citizens was allowed to express his views at the August 5, 1969 hearing. Threats of boycotts and strikes have been publicized.

This part of the plan is distasteful, because all but 200* of the students being reassigned *en masse* are black. It can legitimately be said and has been eloquently said that this plan is an affront to the dignity and pride of the black citizens. Pride and dignity are important. If pride and dignity were all that are involved, this part of the plan ought to be disapproved. The court, out of forty-year memory of four years of transportation on an unheated Model-T school but thirteen miles each way from a distant rural community to high school in a "city" of 4,000, is fully aware how alien and strange are the sensations experienced by a school child who is hauled out of his own community and into a place where the initial welcome is uncertain or cool.

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* The 200 students being reassigned from Paw Creek to Woodland are white.

However, this part of the plan is not compulsory. Students who want to remain in the comfort of their familiar area may elect to attend the Zebulon Vance School instead; alternatives are also provided for the junior high school students.

Moreover, as one of the attorneys remarked at the first hearing in a discussion about reassignments and school busses: "The question is really not one of 'bussing' but whether what the child gets when he gets off of the bus is worth the trouble."

I personally found the better education worth the bus trip.

Despite their undoubted importance, pride and dignity should not control over the Constitution and should not outweigh the prospects for quality education of children. The uncontradicted evidence before the court is that segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children. By way of brief illustration a table follows showing the contrasting achievements of sixth grade students in five of the closed schools (Bethune, Fairview, Isabella Wyche, Alexander Street and Zeb Vance) and in five of the schools to which black students are going to be transferred:

Order dated August 15, 1969

AVERAGE ACHIEVEMENT TEST SCORES

SIXTH GRADE—1968-69

	SP.	*LANG.*	*ACM. (Math)*	*WM (Word Meaning)*
(Bethune	45	34	41	41
(Ashley Park	61	62	56	58
(Fairview	46	38	42	39
(Westerly Hills	61	61	52	57
(Isabella Wyche	41	34	40	38
(Myers Park	80	84	58	73
(Alexander Street	45	38	34	40
(Shamrock Gardens	57	62	53	56
(Zeb Vance	38	34	39	42
(Park Road	71	75	58	66

This alarming contrast in performance is obviously not known to school patrons generally.

It was not fully known to the court before he studied the evidence in the case.

It can not be explained solely in terms of cultural, racial or family background without honestly facing the impact of segregation.

The degree to which this contrast pervades all levels of academic activity and accomplishment in segregated schools is relentlessly demonstrated.

Segregation produces inferior education, and it makes little difference whether the school is hot and decrepit or modern and air-conditioned.

It is painfully apparent that "quality education" can not live in a segregated school; *segregation itself is the greatest barrier to quality education.*

As hopeful relief against this grim picture is the uncontradicted testimony of the three or four experts who

testified, some for each side, and the very interesting experience of the administrators of the schools of Buffalo, New York. The experts and administrators all agreed that transferring underprivileged black children from black schools into schools with 70% or more white students produced a dramatic improvement in the rate of progress and an increase in the absolute performance of the less advanced students, without material detriment to the whites. There was no contrary evidence. (In this system 71% of the students are white and 29% are black.)

Moreover, the Board's announced policy and the uncontradicted testimony of the superintendent show that serious arrangements are being made to welcome, rather than rebuff, the transferees into all school activities. This is something new and important.

No legal authority is cited that the Constitution prohibits transport of consenting black children from an inferior educational environment into a better educational environment for the purpose of complying with the constitutional requirement of equal protection of laws.

The choice of how to do the job of desegregation is for the School Board—not for the court.

The Board has wide discretion in choosing methods; many effective methods are described in the evidence; the court's duty is simply to pass on the legality of the Board's actions. It appears to the court that the improvement in the education of 4,200 school children is the one most obvious result of the Board' plan of action for 1969-70, and that this is more important constitutionally than other considerations which have been advanced.

It is not the intention of this court to endorse or approve any future plan which puts the burden of desegregation primarily upon one race. However, there is not time before September 2, 1969 to do a complete job of reassign-

ing pupils; the plan is a step toward more complete compliance with the law; the court reluctantly votes in favor of the 4,200 school children and approves the plan on a one-year basis.

The Major Task Lies Ahead This Fall

The big job remains to be done. After implementation of the current plan, further large scale faculty transfers will still be necessary. Sixteen years after *Brown* v. *Board of Education,* some thirteen thousand school children will remain in black or nearly all-black schools. Most white students will remain in substantially all-white schools. The failure of the plan to deal with those problems of course can not be approved. The failure of the plan to include a time table for the performance of specific elements of the program of course can not be approved, *Felder, et al.* v. *Harnett County Board of Education, et al.,* 409 F. 2d 1070 (4th Cir., 1969). These matters must be covered by specific instructions to the Board.

All findings of fact in the previous orders of April 23, 1969, and June 20, 1969, and the supplemental findings of June 24, 1969, are incorporated herein to the extent that they are consistent with the findings, conclusions and orders herein reached and given. All evidence at all hearings is considered in reaching these conclusions.

Order

1. The policy statement of the Board is approved.

2. The faculty desegregation program is approved.

3. The plan to desegregate pupils by closing seven all-black schools and assigning their pupils to outlying white

schools is approved only (1) with great reluctance, (2) as a one-year, temporary arrangement, and (3) with the distinct reservation that "one-way bussing" plans for the years after 1969-70 will not be acceptable. If, as the school superintendent testified, none of the modern, faculty-integrated, expensive, "equal" black schools in the system are suitable for desegregation now, steps can and should be taken to change that condition before the fall of 1970. Unsuitability or inadequacy of a 1970 "black" school to educate 1970 white pupils will not be considered by the court in passing upon plans for 1970 desegregation. The defendants contended and the court found in its April 23, 1969 order that facilities and teachers in the various black schools were not measurably inferior to those in the various white schools. It is too late now to expect the court to proceed upon an opposite assumption.

4. The plan to reassign 1,245 students from presently overcrowded black schools is approved.

5. Reassignment of the Paw Creek students to Woodland is approved.

6. The proposals of the Board for restructure of attendance lines; for consideration of pairing and grouping schools; for review of the construction programs; and for support programs, student exchange and faculty orientation are approved in principle, although for lack of specific detail and time table they are not approved as presented.

7. The Board is directed to prepare and present by November 17, 1969, the following:

(1) Plan for complete faculty desegregation for 1970-71.

(2) Plan for student desegregation for 1970-71, including making full use of zoning, pairing, grouping, clustering, transportation and other techniques, complete with statistics and maps and other data showing precisely what (subject to later movement of pupils) the assignment of pupils and teachers will be for the year 1970-71, having in mind as its goal for 1970-71 the complete desegregation of the entire system to the maximum extent possible. (The assumption in the Board's report that a school is desegregated when it has as many as 10% of a minority race in its student body is not accepted by the court, and neither the Board nor the court should be guided by such a figure.) "Possible" as used here refers to educational—*not* "political"—possibility. If Anson County, two-thirds black, can totally desegregate its schools in 1969, as they have now done, Mecklenburg County should be able to muster the political will to follow suit.

(3) A detailed report showing, complete with figures and maps, the location and nature of each construction project proposed or under way, and the effect this project may reasonably be expected to have upon the program of desegregating the schools.

8. Since a mid-city high school may prove most desirable, the Board is directed pending further orders of court not to divest itself of any land, options, rent arrangements or other access to or control over real estate which it may now have in the Second Ward area.

9. Jurisdiction is retained.

This the 15th day of August, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Order dated August 29, 1969

The School Board's amended plan for desegregation of the Charlotte-Mecklenburg schools was approved by order of court dated August 15, 1969. The Board has now tendered a modification to this plan which was filed today, August 29, 1969.

The modification relates to the facilities to be provided for those black children whose parents exercise freedom of choice to attend a black elementary school in the inner city instead of attending the white schools listed in the July 29, 1969 plan which has already been approved by the court.

The amendment calls for using the building of former Irwin Avenue Junior High School with certain minor renovations, instead of Zeb Vance School, and a limit of six hundred students upon those who would be admitted to this program at Irwin Avenue School. This part of the motion to amend is approved. The choice of building, *per se*, is a matter for the School Board, not the court.

The amendment proposes that the Irwin Avenue School would be operated "as an innovative school." The court does not know what this means. If by this phrase is meant that anything will be done to make this school more attractive to the black students than the black schools they have been attending, then the program will constitute the location and use of a school facility for the purpose of promoting segregation which by previous decisions of this and other courts the defendants have been fully advised is unconstitutional. *Felder, et al.* v. *Harnett County, North Carolina*, 409 F.2d 1070 (4th Circuit, 1969) (decided April 22, 1969), and cases cited therein. The addition of "innovations" at Irwin Avenue School will not be approved by the court unless these "innovations" have been arranged and

provided for all the black students who transfer to white schools under the July 29, 1969 plan of the Board previously approved. The phrase "innovative" may refer to what the Board has heretofore called "compensatory education." The court has not yet been advised of any performance by the Board in line with the undertaking in its July 29, 1969 plan to provide "compensatory education" for pupils who lag behind their classmates in academic achievement. Unless and until the court can be informed and satisfied that this "compensatory education" is provided in the other schools, the court is of the opinion that providing it in the Irwin Avenue School would set up a magnet to attract black children away from desegregated assignments and therefore on the present record at least that part of the plan is disapproved.

The proposal to provide transportation for any of the students attending Irwin Avenue School is expressly disapproved. The effect of providing transportation is to subsidize at tax payers' expense those who are actively seeking to defeat the constitutional mandate to desegregate the schools. No authority is advanced or suggested to justify such a flagrant violation of the law, and none has been imagined by the court. The Board is expressly restrained from and enjoined against providing transportation in any form to any student in the system, black or white, which may or might enable him to travel any part of the distance from his home to or from any school elected by or for him under "freedom of transfer" or "freedom of choice," except that the Board may provide transportation as previously ordered by this court to those students who elect to transfer or who are transferred by the Board from a school in which their race is in a majority to a school in which their race

is in the minority. As this court pointed out before, bus transportation has too long been used as a tool to promote segregation. The year 1969 is too late in the day to start using this tool for that purpose in new situations.

This the 29th day of August, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Motion for Further Relief and for Show Cause

(Filed September 2, 1969)

Plaintiffs, by their undersigned counsel, respectfully move the Court for further relief and for a show cause order in the above styled cause and, as grounds therefore, show the Court the following:

1. On August 15, 1969, the Court entered an Order approving an amended plan of desegregation for the Charlotte-Mecklenburg Public Schools filed by the defendant Board. The plan provided generally (1) for the closing of seven all-black schools, five elementary schools, one junior high school and one senior high school; (2) the transfer of these students to previously all white schools; (3) the transfer of some black students from overcrowded black schools to previously all-white schools; (4) the restructuring of attendance zones; (5) reviewing the construction program; (6) the initiation of a compensatory education plan to assist pupils who are behind their classmates in academic achievement; (7) an increase in desegregation of teachers and school personnel with a more extensive program of in-service training for such personnel; (8) the grouping of schools for student exchange; and a policy statement with respect to the Board's obligation to affirmatively desegregate schools and to provide equality of educational opportunities for all students. The closing of the seven black schools and the reassignment of some black students from overcrowded black schools would mean an increase of 4125 black students in integrated schools. The Board proposed to provide transportation for the black students who were being reassigned.

In approving the plan, the Court noted its objection to one-way desegregation—imposing the sole burden of desegregation on black students and parents. See also *Brice*

v. *Landis*,—F. Supp.—(N.D. Calif., Civ. No. 51805, Aug. 8, 1969). The Court stated however, that in view of the other steps being taken by the Board and the apparent commitment of the Board to now carry out its obligations under the Constitution the Board's plan warranted approval, at least for one year. The Court directed the Board to submit a plan for complete desegregation of the system on or before November 17, 1969.

2. Plaintiffs are now advised that the defendants have failed to implement the plan approved by the Court and in fact have taken steps to impede and limit the desegregation ordered.

(a) The plan approved by the Court retained freedom of choice for students to transfer out of schools after initial assignments to other schools. Zeb Vance Elementary School was designated as a black school to which students in the closed elementary schools could transfer if they elected not to attend integrated schools. Plaintiffs objected initially to this feature of the plan because of the patent inadequacy of this school facility. The Board now proposes to reopen Irwin Avenue School in lieu of Zeb Vance Elementary School and in addition to provide transportation[1] and compensatory education for the students at this school. Plaintiffs have no objection to the reopening of Irwin rather than Zeb Vance if freedom of choice is to continue since Irwin is obviously a better facility.[2] Plaintiffs submit, however,

[1] Similar transportation is provided for white students who reside in Negro or predominantly Negro school zones who elect under freedom of choice to transfer out to white or perdominantly white schools such, for example, as white students transferring from Amay James, Marie G. Davis, Hawhtorne and Piedmont.

[2] The Court on August 29, 1969 entered an Order approving of this proposed change but enjoined the Board from providing transportation and compensatory education.

that the operation of this school as well as the other racially segregated schools in the system continues to violate the constitutional mandate to desegregate. Freedom of choice, however, has served and has been utilized by defendants as a means to effectively limit and impede the desegregation of students anticipated by the Court. Of the 1,235 students affected by the closing of the black elementary schools, a substantial portion have elected to attend Irwin or other all black elementary schools. A stubstantial number of the junior high and senior high school students have also elected to attend all-black schools. Black students have quite appropriately objected to one-way desegregation and have opted, under freedom of choice, not to shoulder the complete burden of desegregation. A fact which is more important, however, is that defendants have failed to institute programs and policies to accommodate those students who choose to remain in the intergrated schools. When all practices of the Board are considered, freedom of choice has not been free but patently illusory. See *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 20 L. ed. 2d 716; *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 20 L. ed. 2d 733; *Coppedge* v. *Franklin County Board of Education*, 372 F.2d 410 (4th Cir. 1968); *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1967), aff'd en banc (5th Cir. 1968). The elimination of freedom of choice in this system would promote integration of both black and white schools. No administrative or other constitutionally acceptable reason has been shown for retention of this practice. It should be eliminated *now*. *Green* v. *County School Board of New Kent County*, *supra*.

(b) Not one step has been taken by the Board to implement the plan and Court Order with respect to reassigning

the black students now in overcrowded black schools. The Court viewed this step by the Board as an indication of its sincerity to desegregate. We are now told that the Board will move some children in the midst of the school year as mobile units are removed and secured although there are spaces available to accommodate some students now. Plaintiffs are advised that none of the children have been advised of pending reassignment. It would be unconscionable to pick up large blocks of black students in the midst of the school year and reassign them to white schools. Despite the order, despite the promises, the Board has done nothing to implement this provision for the beginning of the 1969-70 school year.

(c) The Board has failed to implement the provision of the Order requiring compensatory education for the underachievers. Subsequent to the Order, the Board proposed to provide such program for the black students who remained at the all-black Irwin School. Nothing, however, has been done in this regard for the black students who have elected to integrate in the previously all-white schools. What the Board proposes is to penalize those students who would integrate while providing compensatory programs for those who remain. The Board should be specifically directed to provide these programs for all students in all schools.

3. School is scheduled to open on September 2, 1969. The Court will not be able to review compliance with its Order in time to insure its complete implementation before the beginning of school. Clearly, however, the anticipated substantial steps toward desegregation (see Order of April 23, 1969) have not been achieved. Nor has the Board taken even the minimal steps to desegregate as directed by the Court. Constitutional rights are involved here. Plaintiffs are entitled to effective relief now.

Motion for Further Relief and for Show Cause

WHEREFORE, plaintiffs respectfully pray:

(a) That this matter be reopened for consideration of a plan of desegregation for the 1969-70 school year.

(b) That the defendants be enjoined to adopt and to implement a plan for the 1969-70 school year which will completely desegregate the schools. Plaintiffs pray that the order specifically enjoin the defendants from placing the primary or sole burden of desegregation upon black students and parents.

(c) That an order be issued directing the defendants to show cause why each of them should not be held in contempt for failing to implement the Court's Order of August 15, 1969.

Respectfully submitted,

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Attorneys for Plaintiffs

Order dated October 10, 1969

On April 23, June 20 and August 15, 1969, orders were entered directing the defendants to submit a plan and a time table for the desegregation of the Charlotte-Mecklenburg schools, to be completed by the fall of 1970. Nearly six months after the original order, faculty desegregation is well along and there have been a number of substantial improvements in the stated policies of the Board, including the stated assumption of duty by the Board to desegregate the schoools "at the earliest possible date." Limited steps have been taken toward compliance with the pupil desegregation provisions of that original order. However, the major part of the job remains undone, and no plan for desegregation of the entire system has apparently been voted on by the Board.

The latest order set November 17, 1969, as the revised date for defendants to file a complete plan and time table. Defendants have now filed a 15-page motion and supporting affidavit asking the court to extend by another two and one-half months, to February 1, 1970, the time for compliance with the orders. Plaintiffs oppose the extension.

The justification advanced for this delay is that they have hired a systems analyst to re-draw attendance lines, and that the three months between August 15 and November 17 are not enough time to program a computer and prepare a plan.

It would be a happy day if the job could be turned over to a computer. A computer, if programmed objectively, could produce objective results; all could blame the machine (in addition to the court) for any unpleasant decisions. Also, the court would like to avoid unnecessary pressure on the school staff and administrators.

However, the information thus far available is inadequate to justify the extension. Computers are for time-*saving*,

not delay. The computer work was estimated by the Board's chosen systems analyst, Mr. Weil, to require ninety man days of work. He proposes to consume ninety calendar days with this job! The Board's motion says that their decisions about construction and location of 21 building projects (involving many millions of dollars) are to be held up pending development of the plan. The school budget approaches fifty million dollars. The question fairly arises why the Board should not employ or assign more than one person at a time to feed the computer. Mr. Weil's original plan, which is in evidence, was prepared in a very few days. The court has on file also three or four other plans, including at least one which local school officials say is educationally and technically feasible, which were prepared in a few days each. The use of a computer does not appear to justify the delay.

Moreover, computers cannot make political nor legal decisions; they react to what is fed into them; and the request for postponement leaves the court to speculate over what will be fed into the computer. The motion does not say that Mr. Weil has been instructed by the Board to frame a plan to desegregate the schools; his commission, by a Board committee only, is limited to re-drawing attendance lines; the vague references in the Board's motion to his instructions as to travel limitation and specified school capacities and desirable racial balance permit the inference, in fact, that his mission could be *re*-segregation of much of the system.

The motion also contains no commitment on the part of the Board to adopt any plan that the computer may produce; it gives no information about the Board's intentions as to other desegregation methods it will use; and it promises no *result* from the delay except *consideration* by the

Board of a computer plan for re-arranging school lines.

The motion is preoccupied with one *method*, and silent about *results*.

Before passing on the motion, the court has a duty to discover what the Board has accomplished since its July 29 promises were made, and whether the extra time will promote genuine progress toward compliance with the Constitution or whether it will just be time lost.

The Board is therefore directed to file with the court by October 29, 1969, the following information:

1. A full statistical report on the results of the closing of the inner-city schools and where the 4,200 black pupils the Board proposed on July 29 to transfer to white schools are actually going to school as of October 10, 1969.

2. The figures regarding the effect of freedom of transfer on the desegregation proposed in the July 29, 1969 plan for closing inner-city schools and transferring their students.

3. A report on freedom of choice or freedom of transfer: How many children, by school or location and race, chose to transfer out of and into the various schools for the 1969-70 year.

4. Full reports on the current numbers and races of the children and teachers in the system, school by school, with percentages of each race for each school.

5. A report on the children being provided bus transportation, school by school.

6. A description of what has been done to provide the compensatory education programs proposed in the July 29 plan and policy statement.

Order dated October 10, 1969

7. A copy of all September and October, 1969, reports of the Board to the Department of Health, Education and Welfare.

Unless the Board has made the hard decisions needed to desegregate the schools, the time spent on a computer plan may well be just more time lost, and delaying decision may simply compress into fewer months next year the decisions that should have already been made. Therefore, in addition to the above, the Board is directed to answer by October 29, 1969, the following questions:

1. What, in verbatim detail, are the instructions that have been given to Mr. Weil?

2. What is Mr. Weil's assigned mission or goal?

3. What areas of the district is he directed to include in his program of re-drawing attendance lines?

4. What areas, if any, is he directed to exclude?

5. What schools will his program affect?

6. Will pairing, grouping or clustering of schools be used by the Board as needed to supplement the computer plan?

7. Will the Weil program of re-drawing attendance lines produce desegregation of all the schools by September, 1970?

8. If the Weil program does not produce desegregation of all the schools by September, 1970, what does the Board plan to do to produce that result?

9. Will any plan produced by the Weil method or any other re-drawing of attendance lines desegregate

the schools if unrestricted freedom of transfer or freedom of choice is retained?

The value of the answers to these nine questions is substantially dependent on whether they are made by vote of the full Board or by non-voting representatives such as attorneys or other agents.

Pending receipt of the above information, the court will defer action on the request for time extension. Action will also be deferred for the present on the motions which have been filed by the plaintiffs which include requests for abolition of freedom of choice and appointment of an outside expert to devise a plan in default of Board action.

This the 10th day of October, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Defendants' Response to Motion for Further Relief

(Filed October 11, 1969)

The defendants, The Charlotte-Mecklenburg Board of Education and the individual Board members, answering the motion of the plaintiffs filed herein on the second day of September, 1969, allege and say:

1. The allegations of Paragraph 1 deal with matters and things appearing of record in this case and this defendant is not required to either admit or deny said allegations.

2-A. The order of the Court dated August 29, 1969, has disposed of the allegations contained in Paragraph 2-A and these defendants are not required to either admit or deny the same.

2-B. The allegations contained in Paragraph 2-B are denied and in further answer thereof, these defendants allege that substantial steps have been taken to implement the plan with respect to re-assigning black students now in over-crowded schools and that the record in this cause expressly discloses that the plan did not contemplate re-assignment of these students until such time as the additional mobile units were available and some students might not be re-assigned until the end of December. It is expected that all students will be re-assigned on or before October 15, 1969.

2-C. The allegations contained in Paragraph 2-C are denied.

WHEREFORE, these defendants pray the Court that the relief demanded by the plaintiffs in said motion be denied

and that these defendants have such other and further relief as it may be entitled to receive.

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.....

William J. Waggoner
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Charlotte-Mecklenburg Schools

Research Report 2-'69
and 10-'69

SUMMATION OF INTEGRATION 1965 (MARCH) AND 1968-69 (OCT. 1, '68)
AND 1969-70 (Oct. 2, '69)

	For Pupils				Professional Staff			
Schools Having Integration								
For Pupils	1965 1 N + 22 W = 23 of 109 or 21%		1968 16 N + 68 W = 84 of 112 or 75%		For Staff	1965 3 N + 0 W = 3 of 109 or 3%		1968 16 N + [illegible] = [illegible] or [illegible]
	N	1965 W	N	1968 W		N	1965 W	N	1968 W
Number in Minority Race (Integrated)									
Pupils	9W	476N	1192W	6704N		5.7N	0N	131W	208N
Number in Majority Race (Integrated)									
Pupils	343N	16,446W	8697N	47,356W		143.3N	+0W	374N	3579W
Total involved by Integration									
Predominantly Negro Schools -- Pupils	352		9889		Staff	149		505	
Predominatly White Schools -- Pupils	16,922		54,060		Staff	0		2783	
Total -- Pupils	17,274 or 24% of 72,336 Enrolled		63,949 or 77% of 83,111		Staff	149 or 5% of 3140 incl. part assignments in schools		3288 or 91% of 3613 assigned at one defini school	

1965 (March), 1968-69 (Oct. 1, '68), and 1968-69

Grade	1965 No. School	1965 Pupils M	1965 Pupils W	1968 No. School	1968 Pupils M	1968 Pupils W	1969 No. School	1969 Pupils M	1969 Pupils W	Professional Staff 1965 M	1965 W	1968 M	1968 W	1969 M	1969 W
1-6	72	9,364	27,696	76-	13,290	31,545	73-	13,374	31,522	377+	1171½	478	1329	499	1344
7-9	17	2,475	11,804	21	5,934	14,741	20-	6,188	15,191	111-	533	228	706	232	694
10-12	8	1,625	10,677	11	4,377	12,313	10-	4,472	12,808	65	479½	178	644	194	666
	97	13,464	50,177	108-	23,601	58,599	103-	24,034	59,521	553½	2184	884	2679	925	2704
Other	12	6,877	1,818	[illegible]	640	271	4+	656	307	323½	79	23	27	22	30
				Kgn. + Trainable											
1-4	1	360								15½					600a
1-7	2	431	207							17	9½				
1-9	3	729	1611							32	68				
5-9	1	505								25½					
1-12	3	2400								113½					
7-12	2	2452								120	1½				
Total	109	20,341	51,995	112	24,241	58,870	107	24,690	59,828	877	2263	907	2706	947	2734

Include Part-time | Not Include Part-time

Among teachers assigned to more than one school

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Elementary	N	% N	W	N	% N	W (other)	N		W (other)	N	% N	W	N	% N	W (other)	N		W (other)
Albemarle Rd.				4	1%	499	4	1%	510				6	32%	13	6	32%	14
Alexander Street	342	100%		257	100%					14.1	100%		11	100%				
Allenbrook				50	10%	452	61	12%	452				2	10%	18	5	24%	16
Ashley Park		0%	694		0%	553	27	4%	574		0%	22.9	2	9%	20	4	17%	19
1-9 '65 Bain		0%	674	25	3%	699	33	4%	735		0%	28.2	1	3%	28	5	17%	25
Barringer		0%	604	668	84%	131	859	78%	16		0%	24.8	13	72%	18	16	47%	18
Barryhill		0%	1026	119	13%	685	114	14%	675		0%	39.6	2	6%	32	6	16%	31
Bethune	343	97%	9	223	99%	3				17.6	100%		11	100%				
Beverly Woods					0%	286	68	9%	684				1	8%	12	5	18%	23
Biddleville	434	100%								17.2	100%							
1968 Billingsville	729	100%		619	100%	2	610	100%	0	32.1	100%		25	100%		16	62%	10
Briarwood	2	0%	582	8	1%	640	6	1%	680		0%	23.9	3	12%	22	6	24%	21
Bruns				740	99%	4	774	99%	10				26	88%	2	21	66%	11
Chantilly		0%	445	2	0%	491	5	1%	487		0%	18.8	1	5%	21	4	17%	19
1967 Clear Creek		0%	207	58	20%	225	51	17%	244		0%	9.6	1	8%	12	3	20%	12
Collinswood		0%	375	72	13%	490	111	20%	443		0%	16.1	1	5%	21	3	14%	19
Cornelius		0%	241	239	99%	252	195	95%	237		0%	11.3	7	33%	14	5	26%	14
Cotswold		0%	631	11	2%	567	23	4%	537		0%	25.0	1	5%	21	4	18%	18
Crestdale	97	100%								5.0	100%							
Davidson		0%	178	101	35%	186	104	36%	186		0%	7.8	1	8%	11	2	17%	10
Marie Davis	808	100%		705	100%		691	100%	0	34.3	100%		29	100%		14	93%	15
Derita	6	1%	892	165	18%	728	163	19%	688		0%	35.4	3	9%	32	5	14%	30
Devonshire	2	0%	474		0%	889	0	0%	903		0%	19.2	4	11%	37	7	18%	31
Dilworth	100	20%	401	223	39%	355	113	25%	336		0%	23.8	4	18%	22	2	9%	19
Double Oaks	793	100%		800	100%		836	100%	0	28.2	100%		32	100%		15	63%	12

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff								
										1965			1968-69*			1969-70*		
Elementary	N	% N	W	N	% N	W (other)	N		W (other)	N	% N	W	N	% N	W (other)	N		W (other)
Druid Hills	520	100%		504	77%	3	472	77%	3	20.7	100%		20	100%		13	62%	8
Eastover		0%	704	49	8%	580	42	7%	559		0%	27.1	1	4%	24	4	19%	20
Elizabeth	5	1%	448	270	53%	194	366	71%	151		0%	22.9	2	9%	21	6	29%	20
Enderly Park		0%	368	2	1%	374	3	1%	371		0%	14.9	1	6%	15	3	17%	13
Fairview	702	100%		363	100%					28.0	100%		19	100%				
First Ward	473	100%		749	100%		820	100%	0	22.8	100%		30	100%		17	56%	17
1965 J. H. Gunn	696	100%								33.6	100%							
Hickory Grove		0%	530	80	13%	531	70	12%	533		0%	21.7	1	4%	23	3	15%	20
Hidden Valley					0%	977	0	0%	1100				2	5%	35	7	17%	35
Highland	2	1%	273	47	13%	324	69	18%	305		0%	14.0	1	7%	14	3	19%	13
Hoskins		0%	342	18	6%	261	13	5%	228		0%	14.7	2	15%	11	3	25%	9
Huntersville		0%	553	162	22%	560	154	22%	535		0%	22.9	2	7%	25	5	19%	22
Huntingtowne Farms		0%	358	7	1%	695	7	1%	603		0%	15.1	1	4%	26	4	16%	21
Idlewild		0%	592	2	0%	521	56	7%	597		0%	23.9	1	4%	22	6	26%	23
1965 Amay James	360	100%		477	100%	1	473	77%	3	15.5	100%		19	100%		13	59%	9
1965 Ada Jenkins	431	100%								17.0	100%							
Lakeview		0%	400	269	65%	147	362	71%	102		0%	18.5	14	74%	5	13	62%	8
Lansdowne		0%	633		0%	758	75	9%	802		0%	23.9	1	3%	30	6	17%	30
Lincoln Heights	783	100%		817	100%	2	711	100%	0	29.1	100%		30	100%		16	57%	12
Long Creek		0%	423	250	35%	466	267	36%	468		0%	17.6	2	7%	26	6	21%	23
1965 Matthews		0%	937	(1-6) 93	11%	742	86	10%	802		0%	39.7	1	3%	32	6	16%	31
Merry Oaks		0%	538		0%	469	0	0%	442		0%	21.9	1	5%	19	3	16%	16
Midwood		0%	560	1	0%	522	11	2%	477		0%	24.9	2	9%	21	4	17%	19
Montclaire		0%	720		0%	722	0	0%	718		0%	29.1	1	4%	27	5	19%	23
Morgan	305	100%								14.9	100%							
Irwin Ave. (Elem)							315	100%	0							10	67%	5

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Elementary	N	% N	W	N	% N	W (other)	N		W (other)	N	% N	W	N	% N	W (other)	N		W (other)
Myers Park		0%	575	23	4%	543	22	5%	456		0%	24.9	1	4%	23	3	12%	22
Myers Street	820	100%								32.2	100%							
Nations Ford		0%	513	63	10%	585	47	6%	681		0%	21.6	1	4%	25	6	21%	22
Newell		0%	463	73	15%	423	74	17%	438		0%	18.3	1	5%	18	3	15%	17
Oakdale		0%	402	72	15%	480	69	12%	517		0%	17.2	1	5%	21	6	25%	18
Oakhurst		0%	548	2	0%	615	5	1%	616		0%	22.8	1	4%	23	4	17%	20
Oaklawn	666	100%		650	100%		613	100%	0	26.0	100%		25	92%	2	11	42%	15
Olde Providence				10	2%	434	80	16%	512				1	6%	17	5	20%	20
Park Road		0%	583		0%	551	44	9%	548		0%	22.7	1	5%	21	7	30%	16
Paw Creek		0%	793	63	7%	861	27	4%	609		0%	30.3	1	3%	31	5	22%	18
Pineville		0%	364	168	32%	363	146	28%	375		0%	16.2	1	5%	21	4	17%	19
Pinewood		0%	719		0%	707	0	0%	674		0%	28.1	1	4%	26	4	15%	22
Plaza Road		0%	400	99	17%	409	88	20%	362		0%	17.7	1	5%	21	4	17%	17
Rama Road		0%	442	2	0%	777	1	0%	815		0%	18.7	2	7%	27	5	17%	24
Sedgefield	3	1%	526	7	1%	545	3	1%	548		0%	21.8	2	9%	20	4	17%	19
Plato Price	505	100%								25.4	100%							
Selwyn		0%	531	5	1%	598	31	5%	617		0%	21.9	1	4%	22	5	19%	21
Seversville	96	18%	229								0%	14.8						
Shamrock Gardens		0%	536		0%	539	0	0%	515		0%	21.9	1	5%	20	4	17%	17
Sharon		0%	591		0%	519	89	20%	364		0%	22.9	1	5%	20	4	20%	16
Starmount		0%	481	25	3%	713	25	3%	712		0%	20.9	1	3%	28	5	17%	25
Statesville Road		0%	650	295	34%	534	333	39%	522		0%	25.9	3	9%	29	8	29%	25
Steele Creek		0%	222	12	2%	531	5	1%	509		0%	10.7	1	5%	20	4	18%	18
Sterling	699	100%								33.9	100%							

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Elementary	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)
Torrence-Lytle	1005	[illegible]%								46.1	100%							
Tryon Hills		0%	324	241	58%	245	322	44%	166		0%	15.0	1	5%	20	4	18%	18
Tuckaseegee		0%	631	61	10%	553	58	9%	578		0%	23.9	1	4%	23	4	17%	20
University Park	700	100%		777	100%		825	100%	1	25.8	100%		30	97%	1	23	70%	10
Zeb Vance	465	100%		257	100%					19.5	100%		11	100%				
Villa Heights	23	4%	594	796	14%	126	929	91%	88		0%	28.3	23	62%	14	23	58%	17
Wesley Heights	214	100%								8.3	79%	2.2						
Westerly Hills					0%	569	46	8%	539				1	4%	22	4	17%	20
Wilmore	6	2%	323	145	33%	293	228	97%	235		0%	15.4	8	40%	12	9	41%	13
Windsor Park	1	0%	679	2	0%	737	1	0%	748		0%	25.8	1	4%	27	6	20%	24
Winterfield		0%	455		0%	689	48	7%	688		0%	18.7	1	4%	26	6	20%	24
Woodland	360	100%								14.8	100%							
Woodlawn		0%	283								0%	14.0						
Isabella Wyche	383	100%		222	100%					18.6	100%		12	100%				
Child Development (Kgn. Centers)																		
Davidson, #1				83	41%	117	80	40%	121				3	30%	7	3	30%	7
Pineville, #2				166	82%	37	163	77%	43				2	20%	8	2	20%	8
Seversville, #3				174	87%	26	181	90%	21				8	80%	2	7	70%	3
Morgan, #4				188	97%	6	187	94%	12				8	80%	2	7	78%	2

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Junior High	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)
Albemarle Road		0%	577	66	7%	881	63	6%	995				4	9%	43	6	13%	40
Alexander		0%	872	347	31%	755	369	32%	771		0%	28.9	6	12%	44	8	16%	41
Cochrane		0%	872	76	5%	1444	79	5%	1552		0%	35.4	6	10%	56	12	18%	54
Coulwood	3	1%	574	119	14%	727	106	12%	770		0%	27.1	4	11%	34	6	16%	32
Eastway		0%	1046	3	0%	1364	61	4%	1356		0%	43.2	3	5%	55	11	18%	51
Alex. Graham		0%	1048	8	1%	1084	113	10%	1028		0%	43.8	4	9%	43	9	15%	40
Hawthorne	25	4%	670	492	52%	447	596	56%	472		0%	33.9	12	27%	33	15	31%	34
Irwin Ave.	785	100%		666	100%					42.7	100%		32	97%	1			
McClintock		0%	1273	46	4%	1228	93	7%	1288		0%	51.5	2	4%	49	10	17%	48
Northwest	773	100%		932	100%		1052	99%	1	33.7	100%		39	100%		22	52%	20
Piedmont	121	29%	291	428	89%	53	443	24%	55		0%	26.8	13	34%	12	17	57%	13
Quail Hollow		0%	766	171	12%	1261	155	10%	1421		0%	35.2	3	5%	61	8	13%	55
Randolph				272	28%	711	289	29%	710				2	5%	38	9	20%	35
Ranson	9	1%	658	253	30%	586	260	32%	548		0%	30.0	6	16%	31	11	31%	25
Sedgefield	6	1%	920	189	19%	802	167	17%	809		0%	40.5	5	11%	39	9	21%	34
Smith		0%	1115		0%	1389	55	4%	1436		0%	48.6	3	5%	57	9	15%	52
Spaugh	1	0%	930	186	18%	871	287	26%	839		0%	42.5	6	14%	43	10	24%	37
Williams	752	100%		893	100%		1081	100%	0	34.9	100%		37	100%		27	63%	16
Wilson		0%	1064	60	5%	1132	71	6%	1145		0%	45.6	4	9%	45	9	18%	42
York Rd. (Kennedy)	(7-12) 1041	100%		727	97%	6	854	99%	9	49.9	100%		32	97%	1	21	55%	15
													5	19%	21	4	27%	11

Learning Academy - 7th & 8th grades counted in JH, above.

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965, 1968-69*, and 1969-70*

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Senior High	N	% N	W	N	% N	W (other)	N	% N	W (other)	N	% N	W	N	% N	W (other)	N	% N	W (other)
East Mecklenburg		0%	1782	155	8%	1739	227	11%	1925		0%	79.2	6	7%	85	16	15%	91
Garinger	2	0%	2266	202	9%	2157	492	19%	2148		0%	100.0	6	6%	102	22	18%	97
Harding		0%	1002	169	17%	814	636	47%	720		0%	48.0	4	7%	49	16	22%	56
Independence				92	7%	962	135	11%	1111				6	9%	59	12	16%	62
Myers Park	31	2%	1772	158	8%	1855	233	12%	1767		0%	76.7	6	6%	87	17	18%	79
North Mecklenburg	1	0%	1155	410	27%	1109	462	25%	1185		0%	51.8	6	7%	63	13	17%	64
Olympic				259	33%	522	376	42%	512				5	11%	39	10	21%	38
7312-65 Second Ward	1411	100%		1139	100%	3				70.0	98%	1.5	57	75%	3			
South Mecklenburg	30	2%	1430	106	6%	1812	109	5%	2024		0%	72.0	4	5%	78	17	18%	79
West Charlotte	1560	100%		1569	100%		1658	100%	0	65.0	97%	2.0	74	93%	6	58	67%	29
West Mecklenburg	1	0%	1270	118	8%	1340	148	9%	1444		0%	61.4	4	5%	73	13	15%	71

Defendants' Report to the Court Pursuant to Order of October 10, 1969

On October 2, 1969, the defendants, Charlotte-Mecklenburg Board of Education and the individual Board members, petitioned the Court for an extension of time in which to file its plan for faculty and student desegregation for the 1970-1971 school year. The Court deferred ruling on the defendants' motion pending submission of certain information to the Court.

1. Attached marked Exhibit "A" is statistical information on the results of closing the inner-city schools and transfers from overcrowded schools and attached marked Exhibit "B", the Court will find information on the desegregation proposal contained in the July 29, 1969 plan.

With reference to elementary schools, those students remaining in the school attendance districts, 463 blacks are attending predominantly white schools and 446 are attending predominantly black schools. Of those students remaining in the Irwin Junior High attendance district, 273 blacks are attending predominantly white schools and 229 are attending predominantly black schools. Of the students remaining in the Second Ward school district, 506 blacks are attending predominantly white schools and 169 are attending predominantly black schools.

The Board is most concerned with the lack of responses of some black students and parents in the overcrowded schools. At the present time, 73 students from Amay James are now attending predominantly white Ashley Park (27 students) and Westerly Hills (46 students). Two trainable classes were transferred from the Wilmore School to predominantly white Berryhill. The anticipated enrollment for Lincoln Heights did not materialize so that it was unnecessary to move children from this school.

Defendants' Report to the Court Pursuant to Order of October 10, 1969

The Board is continuing to examine new approaches in an effort to gain acceptance by the patrons of moves to relieve overcrowded schools. To this point, efforts have included written communications, meetings in the schools and social worker visitations in the homes. Transportation has been offered in every instance.

In summation, regarding seven closed schools and transfers from overcrowded schools, the total pupils dealt with were 2700. Of this number, only 2216 were available for re-assignment. Twelve hundred eighty-seven (1287) accepted re-assignment and 929 requested freedom of choice. Thirteen hundred fifteen (1315) of the available 2216 black pupils are now going to predominantly white schools.

2. With reference to the inquiry of the Court regarding the effect of freedom of transfer on the desegregation proposed in the July 29, 1969 plan for the closing of inner-city schools and transferring their students, Section 2 of Exhibit "C" discloses the sending and receiving schools for such students electing free choice of transfer totaled 929, 209 of which were granted transfers to predominantly white schools. Exhibit "A" also shows school by school break-down for receiving schools of students electing free choice of transfer.

3. Attached marked Exhibit "C" is a report of the number of children, by school and race, who chose to transfer out of and into the various schools for the 1969-70 year. This information reinforces the Board's prior position that free choice of transfer has had little adverse effect on desegregation. The Court's attention is directed in Section 1 to Albemarle Road Elementary School and it is noted that 13 white students were granted transfers to

enter and 14 were granted transfers to leave, leaving the school with one less white student than originally assigned. By following this comparison, it is easy to note that the racial composition of the schools has been affected very little by free choice of transfer.

Attention is called to the fact that in Section 1 of Exhibit "C", there were 1610 requests for transfer, of which 1200 were granted. Black students lodged 504 requests and were granted 402. In addition, 929 black students from the closed inner-city schools requested and were granted transfers. Thus, 1331 black students and 798 white students were granted free choice of transfer for the year 1969-1970.

4. Attached marked Exhibit "D" is a report on the current numbers and races of children and teachers in the system, school by school, with percentages of each race for each school.

The first page of this exhibit is a summation that reflects the prior information presented to the Court with the addition of information for the year 1969. An interpretation of this information on the summation page shows that in 1969, 89 of 107 schools served both races. The 16 predominantly Negro schools integrated had 1153 white pupils and 8858 Negro pupils to account for a total of 10,011 pupils in predominantly black schools. The 73 integrated predominantly white schools had 8490 black students attending school with 52,070 white students. Thus, 60,560 students attend predominantly white integrated schools. Integrated schools have a total of 70,571 students, representing 83.5 per cent of all students served by the system. Interpretation of the staff summation shows that

all schools are integrated, 18 schools of which are predominantly Negro and 89 schools of which are predominantly white. It is noted that the number of students attending schools having no desegregation of their student bodies has been reduced from 19,258 in 1968-69 to 13,947 students for the year 1969-70. During 1969, 7,342 black students are attending schools having no desegregation of student bodies and 6,605 whites attend schools in which the student bodies are not desegregated.

The remaining information of Exhibit "D" is a school by school break-down of pupils and faculty for the years noted.

5. Attached marked Exhibit "E" is a report on children being provided bus transportation, school by school. It is noted that 599 pre-schoolers, 10,441 elementary, 8,989 junior high and 4,708 senior high students are being provided transportation. This represents total daily transportation for 24,737 students.

6. Attached marked Exhibit "F" is a description of what has been done to provide the compensatory education programs proposed in the July 29, 1969 plan and policy statement.

7. The defendants are unable to furnish a copy of all September and October, 1969, reports of the Board to the Department of Health, Education and Welfare. Ordinarily, the forms for reporting are made available to the school system for a report as of October 1 of each year. The forms for reporting for the 1969-1970 school year have not been printed and furnished to the school system. It is submitted that substantially all of the information that

would be contained in the report to the Department of Health, Education and Welfare is disclosed in the information submitted in connection with Items 1, 2, 3, 4 and 5 above.

In its order of October 10, 1969, the Court posed nine additional questions which the Board was directed to answer. It is noted that the following responses were approved by unanimous resolution of the full Board of Education, such responses being as follows:

1. What, in verbatim detail, are the instructions that have been given to Mr. Weil?

ANSWER: Mr. Weil, on behalf of Systems Associates, Inc. has been instructed to devise a computer assisted systems analysis approach to restructuring each of the attendance lines for all schools served by the system. In this connection, it is understood that the product of such an approach would involve a computer print-out of all the possible configurations or combinations of grids within the following limitations:

1. All grids must be contiguous to the home grid or to grids which are contiguous to the home grid. (A grid is a 2500 ft. square as shown on the school attendance maps filed as exhibits in this matter.)

2. No combination of grids can be considered if they exceed the rated capacity of the school by 20%. Further, such combinations cannot underpopulate the school by less than 20%.

3. A school district cannot contain the home grid of another school.

4. A school district must contain the home grid in which the school is located.

5. No school district attended by whites should have less than 60% white student population to avoid "tipping."

After meeting these five tests, all possible combinations for each school will be separately printed in their order of desirability. Desirability will be determined first by the closeness of the integration ratio to 70% white/30% black. Second, desirability is reflected by the compactness of the school district; and third, the combination of grids which yields a student population closest to 100% of the school's rated capacity is considered most desirable. It is observed that the first five rules serve to identify the various combinations of grids which are possible, and the latter three rules judge the desirability of the various combinations.

2. What is Mr. Weil's assigned mission or goal?

ANSWER: Mr. Weil's mission or goal is to produce for each school, independent of all other schools, all feasible combinations of grids which may comprise a school district within the limitations set forth in the answer to question 1.

3. What areas of the district is he directed to include in his program of redrawing attendance lines?

ANSWER: Mr. Weil has been directed to include all areas of the County in developing combinations of grids which may comprise a school district.

Defendants' Report to the Court Pursuant to Order of October 10, 1969

4. What areas, if any, is he directed to exclude?

ANSWER: He has not been directed to exclude any geographical areas. However, certain special education programs, such as the learning academy and child development centers, have been excluded from his consideration. These programs enroll students from large geographic areas and in some cases, students from the entire county.

5. What schools will his program affect?

ANSWER: In making the systems analysis, the attendance lines of all schools served by the system will be considered and there is substantial probability that all attendance lines will be affected in varying degrees.

6. Will pairing, grouping or clustering of schools be used by the Board as needed to supplement the computer plan?

ANSWER: It is not suggested by the Board of Education that there is a "computer plan." The information supplied by the systems analysis approach will be utilized by the staff and the Board of Education along with other information in restructuring attendance lines. The Board of Education will consider pairing, grouping or clustering of schools where practical, educationally feasible and where such techniques offer reasonable prospects of producing stable desegregation in such affected schools.

7. Will the Weil program of redrawing attendance lines produce desegregation of all the schools by September, 1970?

ANSWER: The information supplied by the systems analysis approach will not produce desegregation of all schools by September, 1970. Dramatic results are expected. It is hoped that the number of all white and all black schools will be substantially reduced. The number of such schools cannot be determined at this time.

8. If the Weil program does not produce desegregation of all the schools by September, 1970, what does the Board plan to do to produce that result?

ANSWER: As pointed out above, the Weil program does not purport to be a single print-out of the best possible school district. Instead, it consists of a print-out of the best alternative grids for each school which for the purpose of such print-out is considered independently of all other school districts. This computer information will then be considered by persons familiar with neighborhoods, traffic patterns, natural hazards and other factors which to a limited degree may affect desegregation favorably or unfavorably in restructuring attendance lines. The Board of Education does not feel that it will be possible to produce pupil desegregation in each school by September, 1970. It is expected that faculties will fairly represent a cross section of the total faculty so that most and possibly all schools will not have a racially identifiable faculty. Furthermore, the restructuring of attendance lines coupled with faculty desegregation may satisfy constitutional requirements.

9. Will any plan produced by the Weil method or any other redrawing of attendance lines desegregate the schools

if unrestricted freedom of transfer or freedom of choice is retained?

ANSWER: The Board does not know precisely what effect free choice of transfer will have on desegregation through the utilization of the Weil approach. However, the Board does contemplate that additional restrictions on free choice of transfer will be required. The experience of this system indicates that retention of free choice of transfer would have little adverse effect on desegregation. During the 1968-69 school years, approximately 5 per cent of the students served by the system elected free choice of transfer, many of which transfers had no adverse effect on desegregation. In view of the limitation of the school population to not less than 60 per cent white, which will tend to stabilize racial ratios within the schools, it is believed that retention of a more restricted free choice of transfer will not have any appreciable effect on desegregation and will enable students in case of practical hardship or educational desire to attend the school of his or her choice.

The Board has acknowledged its duty to desegregate the schools served by the Charlotte-Mecklenburg Public School System and is earnestly striving to fulfill this responsibility. Moreover, the Board realizes that to be workable, any plan for further desegregation must not only be approved by the Court, but must also be accepted by the community. In order to enhance the chances of success, the Board feels that it is imperative that its planning be thoroughly done, carefully reviewed, meaningfully interpreted to the community and realistically administered.

Defendants' Report to the Court Pursuant to Order of October 10, 1969

In considering the defendants' motion for an extension of time, it is respectfully requested that the Court carefully consider the foregoing duties of the Board.

Respectfully submitted this 29th day of October, 1969.

/s/ WILLIAM J. WAGGONER
William J. Waggoner
1100 Barringer Office Tower
Charlotte, North Carolina
Attorney for Defendant

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

Dr. William C. Self, of lawful age, being first duly sworn, on his oath states that he is the Superintendent of Defendant named in the above and foregoing matter and that the facts stated in this report are true according to his best knowledge and belief.

/s/ WILLIAM C. SELF
Dr. William C. Self

Sworn and subscribed to before me
this 29th day of October, 1969.
/s/ FAYE JALLEY
Notary Public
My commission expires: 3-27-71

ANSWERS TO STATISTICAL QUESTIONS
Civil Action No. 1974
Judge James B. McMillan
Re: 10-10-69

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1. Pupil Distribution for Closed and Overcrowded Schools

2. Accounting of These Schools in Total Relating Effect of Freedom of Choice

3. Report on Freedom of Choice Transfers: Section I, II

4. Degree of Integration: Pupils and Professional Staff in Each School

5. Pupils Transported Daily 1969-70 - - First Month Average

6. Compensatory Education

7. HEW Reports (Not included, pending official printing. Expected Report Date is December 15, 1969. Questions 2 and 4, above are basic for the HEW Report).

10-28-69

The Charlotte-Mecklenburg Schools

Pupils from closed schools*
or
Pupils from overcrowded schools

From:

Five Elementary Closed Schools

PUPIL DISTRIBUTION REPORT

(1) Reassigned School (Enrolled Oct. 10, 1969)

Schools	# Pupils	Schools	# Pupils	Total # Pupi
Beverly Woods	46	Park Road	44	
Idlewild	55	Selwyn	25	
Lansdowne	75	Sharon	89	
Olde Providence	71	Winterfield	48	453

(2) Freedom of Choice School (After Reassignment)

Dilworth	3	First Ward	14	
Double Oaks	107	Oaklawn	22	
Elizabeth	2	Wilmore	7	
		Irwin Elem.	301	456

(3) Moved Residence: Present School

Double Oaks	7	Oaklawn	17	
Druid Hills	3	Tryon Hills	23	
Elizabeth	18	Villa Heights	29	
First Ward	35	Wilmore	4	
Lincoln Heights	7			143

(4) Left County

(5) Pupils not reporting to school (Still live in Area): Dropouts

Grand Total 1052

*Five Elementary Closed Schools

Number of pupils originally assigned to these schools* at end of school year 1968-69 for 1969-70 year. 1052

* Alexander St. (141), Bethune (166), Fairview (321), Zeb Vance (227), Isabella Wyche (197), Irwin Ave. Junior High, Second Ward Senior High

A

Pupils from closed schools * or Pupils from overcrowded schools

FEO': Irwin Avenue Junior High

628a

PUPIL DISTRIBUTION REPORT

(1) Reassigned School (Enrolled Oct. 10, 1969)

SCHOOL	NUMBER PUPILS		TOTAL PUPILS
Eastway	47		
Alexander Graham	87		
Killiams	57	**	
McClintock	51		
Smith	46		
Wilson	7		
		TOTAL	295

(2) Freedom of Choice School (After Reassignment)

Eastway	2	
Alexander Graham	5	
Hawthorne	7	
Kennedy	15	
McClintock	3	
Northwest	78	
Piedmont	5	
Ranson	1	
Sedgefield	1	
Smith	3	
Spaugh	16	
Williams	124	
Wilson	4	
	TOTAL	264

(3) Moved Residence: Present School

Cochrane	1	
Alexander Graham	1	
Hawthorne	11	
Spaugh	1	
Kennedy	5	
Northwest	1	
Piedmont	2	
Randolph	3	
Williams	7	
	TOTAL	32

(4) Left County 5

(5) Pupils not reporting to school (Still live in area)

Dropouts	23
GRAND TOTAL	619

Number of pupils originally assigned to this school at end of school year 1968-69 for 1969-70 -- 619

* Alexander St., Bethune, Fairview, Zeb Vance, Isabella Wyche, Irwin Avenue Jr., Second Ward Senior

** The 57 to Williams were Project Opportunity students. This is a Ford Foundation project which was transferred from Irwin to Williams.

ym
10-24-69

Pupils from closed schools *
or
Pupils from overcrowded schools

From: Second Ward Senior High School

PUPIL DISTRIBUTION REPORT

(1) Reassigned School (Enrolled October 10, 1969)

School	# Pupils	School	# Pupils	Total # Pup
East Mecklenburg	15	Independence	2	
Garinger	77	Myers Park	81	
Harding	117	Olympic	55	
		West Charlotte	119	
				466

(2) Freedom of Choice School (After Reassignment)

East Mecklenburg	1	North Mecklenburg	5
Garinger	30	Olympic	4
Harding	111	West Charlotte	50
Independence	4	West Mecklenburg	2
Myers Park	2		209

(3) Moved Residence: Present School

East Mecklenburg	2	Myers Park	12
Harding	5	Olympic	1
Garinger	1	West Charlotte	7
			28

(4) Left County 9

(5) Pupils not reporting to school (Still live in Area):
Dropouts 234

GRAND TOTAL 946 **

Plus 10

METROPOLITAN HIGH SCHOOL

Number of pupils originally assigned to this school at end of school year 1968-69 for 1969-70 year. 956

Alexander Street, Bethune, Fairview, Zeb Vance, Isabella Wyche, Irwin Avenue Jil, Second Ward Sil.

Distribution lacks 10 pupils' forms which were retained in the following schools:

Irwin 7, Northwest 1, Sedgefield 2.

Statistical Report, #1 (Cont'd)

Accepted Reassignments From Overcrowded Schools

From:		To:	
Amay James	73	Ashley Park	27
		Westerly Hills	46

2. Total Accounting of Pupils and Pupil Distribution
(Including Effect of Freedom of Transfer)

	Closed Schools: Five Elementary	one Junior High	one Senior High	Overcrowded School: one Elementary	Total El.	JH	SH
Enrolled at							
(1) Reassigned school	453	295	466	73	526	295	466
						1,287	
						(48%)	
(2) Freedom of Choice School	456	264	209		456	264	209
						929	
						(34%)	
(3) New-residence Local School	143	32	28		143	32	28
						203	
						(7½%)	
Left School							
(4) Left County		5	9		0	5	9
						14	
						(½%)	
(5) Still Live in Area - - Dropouts		23	234		0	23	234
						257	
						(9½%)	
	1052	619	946				
Report forms error noted - - - - - - - - - - - - - - - - -			+10			10	10
						(¾%)	
					1125	619	956
						2700	

2627 * Total of Principals' end of year assignments to closed schools for 1965-70

*Projected enrollment for closed schools was 3000 based on history-trend of these schools.

B

NTARY SCHOOLS - 1970

| | Freedom of Choice Requests to Inter Granted | | (a) Freedom of Choice Requests to Leave | | | (
	N	N	N	N	N	N
arle Road	0	13	0	14	0	14
brook	0	12	0	3	0	3
y Park	0	38	0	4	0	2
n	0	0	0	6	0	6
inger	0	0	22	12	13	10
hill	0	15	0	4	0	3
ly Woods	0	15	0	10	0	10
ngsville	0	0	14	2	14	2
rwood	0	0	0	7	0	6
Avenue	2	0	1	2	1	2
illy	0	11	0	4	0	4
r Creek	0	0	1	2	1	0
nswood	0	7	3	4	3	4
lius	1	2	0	7	0	6
old	11	18	0	4	0	4
son	0	2	0	0	0	0
	0	14	7	1	0	1
nshire	0	0	0	7	0	6
rth	1	1	0	22	0	21
e Oaks	5	0	6	0	6	0
Hills	5	0	8	0	6	0
ver	1	10	1	12	1	12
beth	13	0	22	18	20	17
ly Park	0	22	0	9	0	9

Answer to Statistical Question No. 3

Report on freedom of choice transfers showing the number of children by school and race, who chose to transfer out of and into various schools for the 1969-70 school year.

Section I

Report On All Schools Except the Seven Closed Down Schools

C

(a)

Elementary Schools 1969-1970	Freedom of Choice Requests to Enter Granted		Freedom of Choice Requests to Leave			
	N	B	N	B	N	B
First Ward	2	0	0	0	0	0
Hickory Grove	0	0	1	3	1	2
Hidden Valley	0	0	0	1	0	1
Highland	0	4	0	4	0	4
Hoskins	0	2	0	20	0	1
Huntersville	0	11	1	1	1	1
Huntingtowne Farms	0	5	0	4	0	4
Idlewild	0	9	0	12	0	1
Amay James	0	0	5	19	3	1
Lakeview	1	0	2	19	2	1
Lansdowne	0	12	0	3	0	3
Lincoln Heights	5	0	12	0	4	0
Long Creek	0	0	4	27	2	2
Marie Davis	17	0	2	0	0	0
Matthews	7	0	2	4	2	3
Merry Oaks	0	2	0	10	0	1
Midwood	0	14	3	10	0	8
Montclaire	0	18	0	4	0	0
Myers Park	2	12	4	5	4	5
Nations Ford	0	14	0	10	0	0
Nevell	0	6	0	16	0	0
Oakdale	1	28	1	1	0	0
Oakhurst	1	11	0	7	0	6
Oaklawn	2	0	10	0	4	0
Olde Providence	0	5	0	2	0	2

[illegible] 1969 - 1970	Freedom of Choice Requests to Enter Granted		Freedom of Choice Request to Leave		[illegible]	
	N	W	N	W		
Park Road	0	17	0	9	0	8
*Paw Creek	0	0	1	3	1	2
Pineville	1	0	1	7	1	7
Pinewood	0	4	0	11	0	9
Plaza Road	1	9	1	19	0	11
**Rama Road	0	0	0	2	0	2
Sedgefield	0	3	0	7	0	7
Selwyn	2	17	0	2	0	2
Shamrock Gardens	0	27	0	7	0	6
Sharon	0	8	0	33	0	33
*Starmount	1	1	0	3	0	3
**Statesville Road	7	0	3	9	2	8
**Steel Creek	0	0	0	10	0	10
Thomasboro	0	18	0	21	0	20
Tryon Hills	5	0	5	16	5	15
Tuckaseegee	0	0	0	2	0	0
University Park	10	0	4	0	3	0
*Villa Heights	0	0	7	0	3	0
*Westerly Hills	0	0	0	0	0	0
Wilmore	1	2	2	14	2	12
Winsor Park	0	13	0	8	0	7
Winterfield	0	25	0	5	0	5
TOTAL:	105	486	156	342	105	186
Combined Total:	591		698 Combined Total			

Notes:)

Note 1: An additional 107 students were returned to school of original assignment since schools requested were closed for transfers.

* School closed out to all transfer requests.
** School closed out to regular transfer request only - (not majority to minority requests.)

[illegible]109 HIGH SCHOOLS	Freedom of Choice Requests to Enter - Granted		(a) Freedom of Choice Requests to Leave		(b) Grant	
	N	V	N	V	N	V
Albemarle Road	0	0	1	9	0	0
Alexander	0	0	7	13	4	12
Cochrane	0	0	0	2	0	0
Coulwood	1	33	0	10	0	1
Eastway	0	0	0	4	0	0
Alexander Graham	5	58	0	2	0	2
Hawthorne	5	13	23	98	10	25
J. F. Kennedy	21	0	46	63	40	26
McClintock	0	0	2	7	2	2
Northwest	26	0	46	4	41	4
Piedmont	11	1	8	51	8	27
Quail Hollow	0	9	0	9	0	4
Randolph	4	22	0	58	0	23
Ranson	0	0	2	1	2	0
Sedgefield	27	0	8	35	8	34
Smith	2	19	0	7	0	4
Spaugh	48	16	33	14	13	2
Williams	14	0	28	2	21	0
Wilson	0	0	0	5	0	5
Total	164	171	184	394	164	171
Note: Combined Total	335		578	Combined Total		

Note: An Additional 243 Students were returned to original Assignment since schools requested were closed out for transfers.

* School closed out to all transfer requests.

** School closed out to regular transfer request only - (not majority to minority requests.)

SENIOR HIGH SCHOOLS 1969 - 1970	Freedom of Choice Requests to Enter Granted		Freedom of Choice Requests to Leave (a) Granted		
	N	W	N	W	
East Mecklenburg	0	43	3	27	3
**Garinger	13	0	17	37	13
Harding	46	32	12	10	12
Independence	1	24	0	5	0
**Myers Park	9	0	5	26	5
**North Mecklenburg	20	0	10	16	10
Olympic	14	14	17	11	15
*South Mecklenburg	0	Note: 2 2	0	24	0
West Charlotte	29	5	92	3	62
West Mecklenburg	1	21	8	11	8
Total:	133	141	164	170	135
Note: - Combined Total: 1	274		334 - Combined Total		

Note: An Additional 60 Students were returned to School of Original 1 Assignment since schools requested were closed for transfers.

Note: - SAT Students 2

* School closed out to all transfer requests.

** School closed out to Regular transfer request only - (not majority to minority requests.)

3. Section II

Freedom of Choice Transfers From Closed Schools
To Schools in which Assigned for the
1969-70 School Year

From Closed Elementary Schools

To:	Alexander St.	Bethune	Fairview	Zeb Vance	Isabella Wyche	Tot To
Dilworth					3	3
Double Oaks		2	105			107
Elizabeth		2				2
First Ward	7	7				14
Oaklawn		1	21			22
Vilmore				1	6	7
Irwin (Elem)	1	43	121	90	46	301
Total From	8	55	247	91	55	456

Section II (Cont'd): Freedom of Choice Transfers

From: Irwin Avenue Junior High - - - - 264 Pupils

To: Freedom of Choice School	
Eastway	2
Alexander Graham	5
Hawthorne	7
Kennedy	15
McClintock	3
Northwest	78
Piedmont	5
Ranson	1
Sedgefield	1
Smith	3
Spaugh	16
Williams	124
Wilson	4
Total From	264

Section II (Cont'd): Freedom of Choice Transfers

From: Second Ward Senior High - - - - 209 Pupils

To: Freedom of Choice School	
East Mecklenburg	1
Garinger	30
Harding	111
Independence	4
Myers Park	2
North Mecklenburg	5
Olympic	4
West Charlotte	50
West Mecklenburg	2
Total From	209

The Charlotte-Mecklenburg Schools

642a

Research Report 2-'69
and 10-'67

SUMMATION OF INTEGRATION 1965 (MARCH) AND 1968-69 (OCT. 1, '68)
AND 1969-70 (Oct. 2, '69)

	For Pupils				Professional Staff			
I	Schools Having Integration							
. For Pupils	1965 1 N + 22 W = 23 of 109 or 21%		1968 16 N + 68 W = 84 of 112 or 75%	1969 16 N + 73 W = 89 of 107 (83%)	. For Staff	1965 3 N + 0 W = 3 of 109 or 3%		1968 16 N + 82 = 98 of or 87½%
II	1965		1968	1969		1965		1968
	N	W	N	W	N	W	N	W
A. Number in Minority Race (integrated)								
.Pupils	9W	476N	1192W	6704N 1153W 6978W	5.7W	0N	131W	208N
B. Number in Majority Race (integrated)								
. Pupils	343N	16,446W	8697N	47,356W 36[illegible] 42,022W	143.3N	+0W	374N	2575W
			Total Involved by Integration					
. Predominantly Negro Schools - - Pupils	352		9889	10,011 Staff	149		505	
. Predominatly White Schools - - Pupils	16,922		54,060	60,560 Staff		0		2783
..Total - - Pupils	17,274 or 24% of 72,336 Enrolled		63,949 or 77% of 83,111	70,571 or 83.3% of 84,518 Staff	149 or 5% of 3140 incl. part assignments in schools		3288 or 91% of 3613 assig at one def school	

D

The Charlotte-Mecklenburg Schools

RACIAL DISTRIBUTION OF PUPILS AND PROFESSIONAL STAFF
1965 (March), 1968-69 (Oct. 1, '68), and 1968-69

Grade	1965 No. School	1965 Pupils N	1965 Pupils W	1968 No. School	1968 Pupils N	1968 Pupils W	1969 No. School	1969 Pupils N	1969 Pupils W
1-6	72	9,364	27,696	76-	13,290	31,545	73-	13,374	31,522
7-9	17	2,475	11,804	21	5,934	14,74:	20-	6,188	15,191
10-12	8	1,625	10,677	11	4,377	12,313	10-	4,472	12,808
	97	13,464	50,177	108-	23,601	58,599	103-	24,034	59,521
Other	12	6,877	1,818	4+	640	271	4+	656	307
				:Kgn. + Trainable					
1-4	1	360							
1-7	2	431	207						
1-9	3	729	1611						
5-9	1	505							
1-12	3	2400							
7-12	2	2452							
Total	109	20,341	51,995	112	24,241	58,870	107	24,690	59,828

Professional Staff	1965		1968		1969	
	N	W	N	W	N	W
	377+	1171½	478	1329	499	13
	111-	533	228	706	232	6
	65	479½	178	644	194	6
	553½	2184	884	2679	925	27
	323½	79	23	27	22	
	15½					
	17	9½				
	32	68				
	25½					
	113½					
	120	1½				
	877	2263	907	2706	947	27
	Include Part-time		Not Include Part-time			

Among teachers assigned to more than one school

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Elementary	N	%	W (other)	N	%	W (other)	N	%	W (other)	N	%	W (other)	N	%	W (other)	N	%	W (other)
Albemarle Rd.				4	1%	499	4	1%	510				6	32%	13	6	32%	13
Alexander Street	342	100%		257	100%					14.1	100%		11	100%				
Allenbrook				50	10%	452	61	12%	452				2	10%	18	5	24%	16
Ashley Park		0%	694		0%	553	27	5%	574		0%	22.9	2	9%	20	4	17%	19
1-9 '65 Bain		0%	674	35	5%	699	33	4%	735		0%	28.2	1	5%	28	5	17%	23
Barringer		0%	604	668	84%	131	859	98%	16		0%	24.8	13	42%	18	16	84%	19
Berryhill		0%	1026	119	15%	685	114	14%	675		0%	39.6	2	6%	32	6	16%	37
Bethune	343	97%	9	223	99%	3				17.6	100%		11	100%				
Beverly Woods					0%	286	68	9%	684				1	8%	12	5	18%	23
Biddleville	434	100%								17.2	100%							
1-9 '65 Billingsville	729	100%		619	100%	2	610	100%	0	32.1	100%		25	100%		16	64%	10
Briarwood	2	0%	582	8	1%	640	6	1%	680		0%	23.9	3	12%	22	6	24%	21
Bruns				740	99%	4	774	99%	10				26	93%	2	21	66%	11
Chantilly		0%	445	2	0%	491	5	1%	487		0%	18.8	1	5%	21	4	17%	19
1-7 '65 Clear Creek		0%	207	58	20%	225	51	17%	244		0%	9.6	1	8%	12	3	20%	13
Collinswood		0%	375	72	13%	490	111	20%	443		0%	16.1	1	5%	21	3	14%	19
Cornelius		0%	241	239	99%	252	195	92%	237		0%	11.3	7	33%	14	5	24%	16
Cotswold		0%	631	11	2%	567	23	4%	537		0%	25.0	1	5%	21	4	19%	17
Crestdale	97	100%								5.0	100%							
Davidson		0%	178	101	35%	186	104	36%	186		0%	7.8	1	9%	11	2	18%	11
Marie Davis	808	100%		705	100%		691	100%	0	34.3	100%		29	100%		14	93%	15
Derita	6	1%	892	165	19%	728	163	19%	688		0%	35.4	3	9%	32	5	24%	37
Devonshire	2	0%	474		0%	889	0	0%	903		0%	19.5	4	11%	37	7	33%	21
Dilworth	100	20%	401	223	39%	355	113	23%	336		0%	23.8	4	15%	22	3	14%	17
Double Oaks	703	100%		300	100%		836	100%	0	28.2	100%		32	100%		19	61%	12

COMPARISON OF PUPILS AND PROFESSIONAL STAFF
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Elementary	N	%	W	N	%	W (other)	N	%	W (other)	N	%	W	N	%	W (other)	N	%	W (other)
Druid Hills	520	100%		504	99%	3	472	99%	3	20.7	100%		20	100%		13	62%	8
Eastover		60%	704	49	9%	580	42	7%	559		0%	27.1	1	4%	24	4	19%	20
Elizabeth	5	1%	448	270	59%	194	366	96%	151		0%	22.9	2	9%	21	6	29%	20
Elderly Park		0%	368	2	1%	374	3	1%	371		0%	14.9	1	4%	15	3	19%	13
Fairview	702	100%		363	100%					28.0	100%		19	100%				
First Ward	473	100%		749	100%		820	100%	0	22.8	100%		30	100%		17	50%	17
1965 J. H. Gunn	696	100%								33.6	100%							
Hickory Grove		60%	530	80	13%	531	70	6%	533		0%	21.7	1	7%	23	3	13%	20
Hidden Valley					0%	977	0	0%	1100				2	5%	35	7	35%	35
Highland	2	1%	273	47	13%	324	69	18%	305		0%	14.0	1	7%	14	3	19%	13
Hoskins		0%	342	18	6%	261	13	4%	228		0%	14.7	2	15%	11	3	23%	9
Huntersville		0%	553	162	22%	560	154	22%	535		0%	22.9	2	7%	25	5	19%	22
Huntingtowne Farms		0%	358	7	1%	695	7	1%	603		0%	15.1	1	4%	26	4	15%	21
Idlewild		0%	522	2	0%	521	56	10%	597		0%	23.9	1	4%	22	6	21%	23
1965 Amay James	360	100%		477	100%	1	473	99%	3	15.5	100%		19	100%		13	57%	9
1965 Ada Jenkins	431	100%								17.0	100%							
Lakeview		0%	400	269	65%	147	362	79%	102		0%	18.5	14	74%	5	13	62%	8
Lansdowne		0%	633		0%	758	75	9%	802		0%	23.9	1	3%	30	6	17%	30
Lincoln Heights	783	100%		817	100%	2	711	100%	0	29.1	100%		30	100%		16	57%	12
Long Creek		0%	423	250	35%	466	267	36%	468		0%	17.6	2	7%	26	6	21%	23
1965 Matthews		0%	937	(1-6) 93	11%	742	86	10%	802		0%	39.7	1	3%	32	6	14%	31
Merry Oaks		0%	533		0%	469	0	0%	442		0%	21.9	1	5%	19	3	16%	16
Midwood		0%	560	1	0%	522	11	2%	477		0%	24.9	2	7%	21	4	17%	19
Montclaire		0%	720		0%	722	0	0%	718		0%	29.1	1	4%	27	5	19%	23
Morgan	305	100%					315	100%	0	14.9	100%					10	67%	5
Irwin Ave. (Elem)																		

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Elementary	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)
Myers Park		0%	575	23	4%	543	22	5%	456		0%	24.9	1	4%	23	3	[illegible]	22
Myers Street	820	100%								32.2	100%							
Nations Ford		0%	513	63	10%	585	47	6%	681		0%	21.6	1	4%	25	6	[illegible]	22
Newell		0%	463	73	15%	423	74	15%	438		0%	18.3	1	5%	18	3	[illegible]	17
Oakdale		0%	402	72	15%	480	69	12%	517		0%	17.2	1	5%	21	6	[illegible]	18
Oakhurst		0%	548	2	0%	615	5	1%	616		0%	22.8	1	4%	23	4	17%	20
Oaklawn	666	100%		650	100%		613	100%	0	26.0	100%		25	93%	2	11	42%	15
Olde Providence				10	2%	434	80	14%	512				1	4%	17	5	[illegible]	20
Park Road		0%	583		0%	551	44	7%	548		0%	22.7	1	5%	21	7	[illegible]	19
Paw Creek		0%	793	63	7%	861	27	3%	609		0%	30.3	1	3%	31	5	[illegible]	18
Pineville		0%	364	168	34%	363	146	28%	375		0%	16.2	1	5%	21	4	17%	19
Pinewood		0%	719		0%	707	0	0%	674		0%	28.1	1	4%	26	4	[illegible]	27
Plaza Road		0%	400	99	17%	409	88	20%	362		0%	17.7	1	5%	21	4	[illegible]	17
Rama Road		0%	442	2	0%	777	1	0%	815		0%	18.7	2	7%	27	5	[illegible]	28
Sedgefield	3	1%	526	7	1%	545	3	1%	548		0%	21.8	2	9%	20	4	[illegible]	19
5-9-65 Plato Price	505	100%								25.4	100%							
Selwyn		0%	531	5	1%	598	31	5%	617		0%	21.9	1	4%	22	5	[illegible]	21
Seversville	96	16%	229								0%	14.8						
Shamrock Gardens		0%	536		0%	539	0	0%	515		0%	21.9	1	5%	20	4	[illegible]	17
Sharon		0%	591		0%	519	89	20%	364		0%	22.9	1	5%	20	4	[illegible]	16
Starmount		0%	481	25	3%	713	25	3%	712		0%	20.9	1	3%	28	5	[illegible]	20
Statesville Road		0%	650	295	36%	534	333	39%	522		0%	25.9	3	9%	29	8	[illegible]	21
Steele Creek		0%	222	12	2%	531	5	1%	509		0%	10.7	1	5%	20	4	[illegible]	19
1-12-65 Sterling	699	100%								33.9	100%							
Thomasboro		0%	885		0%	705	0	0%	690		0%	34.3	2	7%	25	5	[illegible]	25
Paw Creek Annex							30	11%	271							1	[illegible]	10

COMPARISON OF PUPILS AND PROFESSIONAL STAFF
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965		1968-69*		1969-70*	
Elementary	N	%	W	N	%	W (other)	N	%	W (other)	N	W	N	% W (other)	N	% W (other)
Torrence-Lytle	1005	100%		241	50%	245	322	66%	166	46.1	100%				
[illegible] Hills		49%	324	61	10%	553	58	7%	578		0% 15.0	1	5% 20	4	18% 18
Tuckaseegee		51%	631				825	100%	1		0% 23.9	1	4% 23	4	17% 20
University Park	700	100%		777	100%					25.8	100%	30	77% 1	23	10% 10
Zeb Vance	465	100%		257	100%					19.5	100%	11	100%		
Villa Heights	23	4%	594	796	86%	126	929	91%	88		0% 28.3	23	82% 14	23	55% 17
Wesley Heights	214	100%								8.3	11% 2.2				
Westerly Hills		0%	569		0%	569	46	5%	539			1	4% 22	4	17% 20
Wilmore	6	2%	323	145	33%	293	228	97%	235		0% 15.4	8	89% 12	9	41% 13
Windsor Park	1	0%	673	2	0%	737	1	0%	748		0% 25.8	1	4% 27	6	22% 24
Winterfield		0%	455		0%	689	48	7%	688		0% 18.7	1	4% 26	6	26% 24
Woodland	360	100%								14.8	100%				
Woodlawn		0%	283								0% 14.0				
Isabella Wyche	383	100%		222	100%					18.6	100%	12	100%		
Child Development (Kgn. Centers)															
Davidson, #1				83	41%	117	80	40%	121			3	30% 7	3	30% 7
Pineville, #2				166	81%	37	163	77%	43			2	20% 8	2	20% 8
Seversville, #3				174	87%	26	181	90%	21			8	50% 2	7	70% 3
Morgan, #4				138	97%	6	187	94%	12			8	50% 2	7	78% 2

COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965, 1968-69*, and 1969-70 *

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils		
Junior High	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)
Albemarle Road				66	7%	881	63	6%	995
Alexander		6%	577	347	31%	755	369	32%	771
Cochrane		6%	872	76	5%	1444	79	5%	1552
Coulwood	3	1%	574	119	14%	727	106	12%	770
Eastway		0%	1046	3	0%	1364	61	4%	1356
Alex. Graham		0%	1048	8	1%	1084	113	10%	1028
Hawthorne	25	4%	670	492	52%	447	536	54%	472
Irwin Ave.	785	100%		666	100%				
McClintock		0%	1273	46	4%	1228	93	7%	1288
Northwest	773	100%		932	100%		1052	99%	1
Piedmont	121	27%	291	428	89%	53	443	89%	55
Quail Hollow		0%	766	171	12%	1261	155	10%	1421
Randolph				272	28%	711	289	29%	710
Ranson	9	1%	658	253	30%	586	260	32%	548
Sedgefield	6	1%	920	189	19%	802	167	17%	809
Smith		0%	1115		0%	1389	55	4%	1436
Spaugh	1	0%	930	186	18%	871	237	22%	839
Williams	752	100%		893	100%		1081	100%	0
Wilson		0%	1064	60	5%	1132	71	6%	1145
York Rd. (Kennedy)	(7-12) 1041	100%		727	99%	6	854	99%	9

Learning Academy - 7th & 8th grades counted in JH, above.

School	Professional Staff 1965			1968-69*			1969-70*		
Junior High	N	% N	W (other)	N	% N	W (other)	N	% N	W (other)
Albemarle Road				4	6%	43	6	13%	40
Alexander		0%	28.9	6	12%	44	8	16%	41
Cochrane		0%	35.4	6	10%	56	12	18%	54
Coulwood		0%	27.1	4	11%	34	6	15%	32
Eastway		0%	43.2	3	5%	55	11	18%	51
Alex. Graham		0%	43.8	4	9%	43	9	18%	40
Hawthorne		0%	33.9	12	27%	33	15	31%	34
Irwin Ave.	42.7	100%		32	97%	1			
McClintock		0%	51.5	2	4%	49	10	17%	48
Northwest	33.7	100%		39	100%		22	52%	20
Piedmont		0%	26.8	13	52%	12	17	57%	13
Quail Hollow		0%	35.2	3	5%	61	8	13%	55
Randolph				2	5%	38	9	26%	35
Ranson		0%	30.0	6	16%	31	11	31%	25
Sedgefield		0%	40.5	5	13%	39	9	21%	34
Smith		0%	48.6	3	5%	57	9	15%	52
Spaugh		0%	42.5	6	14%	43	10	21%	37
Williams	34.9	100%		37	100%		27	100%	16
Wilson		0%	45.6	4	8%	45	9	18%	42
York Rd. (Kennedy)	49.9	100%		32	97%	1	21	51%	15
Learning Academy				5	19%	21	4	27%	11

March 6, 1965, 1968-69*, and 1969-70*

School	1965 Pupils			1968-69 Pupils			1969-70 Pupils			Professional Staff 1965			1968-69*			1969-70*		
Senior High	N	%	W	N	%	W (other)	N	%	W (other)	N	%	W	N	%	W (other)	N	%	W (other)
East Mecklenburg		0%	1782	155	8%	1739	227	11%	1925		0%	79.2	6	7%	85	16	18%	91
Garinger	2	0%	2266	202	9%	2157	492	23%	2148		0%	100.0	6	6%	102	22	22%	97
Harding		0%	1002	169	17%	814	636	47%	720		0%	48.0	4	5%	49	16	44%	56
Independence				92	9%	962	135	11%	1111				6	9%	59	12	18%	69
Myers Park	3	0%	1772	158	8%	1855	233	12%	1767		0%	76.7	6	6%	87	17	20%	79
North Mecklenburg	1	0%	1155	410	27%	1109	462	25%	1185		0%	51.8	6	9%	63	13	17%	64
Olympic				259	33%	522	376	46%	512				5	11%	39	10	21%	38
7-12 Second Ward	1411	100%		1139	100%	3				70.0	98%	1.5	57	95%	3			
South Mecklenburg	30	2%	1430	106	6%	1812	109	5%	2024		0%	72.0	4	5%	78	17	18%	79
West Charlotte	1560	100%		1569	100%		1658	100%	0	65.0	97%	2.0	74	93%	6	58	67%	29
West Mecklenburg	1	0%	1270	118	8%	1340	148	9%	1444		0%	61.4	4	5%	73	13	15%	71

649a

5. [illegible]

SCHOOL	[illegible]	[illegible]	[illegible]	[illegible]
ARSENAULT EL. ELE.		282		
ARSENAULT EL. JUNIOR			712	
ASHAND H			1064	
ASHLEY		94		
ASHLEY PARK		26		
BATH		640		
BARRIMOOR				
BERRYHILL		540		
BEVERLY WOODS		374		
DIAMOND		145		
CLEAR CREST		217		
COCHRANE JUNIOR			890	
COLLEGIATE		81		
CORNELIUS		189		
CRESCENT		43		
CULLWOOD			500	
DAVIDSON		46		
DELTA		385		
DEVONSHIRE		116		
EAST [illegible]				644
EASTOVER		20		
EASTWAY			62	
ELIZABETH		24		
GARNER				339
ALEXANDER GRAHAM			102	
HARDING HIGH				186
HAYES H			49	
[illegible]		386		

E

NUMBER OF PUPILS TRANSPORTED DAILY - [illegible]

	PRE-SCHOOL	ELEMENTARY	JUNIOR HIGH	SENIOR HIGH
WALKE		61		
STELE		414		
HOME FAYS		40		
LD		249		
NDENCE				484
MES		222		
N JUNIOR			129	
KES		245		
CREEK		599		
ES		563		
BROOK JUNIOR			885	
S FAIR HIGH				135
ES ROAD		550		
L NO REPORT		ESTIMATE 405		825
H CENTERVILLE				
DALE		329		
REST		45		
E PROVIDENCE		197		
PIC				429
Y ROAD		102		
CREEK		519		
CREEK ANNEX		108		
ERVILLE		155		
A ROAD		24		
AL VALLEY			1332	
L ROAD		133		
ALLEY			390	
PARK			640	

AVERAGE NUMBER OF PUPILS TRANSPORTED DAILY - 1969-70 FIRST [illegible]

SCHOOL	PRE-SCHOOL	ELEMENTARY	JUNIOR HIGH	SENIOR HIGH
BOYDSFIELD [illegible]		5		
BOYDSFIELD J.H.			88	
SELMA		100		
SHARON		170		
SMITH JUNIOR			897	
SOUTH				1023
SPAUGH			235	
STARMOUNT		29		
STATESVILLE ROAD		685		
STEELE CREEK		441		
TYSON HILLS		71		
[illegible]CKLEBERRY		287		
WEST [illegible]OODS				3
WEST [illegible]EMBURG				615
WESTERLY HILLS		48		
WILLIAMS J.H.			82	
WILSON JUNIOR			932	
WINTERFIELD		37		
DAVIDSON CDC	136			
HUNTSVILLE CDC	168			
SEVERTSVILLE CDC	139			
TOTAL CDC.	156			
TOTALS	599	10,441	8,989	4,70

TOTAL 24,737

ac 1969-70 budget adopted by the Board of Education on September
9 contains the following provisions for compensatory education:

A. New programs:

Supplements for 12 elementary assistant principals	$ 10,000.
Salary for 35 additional special education teachers	320,808.
In-service workshops, consultants, visitation	25,000.

B. Redeployment of personnel from system-wide duties to working directly with compensatory education:

5 directors and coordinators	$ 116,175.
20 corrective reading teachers	206,263.

C. Continuing support for the following activities:

Psychological services	$ 243,810.
Special education	882,450.
Social work	217,342.
Child Development Centers	760,000.
Learning Academy	190,000.

In addition to the budgetary allotment of funds already committed for
ensatory education, the Board of Education intends to make a request of
County Commissioners for the amount of $150,000 which they have announce
icly is being held in contingency for compensatory education. Specific
s for the use of this money include individualizing instruction, par-
larly in providing materials and supplies. Attached is a proposal for
use of these funds which is now being considered.

An application also has been made under the education component through
City Demonstration Agency for Model Neighborhood funds as follows:

Instructional Fees for Model Neighborhood students	$ 26,645.
Establishment of six Model Neighborhood Centers	1,015,188.

The Board of Education has stated its commitment for emphasis in all
artments of the school system on the underachiever and the exceptional
ld.

F

Purpose: Improve reading skills of slow or retarded readers by providing support materials, equipment and personnel.

1. Materials

Supplement State adopted texts Open Highways series with recommended supplemental materials:

Grade Level	Retarded Readers	Support
1	2865	$23,195
2	2761	7,320
3	2637	7,180
4	2475	3,720
5	2440	3,660
6	2358	3,550
7	2488	3,750
8	2375	3,570
9	2265	3,400
10	2230	3,350
11	1870	2,800
12	1685	2,570
		$58,085
	Tax and Shipping	2,750
		$60,835

2. Equipment

200	Tape Recorders	@ $100.00	$20,000
100	Record Players	@ 70.00	7,000
500	Listening Centers	@ 58.60	29,300
			$56,300
	Tax and Shipping		3,000
			$59,300

3. Personnel

Recruit 1,000 volunteers for 20 schools
2 professional staff members to coordinate recruit training and supervision of volunteers — 20,000

Total Cost — $150,135

Order dated November 7, 1969

On October 29, 1969, the United States Supreme Court announced its decision in the Mississippi school case, *Alexander* v. *Holmes County*, Case No. 632. That decision, the most significant in this field since *Brown* v. *Board of Education*, peremptorily reversed an order of the Fifth Circuit Court of Appeals which, upon request of the United States Attorney General, had postponed until 1970 the effective desegregation of thirty Mississippi school districts, and had extended from August 11 to December 1, 1969, their deadline for filing desegregation plans. The Supreme Court held that the Court of Appeals

> "* * * *should have denied all motions for additional time* because continued operation of *segregated schools* under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. *Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin* v. *School Board*, 377 U. S. 218, 234 (1964); *Green* v. *School Board of New Kent County*, 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)

The Supreme Court further directed the Fifth Circuit Court of Appeals to make such orders as might be necessary for the *immediate* start in each district of the operation of a "totally unitary school system for all eligible pupils without regard to race or color."

It is this court's opinion that the word "dual" in the Supreme Court opinion is another word for "segregated," and that "unitary" is another word for "desegregated" or "integrated." It is also this court's opinion that although,

as defendants say, this is not Mississippi, nevertheless the Supreme Court's prohibition against extension of time as laid down in *Alexander* v. *Holmes County* is binding upon this court and this school board, and bars the exercise of the court's usual discretion in such matters, and that to allow the request of the defendants for extension of time to comply with this court's previous judgments would be contrary to the Supreme Court's decision and should not be done.

Therefore, and based also upon the considerations set out in the memorandum opinion to be filed contemporaneously herewith, the motion of the defendants for extension of time for compliance with the court's August 15, 1969 order is denied. Ruling on all other pending motions is deferred.

This the 7th day of November, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Memorandum Opinion dated November 7, 1969

Preliminary Statement

On Wednesday, October 29, 1969, the United States Supreme Court announced its decision in the Mississippi school case (*Alexander* v. *Holmes County*, Case No. 632). That decision peremptorily reversed an order of the Fifth Circuit Court of Appeals which, upon request of the United States Attorney General, had postponed until 1970 the effective desegregation of thirty Mississippi school districts, and had extended from August 11 to December 1, 1969, their deadline for filing desegregation plans. The Supreme Court held that the Court of Appeals

> "• • • *should have denied all motions for additional time* because continued operation of *segregated schools* under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. *Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin* v. *School Board*, 377 U. S. 218, 234 (1964); *Green* v. *School Board of New Kent County*, 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)

The Supreme Court further directed the Fifth Circuit Court of Appeals to make such orders as might be necessary for the *immediate* start in each district of the operation of a "totally unitary school system for all eligible pupils without regard to race or color."

The Mississippi school districts in the *Holmes County* case had degrees of desegregation ranging from nearly zero to about 16% of the Negro pupils. They like Mecklenburg hoped that their "freedom of choice" plans would satisfy the Constitution.

Memorandum Opinion dated November 7, 1969

The request for time extension, and all later proceedings in this cause, must be considered in light of the Supreme Court's reaffirmation of the law which this court has been following, and in light of the urgency now required by the *Holmes County* decision.

THE RESULTS OF THE 1969 PLAN

For pupil desegregation, the July 29, 1969 plan proposed to close seven black inner-city schools (most or all of which had previously been ear-marked for eventual "phase-out") and to transfer their 3,000 students in specified numbers to named suburban schools. All the transferee schools except West Charlotte were white. In addition, 1,245 black students, in specified numbers, were to be transferred from eight black or largely black schools to other designated suburban white schools.

The plan was accepted and approved because of its apparent promise to extend the opportunities of a desegregated education to over 4,000 new black students.

The plan has not been carried out as advertised: (a) Only 73 of the 1,245 scheduled for transfer from overcrowded black schools have been so transferred; those 73 were transferred not to the schools designated, but to other schools not mentioned in the plan. (b) It is now revealed that the closed schools, which were billed in July to produce 3,000 black students for transfer, actually had only 2,627 students in them when the schools closed in June! (c) The Board allowed full freedom of choice for students from the closed schools, and those students in large numbers elected to go to Harding High School, and to Williams Junior High, Northwest Junior High and other black schools, instead of to the assigned white schools. As a result, Harding High School was transformed immediately

from 17% black to 47% black. This produced community consternation but no racial disorder among the students. The result may be deplorable, but the fact that the students at Harding High School have adjusted peaceably to the situation (like others before them at Cornelius, Davidson, Olympic, Randolph Road, Hawthorne and Elizabeth, and like the people of Anson and other North Carolina counties) shows that Mecklenburgers can live with desegregated schools. (d) The transfers proposed simply appear never to have been made to most of the suburban schools named in the plan. (e) *The plan therefore transferred to white schools only 1,315 instead of the promised 4,245 black pupils!* From closed schools, the elementary transferees numbered 463 instead of the advertised 1,235; junior high transferees were 273 instead of 630; and senior high transferees were 506 instead of 1,135; and from overcrowded schools 73 instead of 1,245. If Harding (47% black, 630 Negro students), Olympic (42% black, 376 Negro students), and Wilmore (49% black, 228 Negro students) should be allowed to continue their rapid shift from white to black, the net result of the 1969 pupil plan would be nearly zero.

Faculty desegregation has significantly and commendably improved since the April 27 order. Nevertheless, only six "black" schools and one "black" kindergarten have predominantly white faculties; and 98 out of the 106 schools and kindergartens in the system are today readily and obviously identifiable by the race of the heavy majority of their faculties.

The "performance gap" is wide.

Memorandum Opinion dated November 7, 1969

THE SITUATION TODAY

The following table illustrates the racial distribution of the present school population:

SCHOOLS READILY IDENTIFIABLE AS WHITE

% WHITE	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
100%	9	6,605	2	6,607
98–99%	9	4,801	49	4,850
95–97%	12	10,836	505	11,341
90–94%	17	14,070	1,243	15,313
86–89%	10	8,700	1,169	9,869
	57	45,012	2,968	47,980

SCHOOLS READILY IDENTIFIABLE AS BLACK

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
100%	11	2	9,216	9,218
98–99%	5	41	3,432	3,473
90–97%	3	121	1,297	1,418
56–89%	6	989	2,252	3,241
	25	1,153	16,197	17,350

SCHOOLS NOT READILY IDENTIFIABLE BY RACE

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
32–49%	10	4,320	2,868	7,188
17–20%	8	5,363	1,230	6,593
22–29%	6	3,980	1,451	5,431
	24	13,663	5,549	19,212
TOTALS:	106	59,828	24,714	84,542

Some of the data from the table, re-stated, is as follows:

Number of schools	106
Number of white pupils	59,828
Number of black pupils	24,714

Total pupils	84,542
Per cent of white pupils	71%
Per cent of black pupils ..	29%
Number of "white" schools	57
Number of white pupils in those schools	45,012
Number of "black" schools	25
Number of black pupils in those schools	16,197
Number of schools not readily identifiable by race	24
Number of pupils in those schools	19,212
Number of schools 98-100% black	16
Negro pupils in those schools	12,648
Number of schools 98-100% white	18
White pupils in those schools	11,406

Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

The schools are still in major part segregated or "dual" rather than desegregated or "unitary."

The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from

public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or "*de facto*," and the resulting schools are not "unitary" or desegregated.

FREEDOM OF CHOICE

Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the "black" schools.*

Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in *Green* v. *New Kent County*, 391 U.S. 430 (1968):

> "* * * If there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate

as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason.

The "National Standings"

The defendants filed some statistics concerning the one hundred largest school systems in the country, and say that Charlotte-Mecklenburg desegregation compares favorably with that in most of those systems. That may well be so. The court is not trying cases involving the other ninety-nine school boards, and has not studied any evidence about them and does not know their factual nor legal problems. The court in its first order of April 23, 1969 has noted the substantial desegregation achieved in certain areas in the Charlotte-Mecklenburg system, and is still aware of it. The fact that other communities might be more backward in observing the Constitution than Mecklenburg would hardly seem to support denial of constitutional rights to Mecklenburg citizens. The court doubts that a double standard exists. The Attorney General of the United States has filed suit for desegregation in Connecticut as well as in the whole State of Georgia. One of the most stringent desegregation orders on record was entered recently against a school board in the City of Chicago. Constitutional rights will not be denied here simply because they may be denied or delayed elsewhere. There is no "Dow-Jones average" for such rights. With all due deference to the complexities of this school system, which have already been fully noted

in previous opinions, the Board and the community must still observe the Constitution. The fact that the school system ranks high in some artificial "national standings" or that one-third of the Negro students do attend desegregated schools or predominantly white schools is no answer to the constitutional problems presented by sixteen thousand black Mecklenburgers still going to all-black or largely black schools in this predominantly white community.

THE PROSPECTS FOR THE FUTURE

The second part of the Board's report is answers to the court's questions designed to determine whether the Board has made the hard decisions necessary to desegregate the schoos.

The answers show that those decisions have not been made.

The computer expert has been given restrictions which, taken at face value, indicate that his work will not lead to desegregation of all the schools. One such restriction has the apparent effect of limiting attendance to those who live a maximum of roughly a mile and a half from the school. (This is the requirement that all grids or areas must be "contiguous to the home grid or to grids which are contiguous to the home grid.") Another is the limitation that no school attended by whites should have less than a 60% white student population. (Unless this were coupled with a further requirement that no school attended by blacks shall have more than a 40% black student population, this appears to put the black schools "off limits" for his study.) The original verified motion of the School Board contained two other limitations. Those were that "a 'desirable' racial balance should be obtained" and that "reasonable limitation on distance of travel for a child has been imposed." The

record is silent on what these limitations mean and whether they are still in effect.

The Board has not accepted pairing and grouping and clustering of schools as legitimate techniques, but has simply indicated that it will "consider" those techniques where they offer *"reasonable* prospects of producing *stable* desegregation * * *." (Emphasis added.)

The report states unconditionally that:

> *"The information supplied by the systems analysis approach will not produce desegregation of all schools by September, 1970.* Dramatic results are expected. It is *hoped* that the number of all white and all black schools will be substantially *reduced.* The number of such schools cannot be determined at this time." (Emphasis added.)

The report also says that:

> "* * * *The Board of Education does not feel that it will be possible to produce pupil desegregation in each school by September, 1970.* It is expected that faculties will fairly represent a cross section of the total faculty so that most and *possibly* all schools will not have a racially identifiable faculty. Furthermore, the restructuring of attendance lines coupled with faculty desegregation *may* satisfy constitutional requirements." (Emphasis added.)

The School Board is sharply divided in the expressed views of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools.

Memorandum Opinion dated November 7, 1969

By the responses to the October 10 questions, the Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they *intend not to do it* effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance.

Withholding or delaying the constitutional rights of children to equal educational opportunity on such vague terms as these is not the province of the School Board nor of this court.

Furthermore, since the Supreme Court has now prohibited lower courts from granting extensions of time, it may well be that the gradual time table laid down by this court's April 23, 1969 order contemplating substantial progress in 1969 and complete desegregation by September 1970) was and is too lenient.

If the plan tendered by the School Board on November 17, 1969 is thorough and informative, and sufficiently shows an unconditional purpose on the part of the Board to complete its job effective by September, 1970, the Board may perhaps be allowed to adhere to the existing time table. Certainly a Mecklenburg plan ought if possible to be prepared by the Mecklenburg School Board and its large and experienced staff, rather than by outside experts. Decision on that and other pending questions must await further developments, including the Board's November 17, 1969 report.

Conclusions

The school system is still discriminatorily segregated by race and maintained that way by state action. In many ways it is not in compliance with the Constitution. The Board has not shown a valid basis for an extension of time

to comply with the court's judgment; it has shown no intention to comply by any particular time with the constitutional mandate to desegregate the schools; and it has suggested its intention *not* to comply by September, 1970. In spite of those facts the court would like as a matter of discretion to grant some of the time extension requested, but is of the considered opinion that in *Alexander* v. *Holmes County* the Supreme Court has prohibited the exercise of such discretion. The findings of fact in this opinion will be considered, along with facts found in previous orders, opinions and memoranda, as the basis for such future judgments and orders as may be appropriate, including such judgments and orders as may be appropriate upon receipt of the Board's November 17, 1969 plan. All statements of fact in this memorandum opinion, whether or not labeled as such, shall be deemed findings of fact, as necessary to support such judgments and orders.

This the 7th day of November, 1969.

/s/ JAMES B. McMILLAN
James B. McMillan
United States District Judge

The Amendment to Plan for Further Desegregation of Schools

Pursuant to the order of the Court dated August 15, 1969, and as re-affirmed by the order of the Court dated November 7, 1969, the Charlotte-Mecklenburg Board of Education submits the following as its plan for further desegregation of the schools served by the Charlotte-Mecklenburg Public School System.

Restructuring of Attendance Lines

The Board of Education has embarked upon a comprehensive program for the purpose of restructuring attendance lines involving all schools and all students served by the system. The primary purpose of this program is to achieve further desegregation in as many schools as possible. For the past two and one-half months, this program has been underway and an enormous amount of work has already been performed to bring the program to a point where meaningful information can now be brought forward.

The criteria for developing the computer assisted systems analysis approach to restructuring the attendance lines are as follows:

1. Systems Associates, Inc., the company employed to devise a computer assisted systems analysis approach to restructuring of attendance lines, has been instructed to include all schools and students served by the system. In this connection, it is understood that the product of such an approach would involve a computer print-out of all possible configurations or combinations of grids within the following limitations:

   A. Each school district must be comprised of a single set of contiguous grids. (A grid is a 2500 foot square

as shown on the school attendance maps filed as exhibits in this matter.)

B. No combination of grids can be considered if they exceed the rated capacity of the school by 20 per cent. Further, such combinations cannot underpopulate the school by more than 20 per cent.

C. A school district cannot contain the home grid of another school.

D. A school district must contain the home grid in which the school is located.

E. No school district to which white students are assigned should have less than 60 per cent white student population to avoid "tipping."

After meeting these five tests, all possible combinations of grids are being printed separately for each school. The combinations will be reviewed to determine their desirability. Desirability will be determined by the following factors: (1) the closeness of the integration ratio to 70 per cent white—30 per cent black, (2) the compactness of the school district and (3) the combination of grids which yields a student population closest to 100 per cent of the school's capacity.

It is observed that the first five rules serve to identify the various combinations of grids which are possible and the latter three rules judge the desirability of the various combinations.

The best alternative set of grids for each school will then be considered by school personnel familiar with neighborhoods, traffic patterns, natural hazards and other factors. This review may have a limited effect upon desegregation,

favorably or unfavorably. After consideration of the computer information and such factors as listed above, a new school district will be formulated and its lines shown on a map. Other school districts will be formulated in the same manner until such time as the entire school system serving the elementary, junior high and senior high schools have been redistricted.

It is noted that, in any restructuring of lines, there is a "domino" effect such that a change in any one attendance line may cause changes in other attendance lines. Great care must be exercised in devising attendance lines which promise a substantial degree of stable desegregation. Therefore, in the opinion of the Board, its staff and Systems Analysis Associates, Inc., February 1, 1970, is the earliest practicable date a uniform, comprehensive and well-planned program which restructures attendance lines can be developed and approved by the Board of Education for submission to the Court.

The Board of Education has conducted an examination of the results of the computer analysis of attendance lines for forty-three (43) elementary schools located in the densely populated areas of the city. This examination discloses that it is *theoretically* possible to populate these schools with the following ratios of black students:

1. Two (2) schools at which the black student population ratio is 0%.

2. Nine (9) schools at which the black student population ranges from one to five per cent.

3. Two (2) schools in which the black student population ranges from six to ten per cent.

4. One (1) school in which black student population ranges from eleven to fifteen per cent.

5. Twenty-two (22) schools in which black student population ranges from sixteen to forty per cent.

6. Seven (7) schools in which the black student population is 100 per cent.

It should be noted that these combinations are theoretically possible. However, actual drawing of district lines may disclose that one or more grids are needed in several adjacent attendance areas in order to achieve the ratios set forth above. Computation of the alternatives possible at one black school disclosed that there were in excess of 2,000 possible grid configurations for the school district each of which would yield 60 per cent or greater white student population. The task of selecting the most desirable configuration consistent with the needs of adjacent schools is a monumental task which will require substantial efforts to accomplish for all of the 107 school served by the system.

The Board elected to work first with elementary schools rather than secondary schools because the size of the secondary districts requires substantially greater computer time. Therefore, the Board is not presently in position to furnish to the Court information gained from computer print-outs relating to the secondary schools.

The Board is most concerned with the question of "tipping" referred to above. It has been frequently observed that once a school reaches a point between 35 and 45 per cent black in student population, the school and neighborhood become rapidly predominantly or all black. For ex-

ample, in the school year 1954-1955, Barringer, Bethune, Elizabeth, First Ward, Lakeview, Seversville, Zeb Vance, Villa Heights and Wesley Heights Elementary Schools and Hawthorne and Piedmont Junior High Schools housed all white student bodies totaling 5,502 students. During the school year 1968-1969, these schools except Seversville and Wesley Heights which are now housed in Bruns Avenue Elementary School had student population of 4,652 (81 per cent) black and 1,105 (19 per cent) white students. It is further noted that in March of 1965, these schools had a black student population totaling 35 per cent of the combined enrollments. Therefore, it is the plan of this School Board to limit schools to which white students are assigned to those schools in which it is possible to provide a student population which is at least 60 per cent white. Otherwise, schools with high percentages of blacks become rapidly or more predominantly black and as found by the Court, "a racial mix in which black students heavily predominate tends to retard the progress of the whole groups, whereas, if students are mingled with a clear white majority, such as a 70/30 ratio, the better students can hold their pace, with substantial improvement for the poorer students." It is the considered judgment of the Board of Education supported by its staff that to create a school district which is likely to turn predominantly black is an exercise in futility and will neither produce quality education for the children nor offer lasting prospects for stable desegregation.

The Board has instructed the school staff to periodically review schools which show an unusual growth in their black student population and report to the Board such attendance districts in order that the Board may consider revis-

ing such attendance lines to avoid the possibility of "tipping."

A majority of the Board of Education believes that the constitutional requirements of desegregation will be achieved by the restructuring of attendance lines, the restricting freedom of transfer and other provisions of this plan. The majority of the Board has, therefore, discarded further consideration of pairing, grouping, clustering and transporting. If the majority of the Board of Education is in error in its conviction that such measures are not constitutionally mandated, the Board respectfully requests clear direction to the contrary through the careful consideration of perplexing questions as they apply to the Charlotte-Mecklenburg School System. These questions include the following:

1. What is a unitary school system?
2. What makes a school racially indistinguishable?
3. Will this school system which bases its plan primarily on geographic zoning be considered to have a unitary school system?
4. Will this system be unitary even though it operates more schools with all white student populations?
5. Will this system be unitary even though it operates one or more schools with all black student populations?
6. What constitutes a racially indistinguishable faculty?
7. If a pupil percentage ratio (black/white) is used, what are the acceptable limits?

The Amendment to Plan for Further Desegregation of Schools

8. If pupil ratios (black/white) are used in individual schools, must the same ratios be maintained indefinitely in spite of changing neighborhood patterns?

FREE CHOICE OF TRANSFER

Any black student will be permitted freedom of choice transfer if the school to which he is originally assigned has more than 30 per cent of his race and if the school he is requesting to attend has less than 30 per cent of his race and has available space. Any white student will be permitted freedom of choice transfer if the school to which he is originally assigned has more than 70 per cent of his race and if the school he is requesting to attend has less than 70 per cent of his race and has available space. Availability of space will be determined by the school administration under rules of uniform application established by the School Board.

In addition, transfers may be granted to students whose request for transfer evidences conditions of hardship. Hardship will be determined on the basis of uniform rules developed by the administrative staff.

The administrative procedures for such transfer shall be readily available to each student.

FACULTY DESEGREGATION

During the 1970-1971 school year, the Board of Education will staff each school so that the faculty at each school will be predominantly white and, where practicable, will reflect the ratio of white and black teachers employed in the total faculty of the school system.

Recognizing that the assignment procedures necessary to achieve this goal will place many teachers in circum-

stances with which they are unfamiliar and for which they have only limited preparation, the Board will therefore seek to provide special assistance to them by requesting additional funds in its 1970-1971 budget for in-service education and by deploying its central office staff in the most effective way possible.

It is impossible at this time for the Board to specify the precise percentage of racial mix in each school faculty since the school system will lose approximately 600 teachers at the end of the current year and will employ approximately 750 teachers new to the system. Race and qualification of these teachers are unknown at this time, and faculty assignments cannot be made until the summer months immediately preceding the opening of the school year.

School Construction Program

Until such time as the restructuring of attendance lines is final, a comprehensive review of the new construction program cannot be completed. As indicated in the Board's plan filed with the Court on July 29, 1969, a part of the study will be completed by February 1, 1970, and a more general long-range study will be completed by June of 1970.

The Building and Sites Committee has undertaken this study at the direction of the Board of Education. The Committee has conducted an extensive study involving the 90 projects identified in school system's master plan for construction. The Committee has reported to the Board that 46 of the 91 projects are either completed, under construction, or are far along in planning. Of the 45 projects remaining, 5 ($1,850,000.00) are unaffected by any

plan for further desegregation because they are already integrated; and 19 ($2,690,000.00) projects are unaffected because the work planned will have no effect on the pupil capacity of the physical plant. The Building and Sites Committee has authorized the staff to proceed with planning on all projects unaffected by any anticipated moves in desegregation.

The Committee concluded that the work on the remaining 21 projects might be affected by plans for further desegregation and delayed planning on these projects pending further study. Funds set aside for these 21 projects amounts to $10,475,000.00.

The names of these projects are as follows

1. Moore's Chapel
2. Allen Hills
3. Thomasboro
4. Cotswold
5. Lincoln Heights
6. University Park
7. Villa Heights
8. Highland
9. Lakeview
10. Briarwood
11. Newell
12. Midwood
13. Berryhill
14. Selwyn

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15. Center City Elementary
16. Fairview
17. Wilora Lake
18. Elizabeth
19. Piedmont, Jr.
20. Irwin Avenue, Jr.
21. Metropolitan, Sr.

The Building and Sites Committee has analyzed the present housing conditions for the school system. A copy of this analysis is attached as Exhibit "A".

I, William C. Self, Superintendent of the Charlotte-Mecklenburg school system and Secretary to its Board of Education, do hereby certify that the foregoing is a true, perfect and correct copy of the Amendment to Plan for Further Desegregation of Schools as adopted by the Board of Education on the 13th day of November, 1969, and spread upon its minutes.

This the 17th day of November, 1969.

/s/ William C. Self
William C. Self
Secretary to the Board

Report Submitted in Connection With the November 13, 1969 Amendment to Plan for Further Desegregation

On November 7, 1969, the Court denied the defendant's motion for an extension of time for submission of a plan for further desegregation and ordered submission of a report as directed in the order of August 15, 1969. The defendant's amendment to its plan for further desegregation is submitted contemporaneously herewith, following adoption by the Charlotte-Mecklenburg Board of Education.

The plan should be considered against the background of progress in desegregation accomplished by the School Board. The desegregation of this system began during the school year 1962-1963 by the closing of schools and partial redestricting of attendance lines which was completed in 1965. Through this program, the former dual system of schools which had existed prior thereto was disestablished.

In 1965, this proceeding was instituted by the present plaintiffs and the district court (1965) and the Court of Appeals (1966) approved the plan of desegregation under which the schools were operated through the school year 1968-1969. As set forth below, the degree of desegregation accomplished under that plan has been substantial. It should be kept in mind that the School Board during that period was guided by the following pronouncement of the U. S. Court of Appeals for the Fourth Circuit, to wit:

> "Whatever the Board may do in response to its own initiative or that of the community, *we have held that there is no constitutional requirement that it act with the conscious purpose of achieving the maximum mixture of races in the school population* . . . So long as

> the boundaries are not drawn for the purpose of maintaining racial segregation, *the School Board is under no constitutional requirement that it effectively and completely counteract all of the effects of segregated housing patterns.*" (Emphasis supplied.)—*Swann* v. *Charlotte-Mecklenburg Board of Education,* 369 F. 2d 29 (October 24, 1966)

For almost four years, the Board proceeded in conformity with the plan approved by the District Court and the Court of Appeals. It was not until 1969 that the Board was informed that its plan was no longer acceptable and that additional, but generally unspecified steps were required to effect further desegregation.

The School Board has acted affirmatively in many ways to assure an equal educational opportunity for all students and to further desegregate the system, many of these actions having been taken on its own initiative. This positive action is reflected by the following illustrations:

1. Twenty schools have been closed and pupils reassigned primarily in order to increase racial mixing.
2. A single athletic league has been created without distinction between white and black schools or athletes.
3. Employment practices are on a nondiscriminatory basis and employment ratios reflect the black/white ratio of the community.
4. Individual school faculties have been desegregated.
5. In the school year 1970-71, all faculties will be predominantly white.

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6. Black principals have been assigned to predominantly white schools and white principals have been assigned to predominantly black schools.

7. Black professional personnel have been appointed to ranking administrative positions.

8. A black minister was appointed by the Board of Education to its membership when the community twice failed to elect him to the Board. This member currently serves on the Board of Education.

9. The dual school bus system was eliminated.

10. Nondiscriminatory practices are, and have been, followed in all facets of the school system, including the following:

    a. School fees
    b. School lunches
    c. Library and other instructional materials
    d. Quality of school buildings
    e. Use of federal funds
    f. Course offerings
    g. Evaluation of students

11. The black and white P.T.A. Councils have been merged into a single organization at the urging of the school administration.

12. Specialized and supplementary programs, such as the residential school for underachieving students (the Learning Academy) and the kindergarten and nursery school programs (Child Devel-

opment Centers), have been designed and implemented in such a way that desegregation has been substantially increased.

13. Freedom of choice has been redesigned so that its only effect is to promote increased desegregation and to give stability to the racial mix of individual schools.

14. The current restructuring of attendance lines is designed to promote additional desegregation.

15. The current plan provides for periodic review of the racial mix at each school so that corrective action may be taken to inhibit "tipping" and avoid further black racial isolation in the schools.

This portion of the report deals with further information concerning the nature and effect of the Plan.

The Order dated August 15, 1969, approved the policy statement of the Board and, therefore, a restatement of the same is deemed unnecessary.

A review of the plan discloses that the provisions for restructuring attendance lines are in conformity with the plan as submitted on July 29, 1969, supplemented by later action of the Board which was subsequently submitted to the Court. It is important to know that the Board is now submitting preliminary information relating to theoretical ratios in the elementary schools which promise a remarkable degree of desegregation. It is important that the Court does not construe the information submitted in the plan relating to racial ratios of elementary schools as being in the nature of a guarantee by the Board since it is anticipated the results of restructuring the attendance lines may

produce a greater or lesser degree of desegregation, the extent of which cannot be determined at this time. Comparing the theoretical ratio with the present racial ratio of desegregation in the elementary schools, the following information is disclosed:

Elementary Schools

Percent Black	*Number of Schools 1969-70 Actual Ratios*	*Number of Schools Theoretical Ratios*	*Number of Schools Not Computed 1969-70 Actual Ratios*
0%	9	2	1
1–5%	17	11	3
6–10%	11	2	2
11–15%	6	4	3
16–40%	13	29	8
41–100%	21	8	0

It is noted that it is theoretically possible to reduce the number of all white schools by six and the number of schools which are all black or likely to become predominantly black has been reduced by thirteen schools. The precise ratios must wait the difficult task of locating all attendance lines.

An illustration of the difficulty in designing school attendance lines and in preserving maximum desirable results is shown on Exhibit "A" attached hereto. This exhibit shows three adjacent schools, each of which requires grids needed by one or more of the other schools to reach maximum desirable desegregation. However, by reason of the enormous number of alternative grid combinations available, it is believed that substantial further desegregation may be achieved under this approach.

Report Submitted in Connection with the November 13, 1969 Amendment to Plan for Further Desegregation

The Court has previously expressed concern over Harding High School, Wilmore Elementary and other schools which have shown a rapid shift in student population from white to black. The Board will employ three methods in an attempt to produce stable desegregation. The methods to be used are as follows:

1. In determining the initial attendance lines, the ratio of black to white students will not exceed 60% white—40% black where the school is desegregated.

2. Severe restrictions will be imposed on freedom of choice so that exercise of freedom of choice may have only the effect of improving desegregation in the system.

3. The school staff will keep a watchful eye on schools experiencing unusual growth in black student population. The school staff will report to the Board such shifts so that attendance lines may be altered to counteract neighborhood shifts which often lead to racial isolation of blacks. (See Exhibit "B" attached hereto for examples of such shifts.)

The Court will, therefore, note that the Board's plan is well calculated to produce stable desegregation.

With reference to faculty desegregation, great progress has been achieved for the second school year 1969-70. The plan will produce substantially more desegregation since each school will have a preponderance of white teachers and, where practicable, a more desirable ratio. The Board is not only interested in numbers but also in assisting its faculty with preparation for new teaching conditions and situations. Precise statistics for the next school year cannot

be furnished at this time for the reasons stated in the plan.

To develop a meaningful, enduring and comprehensive construction program, the Board and staff must know the precise location of the new attendance boundaries since the capacities of nearby schools and the effect of new construction on such capacities are critical factors in determining the placement of new schools. Therefore, development of this phase of the plan must await restructuring of attendance lines.

It is noted that with respect to current construction, the five projects unaffected by the desegregation plan involve an expenditure of $1,850,000; projects for standardization of facilities to meet educational programs where capacity is not a factor involve an expenditure of $2,690,000, and projects which may be affected by desegregation involve an expenditure of $10,475,000. The latter sum is being held pending development of the building program specified in the plan.

The Court has previously been furnished information for the 1968-69 school year which indicates that Charlotte-Mecklenburg ranks 43rd in size among the 100 largest school systems of the Nation.

Of the 15 systems which have comparable pupil enrollments and comparable percentages of black students, Charlotte-Mecklenburg ranks 5th in the percentage of schools having a racial mix. Locally, significant additional progress has been made for the 1969-70 school year.

These comparisons are not intended as any indication of a self-satisfied complacency on the part of the Charlotte-Mecklenburg Board of Education regarding the progress which it has made to date in the desegregation of its schools or as a justification for any slow-down in its con-

tinuing efforts to afford every child in the system the education to which he is entitled. However, these comparisons (and similar ones for prior years) do show that Charlotte-Mecklenburg has been among the leaders in facing up to the responsibility of providing quality education on a desegregated basis for all children—white or black.

The Board has no intention of tailoring its performance to those of other systems. On the contrary, the Board on its own initiative is committed to the proposition that every child in the system is entitled in full measure to a quality education unimpaired by any restraints or restrictions upon his constitutional rights.

As outlined above, in response to the June 20, 1969, order of the Court, this Board submitted a plan for the desegregation of teachers and a plan and time-table for active desegregation of pupils. These plans were conditionally approved by the Court on August 15, 1969, with instructions to submit a more comprehensive plan by November 17, 1969.

In compliance with the directions of the Court, the Board of Education and its administrative staff have worked diligently to formulate a plan which will satisfy the mandate of the Court and protect and promote the Constitutional rights of every child, without sacrificing the quality of education which we desire for all our children and without jeopardizing the community support which our schools must have. It is the belief of the Board of Education that the current plan, as detailed in this report, will achieve both these goals.

The Board of Education, however, has been handicapped in its work. It has been required to proceed without clear directives regarding exactly what is required of the Board and the plan to satisfy the mandates of the Constitution

to provide for our children a "non-racial", "desegregated", "unitary" school system.

The Board is now, and always has been, ready and willing in good faith to fully acquit its Constitutional duty and to incorporate in any plan whatever may be required by the Constitution—regardless of what the Board may conceive to be the effect of such compliance on the process of educating children or upon community support for the schools.

The Board takes very seriously its obligation to act responsibly— actions which vitally affect in a direct and personal way the lives and welfare of 85,000 students, their parents, 5,500 school personnel and the community at large. The formation of a stable and workable desegregation plan involves intelligent planning and hard decisions. These decisions should not be made more difficult by requiring the Board to speculate unnecessarily about what must or can be done.

If the Board is in error in its interpretation of its constitutional duty, then the time has come when the Board must be given specific directions as to what are and what are not necessary or permissible ingredients of an acceptable plan. When the Board understands what is required, it can more effectively get on with the job of implementing its plan—without the disruptive uncertainties and protracted litigation involved in the submission of numerous piecemeal, tentative, speculative or conditionally approved plans which are the likely results of plans submitted without a clear understanding of what must be done. It is the Board's conviction that, once the community understands what is required, it will support the Board and accept what-

ever adjustments must be made to comply with these requirements.

Respectfully submitted this 17th day of November, 1969.

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Attorneys for Defendants

Report Submitted in Connection with the November 13, 1969 Amendment to Plan for Further Desegregation

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

Dr. Robert C. Hanes, of lawful age, being first duly sworn, on his oath states that he is the Assistant Superintendent of Defendant named in the above and foregoing matter and that the facts stated therein are true according to his best knowledge and belief.

/s/ ROBERT C. HANES
Dr. Robert C. Hanes

Sworn and subscribed to before me
this 17th day of November, 1969

/s/ FAYE JALLEY
Notary Public

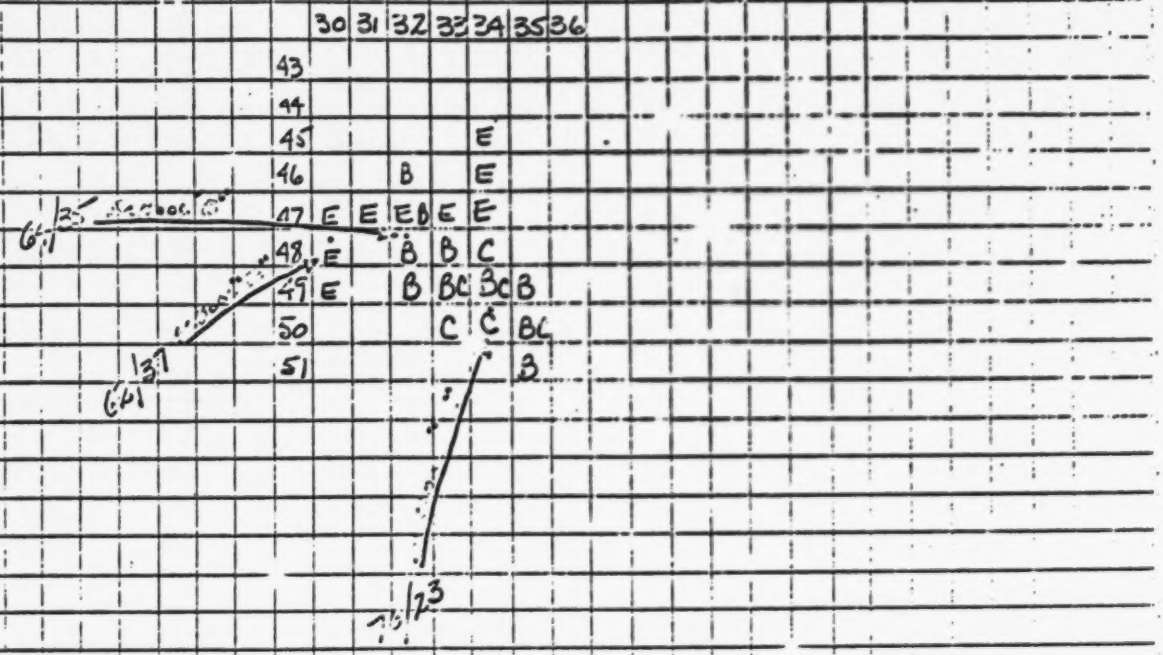
My commission expires: 3/27/71

(See Opposite) ☞

Development _____ Exhibit _____ File No. _____

Subject _____ Sheet No. _____ of _____

By _____ Date _____



Three adjacent school districts representing schools b, c, and e. The squares represent grid squares as disclosed on master elementary map. The designation of school grid represents the location of the school within these grids. The letters within the grids represent those grids required achieving desegregation ratios indicated of 64% white/35% black for school b; 62% white 37% black for school E and 76% white and 23% black for school c. It is noted that several schools claim the grids rec... for other schools.

EXHIBIT "A"

Formerly White Schools Experiencing Change to
Predominantly Black Schools, 1954-55 through 1968-69

School	PUPILS 1954-55 B	1954-55 W	1965, March B	1965, March W	1968-69 B	1968-69 W
Barringer Elem.		190		604	668	131
Bethune		373	343	9	223	3
Elizabeth		718	5	448	270	194
First Ward		597	473		749	
Lakeview		341		400	269	147
Seversville		361	96	229	*	
Zeb Vance		221	465		257	
Villa Heights		772	23	594	796	126
Wesley Heights		225	214		*	
	-0-	3798	1619	2284	3232	601
				+ Est. at Bruns	500	4
					3732	605
Hawthorne Jr. High		785	25	670	492	447
Piedmont		919	121	291	428	53
	-0-	1704	146	961	920	500
Total	0	+ 5502	1765	+ 3245	4652	+ 1105
	5502 (0% B)		5010 (35% B)		5757 (81% B)	

Does not include

(1) Parks Hutchison (121 white in 1954-55) closed as white (not needed) at end of 1958-59 nor North Charlotte (261 white in 1954-55) closed: assigned to new Highland 1955-56.

(2) Seven all-black schools which were closed in 1966-67 to eliminate dual-school boundaries - -

Crestdale, Gunn, Ada Jenkins, Plato Price, Sterling, Torrence-Lytle, Woodland

97 + 696 + 431 + 505 + 699 + 1005 + 360

or 3793 black students, as reported March 6, 1965.

(3) Three all-black schools: Biddleville, Morgan + Myers Street

434 + 305 + 820 (1559 in 1965)

or 390 + 211 + 559 = (1160 in 1967-68)

and all-white Woodlawn school (273).

--These four along with Seversville* and Wesley Heights* were closed at end of 1967-68.

Plaintiffs' Response to Defendants' Amendment to Plan for Further Desegregation of Schools

(Filed November 21, 1969)

On three different occasions this Court has urged, encouraged and requested the defendant School Board to carry out its constitutional duty to desegregate the Charlotte-Mecklenburg public schools. The Court has literally leaned over backwards to seek voluntary compliance by the Board. Even in its last order, in rejecting additional delay to submit a plan, the Court left the opportunity open to the Board for additional time to comply by merely making some showing now of the Board's intent to implement its obligation at some definite time in the future. Despite these efforts, however, the Board now unequivocally, defiantly and contumaciously advises the Court that it will not now, nor in the future, carry out its constitutional responsibilities.

Irrespective of whether the Court's directives are constitutionally mandated, and plaintiffs submit that they are and further that they are required to be implemented with more haste than the Court has heretofore required, the Board is constitutionally obligated to implement these directives pending some change, modification or vacation by this or some other Court. *Walker* v. *City of Birmingham,* 388 U.S. 307, 18 L.ed 2d 1210; *United States* v. *Mine Workers,* 330 U.S. 258, 91 L.ed. 884; *Howat* v. *Kansas,* 258 U.S. 181, 66 L.ed 550. As the Supreme Court stated in *Walker*: "This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and [disobey the directives of the Court] . . . . [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." 388 U.S. at 321, 18

L.ed 2d at 1220. Here this Court has unequivocally directed a plan for complete desegregation of the Charlotte-Mecklenburg public schools. Notwithstanding this directive, however, the defendants, by the Amendment to Plan for Further Desegregation of Schools, in utter contempt of the Court's order, have simply refused to comply. Plaintiffs, therefore, respectfully submit that they are not only entitled to an order requiring defendants, and each of them, to show cause why they should not be held in contempt, *Walker* v. *City of Birmingham, supra,* but certainly now to an order appointing educational consultants to devise a plan for complete and immediate desegregation of the school system. Cf. *Dowell* v. *Board of Education of Oklahoma City Public Schools,* 244 F. Supp. 971 (W.D. Okla. 1965), aff'd in part 375 F.2d 158 (10th Cir. 1967), cert. den., 387 U.S. 931, 18 L.ed. 2d 993; *Alexander* v. *Holmes County Board of Education,* —— U.S. —— (No. 632).

1. The Board's response to the Court's order of November 7, 1969 does no more than reiterate the rejected request for more time. The Board rejects any affirmative obligation to take appropriate steps to disestablish the segregated school system it has created. *Green* v. *School Board of New Kent County,* 391 U.S. 430, 20 L.ed. 2d 716; *NLRB* v. *Newport News Shipbuilding and Dry Dock Company,* 308 U.S. 241, 84 L.ed. 219; *United States* v. *Crescent Amusement Company,* 323 U.S. 173, 89 L.ed. 160; *Standard Oil Company* v. *United States,* 221 U.S. 1, 55 L.ed. 619. The Board questions "tipping", and well it should for the record clearly demonstrates that "tipping" has been caused by the Board's own action and conduct. See Plaintiffs' Further Response filed on November 3, 1969. The Board

then inquires what are its duties, when this Court, the Fourth Circuit and the Supreme Court have clearly instructed the Board with respect to its duties:

> The pattern of separate "white" and "Negro" schools in the [Charlotte-Mecklenburg] school system established under compulsion of state laws is precisely the pattern of segregation to which Brown I and Brown II were particularly addressed, and which Brown I declared unconstitutionally denied Negro school children equal protection of the laws. . . . [S]chool systems were *required* by Brown II "to effectuate a transition to a racially nondiscriminatory school system." . . . . The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of Brown II. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" Brown II held must be affectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the State-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our in-

> quiry. . . . Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. *School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmatively duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . . Green,* 391 U.S. at 435-438, 18 L.ed. 2d at 722-723. (Emphasis added.)

Further delay has now been clearly enjoined. *Green, supra; Alexander* v. *Holmes County Board of Education,* —— U.S. —— (No. 632) and theCourt has been directed to take immediate steps which will disestablish the segregated school system.

2. Defendants propose to restrict freedom-of-choice, allowing limited racial majority to minority situations, but also to allow transfers in hardship cases as "determined on the basis of uniform rules developed by the administrative staff". Defendants' past practices and present defiance of the directives of the Court clearly entitled plaintiffs to some express constitutional standards which can be shown will not further perpetuate this racially dual school system.

3. Defendants further promise to hire and assign teachers and school personnel without regard to race, the same promise made in 1965 which the Court found in April, 1969 had not been implemented.

Plaintiffs' Response to Defendants' Amendment to Plan for Further Desegregation of Schools

4. Defendants finally promise to withhold construction on 21 proposed projects while proceeding with 24 projects. Defendants contend that the 24 projects will not affect desegregation. There has been no showing even as to the 24 projects that they will not adversely affect whatever plan may subsequently be devised and directed by the Court. Plaintiffs submit that pending the approval of a plan by the Court, or at least some showing by the defendants, all construction and additions should be enjoined.

5. The Court has been further directed to devise its own plan and to insure its prompt and effective implementation, particularly where school officials simply refuse to do so. *Alexander* v. *Holmes County Board of Education, supra,* and may do so without further hearings. While the Court may hear and consider objections by the Board to the Court's directed plan, such is permitted only after the Board has fully complied in all respects with the plan directed. *Alexander, supra.*

Plaintiffs, therefore, respectfully submit and pray that the Court reject the defendants' Amendment to Plan for Further Desegregation of Schools; that the Court appoint educational consultants to devise a plan for complete desegregation to be instituted forthwith; that the Court direct that the expenses of the educational consultants be borne by the defendants; that the Court enjoin any further construction or additions pending the complete implementation of the plan directed by the Court; that the Court order that the defendants, and each of them, immediately show cause why they should not be held in contempt of the Court's orders; that the Court award plaintiffs' costs herein, including reasonable counsel fees; that the Court

retain jurisdiction of this cause and award plaintiffs such other and further relief as the Court may deem the plaintiffs entitled.

Respectfully submitted,

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Opinion and Order dated December 1, 1969

On April 23, June 20 and August 15, 1969, the defendant school board was ordered to file plans to desegregate the schools of Charlotte and Mecklenburg County, North Carolina. The defendants have admitted their duty to desegregate the schools; considerable progress has been made toward desegregation of faculties; and progress, previously noted, has been made in some other areas. The schools, however, remain for the most part unlawfully segregated. The facts supporting that conclusion in all the court's previous orders are reiterated here.

The issue is what to do pursuant to the board's latest plan, filed November 17, 1969. The plan recites the following ostensible purpose:

> "The Board of Education has embarked upon a comprehensive program for the purpose of restructuring attendance lines involving all schools and all students served by the system. The primary purpose of this program is to achieve further desegregation in as many schools as possible * * *."

The plan says that a computer analyst has been hired to draw up various *theoretical* possible school zone attendance lines, and that school personnel, before February 1, 1970, will draw the *actual* lines.

The details of the plan show that it contains no promise nor likelihood of desegregating the schools.

The plan and the report accompanying it say (emphasis added):

> "No school district *to which white students are assigned* should have less than 60 per cent white student population to avoid 'tipping.'" (Plan, page 2.)

* * * * *

"... it is the plan of this School Board to limit schools *to which white students are assigned* to those schools in which it is possible to provide a student population which is at least 60 per cent white." (Plan, page 5.)

• • • • •

"In determining the initial attendance lines, the ratio of black to white students will not exceed 60% white—40% black WHERE THE SCHOOL IS DESEGREGATED." (Report, page 5.)

• • • • •

"A majority of the Board of Education believes that the constitutional requirements of desegregation will be achieved by the restructuring of attendance lines, the restricting freedom of transfer, and other provisions of this plan. The majority of the Board has, therefore, discarded further consideration of pairing, grouping, clustering and transporting." (Plan, page 6.)

The strongest claim made in the plan with respect to the all-black schools is that among 43 elementary schools in the densely populated areas of Charlotte it is *"theoretically* [school board's emphasis] possible to populate these schools with the following ratios of black students: . . . Seven (7) schools in which the black student population is 100 per cent." (Plan, pages 3 and 4.) Since the 100% black elementary schools in the system (Billingsville, Marie Davis, Double Oaks, First Ward, Lincoln Heights, Oaklawn and University Park) number exactly seven, this language obviously proposes that these seven schools will remain all-black.

The plan contains no factual information nor estimate regarding plans for desegregation of the 31 other elemen-

tary schools, the 20 junior high schools, and the 10 senior high schools in the system.

Concerning faculty desegregation the plan says:

> "*During* the 1970-71 school year, the Board of Education will staff each school so that the faculty at each school will be *predominantly* white and, *where practicable* will reflect the ratio of white and black teachers employed in the total faculty of the school system." (Plan, page 7.)

With regard to the physical facilities, the court on August 15, 1969, ordered the defendants to produce by November 17 "A detailed report showing, complete with figures and maps, the location and nature of each construction project proposed or under way, and the effect this project may reasonably be expected to have upon the program of desegregating the schools." In response to that order, the plan lists the names of 21 out of 91 projects, expresses a few opinions and conclusions about the building program, and promises a partial study by February 1, 1970 and a "general long range study" *"by June of 1970,"* but it sheds no factual light on the effect of any part of the building program on the segregation issue. Since the board has, in seven months, failed to produce a program for desegregation, it is only natural that they can not predict the effect of any particular building project on such a program. The court has yet not received information necessary to appraise the effects of current building activity on the current unprogrammed course of desegregation.

When the plan is understood, it boils down to this:

1. It proposes to re-draw school zone lines, and to restrict freedom of choice, which the court had already

advised the board to eliminate except where it would promote desegregation. It states no definable desegregation goals.

2. The "60-40" ratio is a one-way street. The plan implies that there will be no action to produce desegregation in schools with black populations above 40%, *and that no white students are to be assigned to such schools.*

3. Continued operation of all seven of the all-black elementary schools would be assured. The same would appear to be true for the entire group of 25 mostly "black" schools, mentioned in the court's November 7 order, which serve 16,197 of the 24,714 black students in the system.

4. Transportation to aid children transferring out of segregated situations (which was ordered by the court on April 23 as a condition of any freedom of transfer plan, *and which was a part of this plan as advertised in the board's October 29 report*) has been eliminated from the plan as filed with the court. Inevitable effects of this action would be to violate the court order and to leave the children recently reassigned from seven closed black inner-city schools with no way to reach the suburban schools they now attend! This is *re*-segregation.

5. Other methods (pairing, grouping, clustering of schools) which could reduce or eliminate segregation—and which the board, on October 29 when it was asking for a time extension, promised to consider—have now been expressly left out of the plan.

6. No time is set to complete the job of faculty and pupil desegregation.

Opinion and Order dated December 1, 1969

7. In the written argument ("Report") filed with the plan, with the candor characteristic of excellent attorneys, the board's attorneys say:

> "It is important that the Court does not construe the information submitted in the plan relating to racial ratios of elementary schools as being in the nature of a guarantee by the Board since it is anticipated *the results of restructuring the attendance lines may produce a greater or lesser degree of desegregation, the extent of which cannot be determined at this time.*" (Report, page 4; emphasis added.)

The defendants have the burden to desegregate the schools and to show any plan they propose will desegregate the controls. They have not carried that burden. Re-drawing school zone lines won't eliminate segregation unless the decision to desegregate has first been made.

THE SCHOOLS ARE STILL SEGREGATED

The extent to which the schools are still segregated was illustrated by the information set out in previous orders including the order of November 7, 1969. Nearly 13,000 out of 24,714 black students still attend schools that are 98% to 100% black. Over 16,000 black students still attend predominantly black schools. Nine-tenths of the faculties are still obviously "black" or "white." Over 45,000 out of 59,000 white students still attend schools which are obviously "white."

THE RESULT IS UNEQUAL EDUCATION

The following table further illustrates the results. Groups A and B show that sixth graders, in the seven

100% black schools the plan would retain, perform at about fourth grade levels, while their counterparts in the nine 100% white elementary schools perform at fifth to seventh grade levels. Group C shows that sixth graders in Barringer, which changed in three years from 100% middle income white to 84% Negro, showed a performance drop of 1½ to 2 years. Group D shows however that Randolph Road, 72% white and 28% Negro, has eighth grade performance results approximately comparable to Eastway, which is 96% white, and Randolph results are approximately two years ahead of all-black Williams and Northwest. Until unlawful segregation is eliminated, it is idle to speculate whether some of this gap can be charged to racial differences or to "socio-economic-cultural" lag.

If the courts should accept the defendants' contention that all they have to do is re-draw attendance lines and allow a type of freedom of choice, two-thirds or more of the black children in Mecklenburg County would be relegated permanently to this kind of separate but unequal education.

AVERAGE ACHIEVEMENT TEST SCORES, GRADE 6, REPORTED IN GRADE EQUIVALENT, 1965-66/1968-69

	WM	PM	SP	LANG	ACM	ACN	AAPP	SS	SC
GROUP A - 100% Black Elementary	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69
Billingsville	37/39	39/42	43/45	36/37	37/38	41/44	38/39	42/43	37/38
Marie Davis	42/43	42/44	49/48	39/41	43/45	45/48	43/41	43/45	39/40
Double Oaks	44/40	42/40	49/46	35/36	41/39	45/44	41/37	44/40	41/37
First Ward	43/40	42/41	50/48	39/36	40/39	44/46	43/41	48/44	42/40
Lincoln Heights	45/44	44/44	52/49	44/42	45/43	46/48	43/41	47/46	42/41
Oaklawn	44/44	42/45	50/53	42/47	41/45	50/49	43/44	41/49	40/47
University Park	44/44	44/47	51/48	43/43	40/44	46/48	41/44	46/46	41/43
GROUP B - 100% White Elementary									
Devonshire	52/59	54/62	57/60	57/64	49/53	53/63	55/59	57/64	57/65
Hidden Valley	/59	/62	/61	/62	/51	/60	/59	/64	/67
Merry Oaks	62/60	66/66	66/67	66/71	53/54	59/65	67/64	70/68	73/72
Montclaire	66/67	68/72	69/70	71/76	58/60	61/67	66/68	70/71	76/77
Pinewood	67/64	68/68	71/68	71/71	58/61	62/67	68/71	72/71	73/70
Rama Road	68/67	68/72	70/71	73/76	58/61	64/67	70/70	72/73	76/78
Shamrock Gardens	59/56	61/57	66/57	64/62	52/53	58/57	63/57	65/61	62/61
Thomasboro	58/55	59/55	63/58	59/58	52/51	55/57	60/56	63/59	64/61
Windsor Park	61/64	63/68	61/66	65/69	55/53	59/63	63/62	65/69	67/72
GROUP C - Barringer	61*/46#	63*/46#	64*/50#	66*/42#	53*/45#	59*/48#	64*/44#	65*/47#	68*/45#

*100% white in 1965
84% black in 1968-69

AVERAGE ACHIEVEMENT TEST SCORES, GRADE 8, REPORTED IN GRADE EQUIVALENT, 1965-66/1968-69

	PM	SP	LANG	ACM	ACN	AAPP	SS	SC
GROUP D - Junior High	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69	1965-66 / 1968-69
Randolph Road (28% black)	/80	/82	/79	/62	/79	/76	/79	/81
Williams (100% black)	55/52	67/64	55/52	52/49	58/61	58/55	56/56	55/56
Northwest (100% black)	59/58	73/71	59/56	54/50	60/61	58/58	59/57	59/58
Eastway (96% white)	84/82	85/86	83/81	74/67	79/82	81/75	83/82	87/87

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THE LAW STILL REQUIRES DESEGREGATION

Segregation in public schools was outlawed by the decisions of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and 349 U. S. 294 (1955).

The first *Brown* opinion (*Brown I*) held that racial segregation, even though physical facilities and other tangible factors might be equal, deprives Negro children of equal educational opportunities. The Court recalled prior decisions that segregation of graduate students was unlawful because it restricted the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." The Court said:

> "Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Quoting a lower court opinion, the Supreme Court continued:

> "'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendence to [retard] the educational and mental development of Negro children

and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.* • • •." (Emphasis added.)

• • • • •

"• • • Such segregation has long been *a nationwide problem, not merely one of sectional concern.*" (Emphasis added.)

The selection of cases for the *Brown* decision demonstrates the nationwide reach of that concern; Brown lived in Kansas and the defendant board of education was that of Topeka, Kansas; defendants in companion cases included school authorities in Delaware and the District of Columbia. Later important cases have involved not just Southern schools, but also schools in New York, Chicago, Ohio, Denver, Oklahoma City, Kentucky, Connecticut and other widely scattered places.

Court decisions setting out the principles upon which the various orders of this court have been based include the following:

SUPREME COURT CASES

Alexander v. *Holmes County* (Mississippi), No. 632 (October 29, 1969).

Brown v. *Board of Education of Topeka* (Kansas), 347 U. S. 483 (1954), 349 U. S. 294 (1955).

Cooper, Members of the Board of Directors of the Little Rock (Arkansas) *Independent School District* v. *Aaron*, 358 U. S. 1 (1958).

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Green v. *County School Board of New Kent County* (Virginia), 391 U. S. 430 (1968).

Griffin v. *County School Board of Prince Edward County* (Virginia), 377 U. S. 218 (1964).

Keyes v. *Denver* (Colorado) *School District Number 1*, Application for Vacation of Stay (Justice Brennan, Supreme Court, August 29, 1969).

Monroe v. *Board of Commissioners of the City of Jackson* (Tennessee), 391 U. S. 450 (1968).

Raney v. *Board of Education of the Gould School District* (Arkansas), 391 U. S. 443 (1968).

United States v. *Montgomery County* (Alabama) *Board of Education*, 395 U. S. 225 (1969).

CIRCUIT COURT CASES

Brewer v. *School Board of City of Norfolk* (Virginia), 397 F.2d 37 (4th Cir., 1968).

Felder v. *Harnett County* (North Carolina) *Board of Education*, 409 F.2d 1070 (4th Cir., 1969).

Wanner v. *County School Board of Arlington County* (Virginia), 357 F.2d 452 (4th Cir., 1966).

Henry v. *Clarksdale* (Mississippi) *Municipal Separate School District*, 409 F.2d 682 (5th Cir., 1969) (*petition for cert. filed*, 38 U.S.L.W. 3086) (U. S. 9/2/69) (No. 545).

United States v. *Greenwood* (Mississippi) *Municipal Separate School District*, 406 F.2d 1086 (5th Cir., 1969) (*cert. denied*, 395 U. S. 907 (1969)).

United States v. *Hinds County School Board*, Nos. 28030 and 28042 (5th Cir., July 3, 1969).

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***Clemons* v. *Board of Education of Hillsboro, Ohio*, 228 F.2d 853 (6th Cir., 1956) (*cert. denied*, 350 U. S. 1006).**

***United States* v. *School District 151 of Cook County, Illinois* (Chicago), 404 F.2d 1125 (7th Cir., 1968) (*rehearing denied*, January 27, 1969).**

DISTRICT COURT CASES

***Eaton* v. *New Hanover County* (North Carolina) *Board of Education*, No. 1022 (E.D. N.C., July 14, 1969).**

***Keyes* v. *School District Number One, Denver* (Colorado), 303 F. Supp. 289 (D. Colo., 1969).**

Some of these principles which apply to the Charlotte-Mecklenburg situation are:

1. Racial segregation in public schools is unlawful, *Brown I; Green* v. *New Kent County, Virginia; Clemons* v. *Hillsboro, Ohio.* Such segregation is unlawful even though not required nor authorized by state statute, *Clemons* v. *Hillsboro.* Acts of school boards perpetuating or restoring separation of the races in schools are *de jure*, unlawful discrimination, *Cooper* v. *Aaron; Keyes* v. *Denver, Colorado School Board* (August 14, 1969), approved by the Supreme Court of the United States two weeks later, *Keyes* v. *Denver*, U. S. Supreme Court, August 29, 1969.

2. Drawing school zone lines, like "freedom of transfer," is not an end in itself; and a plan of geographic zoning which perpetuates discriminatory segregation is unlawful, *Keyes* v. *Denver; Brewer* v. *Norfolk; Clemons* v. *Hillsboro; Henry* v. *Clarksdale, Mississippi; United States* v. *Hinds County; United States* v. *Greenwood.*

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3. No procedure, plan, method or gimmick will legalize state maintained segregation. The constitutional test of a plan is whether it gets rid of segregation in public schools, and does it "now," *Green* v. *New Kent County; Monroe* v. *Jackson; Alexander* v. *Holmes County.*

4. Good faith of the school authorities, if it exists, does not excuse failure to desegregate the schools. ". . . The availability to the Board of other more promising courses of action may indicate a lack of good faith; and at the least *it places a heavy burden upon the Board to explain its preference for an apparently less effective method.*" *Green* v. *New Kent County.* (Emphasis added.)

5. "Natural boundaries" for school zones are not constitutionally controlling. If a zone encloses a black school in a district like this one where white students are in a heavy (71% white, 29% black) majority, the "naturalness" of the boundary or the existence of reasons for the boundary unrelated to segregation does not excuse the failure to desegregate the school, *Keyes* v. *Denver, Colorado; Henry* v. *Clarksdale; Clemons* v. *Hillsboro.*

6. It is appropriate for courts to require that school faculties be desegregated by formula, if necessary, and by a definite time or on a definite schedule, *United States* v. *Montgomery.* Faculty assignments so that each school has approximately the same ratio of black teachers as the ratio of black teachers in the school system at large are appropriate and necessary to equalize the quality of instruction in this school system, *United States* v. *Montgomery; United States* v. *Cook County; Eaton* v. *New Hanover County* (North Carolina).

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7. Bus transportation as a means to eliminate segregation results of discrimination may validly be employed, *Keyes* v. *Denver; United States* v. *Cook County,* Illinois, 404 F.2d 1125, 1130 (1969).

8. Race may be considered in eliminating segregation in a school system, *Wanner* v. *Arlington County, Virginia; United States* v. *Cook County; Green* v. *New Kent County.*

9. ". . . Whatever plan is adopted will require evaluation in practice and the court should retain jurisdiction until it is clear that state imposed segregation has been completely removed." *Green* v. *New Kent County; Raney* v. *Board of Education.*

10. The alleged high cost of desegregating schools (which the court does not find to be a fact) would not be a valid legal argument against desegregation, *Griffin* v. *School Board; United States* v. *Cook County, Illinois.*

11. The fact that public opinion may oppose desegregating the schools is no valid argument against doing it, *Cooper* v. *Aaron, Green* v. *New Kent County; Monroe* v. *Jackson.*

12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

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13. School location and construction and renovation and enlargement affect desegregation. Courts may properly restrain construction and other changes in location or capacity of school properties until a showing is made that such change will promote desegregation rather than frustrate it, *Felder* v. *Harnett County.*

14. Where pupils live must not control where they are assigned to school, if some other approach is necessary in order to eliminate racial segregation, *Green* v. *New Kent County; Keyes* v. *Denver; Eaton* v. *New Hanover County, North Carolina Board of Education.*

15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated, *Green* v. *New Kent County; Henry* v. *Clarksdale; United States* v. *Hinds County.*

16. The school board is endowed by Chapter 115, Section 176 of the General Statutes of North Carolina with "full and complete" and "final" authority to assign students to whatever schools the board chooses to assign them. The board may not shift this statutory burden to others. In *Green* v. *New Kent County*, the Supreme Court said of "freedom of choice":

> "Rather than foster the dismantling of the dual system the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must . . . fashion steps which promise realistically to convert

promptly to a system without a 'white' school and a 'Negro' school but just schools."

17. Pairing of grades has been expressly approved by the appellate courts, *Green* v. *New Kent County; Felder* v. *Harnett County*. Pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools.

18. Some 25,000 out of 84,000 children in this county ride school busses each day, and the number *eligible* for transportation under present rules may be more than 30,000. A transportation system already this massive may be adaptable to effective use in desegregating schools.

19. The school board has a duty to promote acceptance of and compliance with the law. In a concurring opinion in *Cooper* v. *Aaron*, 358 U. S. at 26 (1958), Justice Frankfurter said:

> *"That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system.* This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with Negro populations of large proportions. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law,

precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

"Lincoln's appeal to 'the better angels of our nature' failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's First and Second Inaugurals bequeathed to the Union, cemented with blood, a moral heritage which, when drawn upon in times of stress and strife, *is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.*" (Emphasis added.)

Order

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. All facts found in this and previous orders, and all competent evidence including plans, reports and admissions in pleadings in the record are relied upon in support of this order.

2. The November 17 plan entitled "AMENDMENT TO PLAN FOR FURTHER DESEGREGATION OF SCHOOLS" is disapproved.

3. The defendants are directed to desegregate faculties in all the schools effective not later than September 1, 1970, so that the ratio of black teachers to white teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system.

4. A consultant will be designated by the court to prepare immediately plans and recommendations to the court for desegregation of the schools. The legal and practical considerations outlined in detail in earlier parts of this opinion and order are for his guidance.

5. The defendants are directed to cooperate fully with the consultant. This cooperation will include but not be limited to providing space at the headquarters of the board of education in which he may work; paying all of his fees and expenses; providing stenographic assistance and the help of business machines, draftsmen and computers if requested, along with telephone and other communications services. He shall have full access to maps, drawings, reports, statistics, computer studies, and all information about all phases of the school system which may be necessary to prepare plans or reports. He shall be supplied with

any studies and plans and partial plans for desegregation of the schools which the defendants may have. The defendants will provide this consultant with full professional, technical and other assistance which he may need in familiarizing himself with the school system and the various problems to be solved in desegregating the schools. Any and all members of the board of education who wish to cooperate in the preparation of such a plan may do so. The cooperation of the school administrators and staff will be requested and will be appreciated.

6. Action on the motion of plaintiffs for an order directing immediate desegregation of the entire system is deferred.

7. Further orders with reference to restraining construction and enlargement of schools are deferred.

8. Motion has been filed for a citation of the school board members for contempt of court. Litigants are bound by court orders and may be punished for disobedience of such orders even though such orders may ultimately be reversed on appeal, *Walker* v. *Birmingham*, 388 U. S. 307 (1967). The evidence might very well support such citations. Nevertheless, this is a changing field of law. Despite the peremptory warnings of *New Kent County* and *Holmes County*, strident voices, including those of school board members, still express doubt that the law of those cases applies to Mecklenburg County. This district court claims no infallibility. Contempt proceedings against uncompensated public servants will be avoided if possible. Action on the contempt citation is deferred.

9. If the members of the school board wish to develop plans of their own for desegregation of the schools, with-

out delaying or interfering with the work of the consultant, they may proceed to do so, and if they wish any guidance from the court they will find their guidance in the previous opinions and orders of this court and in the court decisions and principles set out in this opinion and order.

10. Jurisdiction is retained for further orders as may be appropriate.

This is the 1st day of December, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Order dated December 2, 1969

The court appoints as a consultant under the terms outlined in the court's order of December 1, 1969, Dr. John A. Finger, Jr., of Providence, Rhode Island.

The school board and staff are directed to cooperate with Dr. Finger as set out in the December 1, 1969 order.

This the 2nd day of December, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Motion for Immediate Desegregation of the Public Schools in Charlotte and Mecklenburg County

(Filed January 20, 1970)

Plaintiffs, by their undersigned counsel, respectfully move the Court for an order directing Dr. John A. Finger, Jr. to immediately file with the Court his plan for the desegregation of schools and to order the defendants to implement Dr. Finger's plan immediately and, as grounds therefor, show the following:

1. On April 23, June 20 and August 15, 1969, the Court found the defendants to be operating an unconstitutionally segregated school system. Each Order required the defendants to file a plan for the desegregation of the schools. Each plan was blatantly defective and was rejected by the Court.

2. On December 1, 1969, the Court entered an Opinion and Order rejecting the plan filed by the Board on November 17, 1969 and determined that a consultant would be appointed by the Court to prepare immediate plans and recommendations to the Court for the desegregation of the schools. The following day, December 2, the Court entered an Order appointing Dr. John A. Finger, Jr. of Providence, Rhode Island to act as a consultant to the Court in preparing a plan for the desegregation of the schools.

3. Plaintiffs are informed that Dr. Finger has completed the essential elements of his plans and is in the process of refining and perfecting his proposal.

4. On October 29, 1969, the Supreme Court unanimously reversed the United States Court of Appeals for the Fifth

Circuit which had granted delays for the desegregation of schools in Mississippi.

> "Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. *Griffin* v. *School Board,* 377 U.S. 218, 234 (1964); *Green* v. *School Board of New Kent County,* 391 U.S. 430, 438, 439, 442 (1968)."

Alexander v. *Holmes County Board of Education,* 396 U.S. 19 (1969).

5. The day following this Court's Opinion and Order disapproving of the defendants' November 17 plan, the United States Court of Appeals for the Fourth Circuit entered an Order in five cases, three from North Carolina.

> "We consolidate these appeals for hearing and disposition in light of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (October 29, 1969). That recent decision of the Supreme Court teaches '[u]nder explicit holdings of this Court the obligation of every school district is to eliminate dual school systems at once and to operate now and hereafter only unitary schools.' The clear mandate of the Court is immediacy. Further delays will not be tolerated in this circuit. No school district may continue to operate a dual system based on race. Each must function as a unitary system within which no person is to be excluded from any school on the basis of race."

Nesbit v. *Statesville City Board of Education,* No. 13,229 —— F.2d. —— (Dec. 2, 1969). The three school districts from North Carolina were given until the end of the Christmas vacation within which to implement plans for complete desegregation of the schools. The two districts from Virginia were given until the end of the first semester. Each district was required to integrate faculties as well.

> "All plans must include provisions for integration of the faculty so that the ratio of Negro and white faculty members of each school shall be approximately the same as the ratio throughout the system."

6. Following the Supreme Court decision in *Alexander* v. *Holmes County,* the United States Court of Appeals for Fifth Circuit heard and decided a large number of cases from various states within the Circuit. The Court *en banc* unanimously decided that complete integration would not be required until the Fall of 1970. In several of the cases where the plaintiffs were represented by private counsel, petitions for certiorari were filed with the United tSates Supreme Court. The petitioners requested that the Supreme Court order the school districts to prepare for complete desegregation by February 1, 1970 pending a decision by the Court on the merits. The petitioners were granted the preliminary relief which they sought. *Carter* v. *West Feliciano Parish School Board,* —— U.S. —— (Dec. 13, 1969); *Davis* v. *Board of School Commissions of Mobile County,* —— U.S. ——; and *Bennett* v. *Evans County Board of Education,* —— U.S. —— (Opinions of Justice Black in Chambers, December 13, 1969). On January 14,

1970, the Court in a per curiam and decided without oral argument that the Court of Appeals had misread *Alexander* v. *Holmes County Board of Education.*

> "Insofar as the Court of Appeals authorized deferral of student desegregation beyond February 1, 1970, that Court misconstrued our holding in *Alexander* v. *Holmes County Board of Education,* —— U.S. ——. Accordingly, the petitions for writs of certiorari are granted, the judgments of the Court of Appeals are reversed and the cases remanded to that Court for further proceedings consistent with this opinion. The judgments in these cases are to issue forthwith."

Carter v. *West Feliciano Parish School Board,* —— U.S. —— (Jan. 14, 1970). The decision of the Court, representing the views of four members, was concurred by Mr. Justice Harlan and Mr. Justice White. They discussed what they thought were the practical requirements of *Alexander* and found a "maximum" timetable from a Court finding of non-compliance with the requirements of *Green* to the time of the actual operative effect of the relief to be eight weeks. Justices Black, Douglas, Brennan and Marshall found this view to be a "retreat" from the holding in *Alexander* v. *Holmes County Board of Education.* Justices Berger and Stewart dissented, being of the view that the cases should not be decided without oral argument.

7. Findings of non-compliance with the requirements of the *Green* case were made by the Court on April 23, June 20, August 15 and December 1, 1969. Eight weeks, the

"maximum" timetable which Justices Harlan and White viewed as permissible from the date of a finding of noncompliance, a determination which four others viewed as a "retreat" from *Alexander*, has long since passed since the decisions of April, June and August. Eight weeks from December 1, 1969 would be January 26, 1970. That would clearly be the outside date for the implementation of a comprehensive plan for the desegregation of schools in this case.

8. Dr. Finger has not yet filed his plan with the Court. However, even if his plan remains somewhat rough, that plan should be implemented now and any suggested modifications, by the Board, by the plaintiffs or possibly by Dr. Finger can be made later.

> "It would suffice that such measures will tend to accomplish the goals set forth in *Green*, and, if they are less than educationally perfect, proposals for amendments are in no way to suspend the relief granted in accordare are in no way to suspend the relief granted in accordance with the requirements of *Alexander*."

Carter v. *West Feliciano Parish School Board*, —— U.S. —— (1969) (concurring opinion of Justice Harlan).

> "The intent of *Alexander*, as I see it, was that the burden in actions of this type should be shifted from plaintiffs seeking redress for a denial of constitutional rights, to defendant school boards. What this means is that upon a prima facie showing of noncompliance with this court's holding in *Green* v. *New Kent County School Board*, 291 U.S. 430 (1968), plaintiffs may apply

for immediate relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system."

(Concurring opinion of Justice Harlan.)

9. In this Court's Opinion and Order of December 1, 1969, the Court held:

"12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable. . . .

15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I,* this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated, *Green* v. *New Kent County; Henry* v. *Clarksdale; United States* v. *Hinds County.*"

In its Order, the Court invited the Board to submit a plan conforming to the requirements established by the Court.

Motion for Immediate Desegregation of the Public Schools in Charlotte and Mecklenburg County

> "If the members of the school board wish to develop plans of their own for desegregation of the schools without delaying or interfering with the work of the consultant, they may proceed to do so, and if they wish any guidance from the court they will find their guidance in the previous opinions and orders of this court and in the court decisions and principles set out in this opinion and order."

The School Board decided not to appeal from the decision of December 1, 1969 as it had decided not to appeal from the previous orders of the Court. Nor has it submitted a plan as it was invited to do. Instead, members of the Board have continued to criticize the law of the land and to pretend that they do not know what the Court means when it says that all-black schools in this system are constitutionally impermissible. The Court and the plaintiffs have waited patiently and in vain for an indication that the Board would finally accept its burden to devise a constitutional plan for the desegregation of the schools. Since the Board has refused to assume its responsibility, the Court must act to vindicate the constitutional rights of children within the School System.

WHEREFORE, plaintiffs respectfully pray that the Court direct Dr. Finger to file his plan forthwith and upon receipt of his plan, order the defendants:

1. To completely implement the plan filed by Dr. Finger on or before January 26, 1970; and

Motion for Immediate Desegregation of the Public Schools in Charlotte and Mecklenburg County

2. To reassign faculty within the School System so that the ratio of black and white faculty members of each school shall be approximately the same as the ratio throughout the System and that such reassignments be implemented on or before January 26, 1970.

Respectfully submitted,

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Plan for Desegregation of Schools

In response to the invitation of the Court in its order dated December 1, 1969, the Board of Education submits its plan for desegregation in substitution of all prior plans for implementation in September, 1970, as follows:

Policy Statement

Equal opportunity to develop all capabilities to the fullest potential is the right of every individual in a democratic society. Since this right is a basic precept of education, it becomes the responsibility of those who make educational decisions to see that equality of opportunity is provided for all.

The Charlotte-Mecklenburg Board of Education affirms the long held principle that equality of educational opportunity for all children without regard to socio-economic, ethnic, religious or racial differences is essential to the continued growth of our community and is basic to a free and open American democratic society.

The Board further believes that equality of educational opportunity can best be provided by attempting to free individuals from the burden and handicaps imposed by varied circumstances, backgrounds and environmental differences. To this end, the Board has devised an educational program which will to the greatest extent possible, provide for the equal development of all students regardless of such burdens and handicaps.

In this light, the Board of Education firmly believes further desegregation of students and professional staff will contribute to the educational and social development of all children.

Plan for Desegregation of Schools

I.

Attendance Areas

Attendance areas are established for all schools within the Charlotte-Mecklenburg County Administrative School Unit and the boundaries thereof are hereby established as shown onmaps dated January 31, 1970, identified as "Map No. 1, Attendance Areas of Elementary Schools," "Map No. 2, Attendance Areas for Junior High Schools" and "Map No. 3, Attendance Areas for Senior High Schools," copies of which are attached. Practical administrative considerations may require revision of some of the attendance lines shown on these maps to conform to streets, streams, railroads and other identifiable monuments. The administrative staff, with the approval of the Board, may make such revisions provided they do not materially affect adversely the racial mix of the schools involved. A copy of each map (together with any revisions) shall be kept at each school in the attendance areas shown thereon and shall be open to public inspection in the office of the Superintendent and at the schools.

Board Comment:

1. The Board has devised new and comprehensive restructured attendance lines to achieve the degree of desegregation which it believes the Constitution requires. Thse outlines of the attendance lines shown on these maps have been established with the assistance of a computer system analysis which had as its purpose the identity and selection of contiguous grid areas having pupil populations that would most nearly achieve an optimum 70% white to 30% black racial mix for as many of our schools as possible.

The criteria used in the establishment of these attendance areas are as follows:

A. Each school district must be comprised of a single set of contiguous grids. (A grid is a 2500 foot square as shown on the school attendance maps as filed as exhibits in this matter.)

B. No combination of grids could be considered if they exceed the rated capacity of the school by 20 per cent. Further, such combinations could not underpopulate the school by more than 20 per cent.

C. A school district could not contain the home grid of another school.

D. A school district, if feasible, must contain the home grid in which the school is located.

E. Wherever practicable, no school district to which white students were assigned should have less than 60 per cent white student population to avoid "tipping."

After the meeting these five tests, all possible combinations of grids were printed separately for each school. The combinations were reviewed to determine their desirability. Desirability was determined by the following factors: (1) closeness of the integration ratio to 70% white-30% black, (2) compactness of the school district and (3) combination of grids which yields a student population closest to 100% of the school's capacity.

Attached (marked Exhibit "A" and made a part hereof) is a report of Systems Analysis Associates, Inc. which reflects the scope, nature of work performed, recommendations and results achieved through their efforts in consultation with school administrative staff and the Board of Education.

Plan for Desegregation of Schools

2. It has been the purpose of the Board to desegregate as many of the 103 schools as possible and, in order to do so, attendance lines have been drastically restructured and gerrymandered, resulting in 100 schools having some degree of desegregation. The Board is gratified with the results of its desegregation. Sixty-eight (68) of the 103 schools in the system will have a student body composed of 10% to 41% blacks. Of the remaining 35 schools, only 25 will have less than 11% black and 10 will have more than 41% blacks.

3. The Board does not believe that it is required to supplement its restructuring of attendance lines by other techniques, all of which have the primary feature of necessitating involuntary bussing of students from one school attendance zone to another. Such compulsory transportation would violate legislative policies of the United States Congress and the State of North Carolina.

In 1964, Congress enacted 42 USCA 2000 C. et seq., commonly referred to as the HEW Act of 1964, which provides that in an action instituted by the Attorney General under such Act, the court may give "such relief as may be appropriate" with the following limitation:

> ". . . provided that *nothing* herein *shall empower any* official or *court* of the United States *to issue any order* seeking to achieve a racial balance in any school by *requiring transportation* of pupils or students *from one school to another* or one school district to another *in order to achieve* such *racial balance,* or otherwise enlarge the existing power of the court to assure compliance with constitutional standards . . ." (Emphasis supplied).

Plan for Desegregation of Schools

The North Carolina legislative policy is expressed in G.S. Sec. 115-176.1, which specifies:

> ". . . No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of a student in contravention of this article is prohibited, and public funds shall not be used for any such bussing." (Emphasis supplied).

It is observed that the HEW Act of 1964 relates to desegregation actions instituted by the United States Attorney General, whereas the Board is involved in an action in the District Court which was instituted by private litigants. However, the purpose of each type of action is the same; namely, to secure an adjudication of the constitutional rights of all members of a class in a community who are similarly situated (i.e. black students). Compulsory measures imposed by the court cannot be dependent upon who brings the action—the United States Attorney General or private litigants. If a court is prohibited from requiring bussing to achieve a racial balance in the one instance, it must be prohibited from doing so in the other. This same limitation should be equally applicable to any court order which (although silent on the subject of transportation) can be implemented as a practical matter only by compulsory bussing.

By way of summary, the Court cannot require transportation to achieve a racial balance in our schools and voluntary action of the Board would be contrary to the law of the State of North Carolina. Under the circumstances, the Board rejected any arrangement for involuntary bussing of any student outside of his attendance area. This would

be a clear violation of the law as expressed by the United States Congress and by the North Carolina Legislature.

4. Aside from the legal reasons which prohibit involuntary transportation of a student outside his attendance area, in the judgment of the Board, educational and practical considerations preclude such action:

A. It is the judgment of the Board that the supposed benefits to be obtained from the use of extensive additional transportation to eliminate the 10 remaining black schools referred to above would be far outweighed by the resulting burdens, inconvenience and cost. Bussing in a school system as large as the Charlotte-Mecklenburg system is at best an expensive and complex operation. It is acknowledged that a large number of children are already being bussed to and from school. However, the burden, expense, hardship, inconvenience, hazards, expenditure of unproductive time and the added administrative problems occasioned by any bussing program should be minimized.

B. The Board cannot justify on any reasonable basis the very substantial additional cost and burden of the compulsory bussing that would be required for the sole purpose of effecting a desired racial mix in the remaining 10 black schools. Under the best arrangement, the Board could envision to eliminate these black schools, massive cross-bussing would require the transportation of about 11,500 black and white children—5,150 into and 5,150 out of the inner-city at the elementary level and 590 into and 590 out of the inner-city at the secondary level. This involuntary bussing would involve an approximate 15-mile trip each way (30 miles round drip) for each student moved through the heart of the business and residential sections

of the City. Pertinent information relating to such transportation is attached marked Exhibit "B".

C. A plan that generates unnecessary transportation costs and occasions unnecessary burdens and inconvenience for parents and children alike would jeopardize the public support which provides the tax and bond money upon which our schools are totally dependent for financing the already high cost of education.

D. The burden of extra bussing that would be required to desegregate each of the 10 remaining predominantly black schools would fall primarily on elementary children. The major impact of this burden would be imposed upon children who, because of their tender years, are the most illogical candidates to bear this burden.

E. The Board has retained its neighborhood school concept, although admittedly, it has been strained by the gerrymandered attendance lines adopted in this plan. It is a concept which the Board believes is beneficial to the children and enhances the support that comes when children and parents identify themselves with a particular school and its programs. A fragmentation of this type of association is not in the best interest of our schools.

5. With reference to ratios of black students in the various levels of education, attention is called to the fact that blacks comprise 30% of the elementary, 28% of the junior high and 24% of the senior high school population. To the extent possible, the Board has sought to reach these approximate ratios in each school.

Plan for Desegregation of Schools

II.

Assignment of Pupils

All pupils within any attendance area shall be assigned to the school of his or her grade within such attendance area. Assignment for any school year shall be made not later than the last school day of the preceding year or as soon thereafter as possible. In the case of children enrolled during such school year, notice of assignment may be given by noting the same on the report card of the pupil thereof or any other means which will adequately insure the delivery of written notice to the parent. Except for beginners, pupils not then enrolled shall be assigned at the time of their application for enrollment. In order to undo the existing "freedom of choice" assignments heretofore permitted, such assignments will be terminated and the students involved re-assigned to the appropriate school of his or her attendance area.

III.

Continuation of Elementary Voluntary Inner-City Re-Assignments

In its plan submitted to the Court on July 29, 1969, the Board of Education closed certain black schools and temporarily re-assigned the students of those schools as well as the students of certain other black schools whose facilities were overcrowded. Elementary students who were re-assigned and accepted re-assignment under the plan of July 29, 1969, at their election will be assigned to the school of their present attendance provided such school offers instruction at their grade level during the 1970-1971 school term. Free transportation will be provided such students.

Plan for Desegregation of Schools

Board Comment:

The Board is mindful of the educational advantages and the desires of a student and his parents to continuing one's education in the school of last attendance. Therefore, the Board has made available to those elementary inner-city black students who in good spirit accepted transfer to other schools the right to continue attendance at those schools provided the grade level is offered.

IV.

Restricted Transfers

In order to encourage, facilitate and maintain desegregation, transfers from the school to which a student is originally assigned shall be allowed only on the limited basis outlined below. Any black student will be permitted to transfer only if the school to which he is originally assigned has more than 30 per cent of his race and if the school he is requesting to attend has less than 30 per cent of his race and has available space. Any white student will be permitted to transfer only if the school to which he is originally assigned has more than 70 per cent of his race and if the school he is requesting to attend has less than 70 per cent of his race and has available space. Availability of space and rules of transfer will be determined by the school administration under rules of uniform non-racial application authorized by the School Board.

In addition, transfers may be granted to students whose request for transfer evidences conditions of hardship. Hardship will be determined on the basis of uniform non-racial criteria developed by the administrative staff.

The administrative procedure for such transfers will be readily available to each student.

Plan for Desegregation of Schools

Board Comment:

1. Under this provision, transfers are rigidly limited to those which promote desegregation of our schools, excepting only transfers with reference to hardship situations which shall be determined on a strictly non-racial basis and which necesarily must be allowed for the effective administration of the schools and the welfare of the children involved.

2. These restrictions on transfers are designed to complement the limitations imposed by the geographic assignments and to assure the stability and permanence of the desegregation achieved by this plan. Specifically, the plan is designed to accomplish these objectives:

A. Encourage the transfer of black students from predominantly black schools or schools likely to become predominantly black to a school which will promote the permanence of a desirable racial mix.

B. Encourage white students from predominantly white or all white schools wishing to transfer to help stabilize desegregation to do so.

C. Prevent the movement of white students from predominantly black schools or schools likely to become predominantly black.

D. Prevent black students from singling out a school for attendance so that blacks predominate or nearly predominate.

3. It is believed that the foregoing restrictions will tend to minimize tipping and resegregation.

Plan for Desegregation of Schools

V.

Transportation

Transportation will be provided to and from school for all students who are entitled thereto under State law and applicable rules and regulations promulgated by the State.

VI.

Stability of Enrollment

A student enrolled in any school after original assignment or by transfer after original assignment shall remain in the school of enrollment for the school year and no subsequent transfer will be permitted for such year except for hardship or a change of residence from one attendance area to another. In the event of change of residence, the pupil may elect to remain in the school of enrollment for the remainder of the school year. A student enrolled in a school by virtue of utilizing a restricted transfer authorized by Article IV (Restricted Transfers) shall be advanced to the next grade in such school from year to year unless such student prior to the expiration of any current year gives notice of his or her wish to return to the school serving the attendance area of his residence. A pupil enrolled in a school in an attendance area other than that of his or her residence shall be advanced at the appropriate time to the junior or senior high school, as the case may be, serving the attendance area in which the pupil resides. This provision shall not have the effect of denying or enlarging such pupil's right to transfer to another school of his grade pursuant to Article IV.

Board Comment:

The purpose of this section is to prevent voluntary transfers of students during the course of any school year other than those permitted for hardship or change of residence. The Board foresees that an unrestricted right with reference to time to transfer could create a chaotic condition in the administration of our schools. Additionally, this provision in effect sends the student back to his attendance area for re-assignment to secondary schools at the appropriate level. However, restricted transfer is still available to the student.

VII.

Faculty Desegregation

The faculties of all schools will be assigned so that the ratio of black teachers to white teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system.

Board Comment:

This provision is in conformity with the order of the Court dated December 1, 1969.

Concluding Comments of Board

With all due respect to the previously expressed views of the Court (pursuant to whose order this plan is submitted) the Board still adheres to its conviction that the Constitutional requirements of desegregation in the school system will be achieved by the restructuring of attendance lines and further faculty desegregation. In reiterating this conviction, the Board acknowledges that it does so with-

out clear guidance from appellate courts concerning a clear definition of a "unitary" or "desegregated" school system. In its search for guidance from the Supreme Court regarding the true meaning of these and similar terms, the Board is not alone. However, recent appellate and district court decisions acknowledging this lack of guidance have arrived at conclusions that square with the Board's position. The most recent appellate decision comes from the Sixth Circuit Court of Appeals, *Northcross* v. *Board of Education of Memphis*, CA 6, —— Fed. 2nd (January 12, 1970), wherein the court stated:

"... Upon the oral argument of this appeal, we asked counsel for plaintiffs to advise what he considered would be the 'unitary system' that should be forthwith accomplished in Memphis. He replied that such a system would require that in every public school in Memphis there would have to be 55% Negroes and 45% whites. Departures of 5% to 10% from such rule would be tolerated. The United States Supreme Court has not announced that such a formula is the only way to accomplish a 'unitary system.' We have expressed our own view that such a formula for racial composition of all of today's public schools is not required to meet the requirement of a unitary system. *Deal* v. *Cincinnati Board of Education* (Ohio schools) 369 F(2) 55 (6th Cir. 1966), *cert denied*, 389 U.S. 847 (1967); *Mapp* v. *Board of Education* (Tennessee schools) 373 F(2) 75, 78 (6th Cir. 1967); *Goss* v. *Knoxville Board of Education* (Tenn. schools) 406 F(2) 1183 (6th Cir. 1969); *Deal* v. *Cincinnati Board of Education* (Ohio schools) —— F(2) (6th Cir. 1969)."

Plan for Desegregation of Schools

Three district judges, Judges Smith, Edenfield and Henderson of the Northern District of Georgia in *United States of America* v. *State of Georgia, et al.*, USDC, ND, Ga. (Dec. 17, 1969), stated there was uncertainty with respect to specific standards which should be uniformly applied in desegregation cases and went on to state further:

> ". . . In this respect, the higher courts have not yet issued definitive rules as to just what steps are legally required of each local school district."

In that opinion, ratios were specified which permitted retention of some schools entirely populated by the minority race.

In *Bivins* v. *Bibb County*, USDC, M.D. Ga. (Jan. 21, 1970), the Court indicated its impatience with the vague terms typically employed in desegregation cases:

> "The phrase 'student body merger' is new in school desegregation law . . . The word 'merge' is a most imprecise term. Just as some of the other customary expressions used by the courts in this field, for instance, 'desegregate', 'integrate', 'black schools', 'all-black schools', 'white schools', 'just schools', 'dual system', 'unitary system'; the word 'work' in 'a plan which promises realistically to work.' When appellate courts use language like this, they must intend to leave its interpretation and application to the trial courts in the light of the facts and circumstances of each particular case. If the Congress were legislating in this field it would necessarily have to use precise language. If it used language such as that quoted, it would have to define such terms; otherwise, its enactments would be struck down by the courts as being 'void for vagueness.'"

Plan for Desegregation of Schools

In *Bickett, et al.*, v. *School of the City of Norfolk, et al.*, USDC, ED Va. (Dec. 30, 1969), Judge Hoffman indicated a similar concern over the lack of clear guidance from appellate courts; approved a plan for the Norfolk, Va. schools in which the percentage of Negroes in the school levels (attending schools housing less than 10% of one race) will be 23% in elementary schools, 43% in junior high schools and 100% in senior high schools; declined "to require massive compulsory bussing merely to achieve desegregation"; and concluded:

> "Nor do we feel that the Constitution commands racial balancing in each school building predicated upon percentage of white and black children in the several levels of public education; to wit, elementary, junior high school and senior high school."
>
> ". . . Until the Supreme Court speaks on the subject, no one can tell what is correct ('racially unidentifiable' or 'desegregated')." (Information in parenthesis supplied.)

In *Bivins, supra,* the court addressed itself to the question of a merged or desegregated system in which approximately 75 per cent of the blacks were in all black schools and concluded:

> "This court is of the opinion and finds and concludes that the student body in this system is sufficiently so merged, especially when we take into consideration the complete faculty merger above mentioned. . . ."

That same court found no legal mandate requiring racial balances in each school and stated:

Plan for Desegregation of Schools

"(A)ll three plans were drawn under the impression or apprehension that the law requires the achievement of racial balances. The Board probably came to this apprehension from the repeated use of more and more sweeping and expansive, though still imprecise, language by the courts. For instance, a recent order refers to 'full implementation of complete desegregation.' We look in vain for any authoritative statute or decree defining 'complete desegregation.'"

Further comment on the unsettled state of the law appears in *Thornie* v. *Houston County*, USDC, M.D. Ga. (Jan. 21, 1970), to wit:

"No one affected by this area of the law as fast as it is moving should let his hopes soar too high or his fears sink too low. Tomorrow might be a new day."

It is apparent that the courts have not reached a common understanding of what is required under the Constitution. The Board understandably is prone to exercise caution lest, in protecting the rights of some of its citizens, it tramples upon the rights of others in the absence of a clear mandate from the Supreme Court.

The Board has great faith in the citizens of this community and shares the conviction of the court in *Hilson* v. *Washington County*, USDC, M.D. Ga. (Jan. 28, 1970), when it stated:

"This is a nation of law abiding people. When we know what the law is and that it is the law, faithful compliance can be fully expected from everyone."

Plan for Desegregation of Schools

Respectfully submitted this second day of February, 1970.

WILLIAM J. WAGGONER
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Attorneys for Defendant, Charlotte-Mecklenburg Board of Education

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

I, WILLIAM C. SELF, do hereby certify that I am Superintendent of Charlotte-Mecklenburg public schools and that the foregoing is a true and complete copy of the plan of desegregation with official Board comments duly adopted at a meeting of the Charlotte-Mecklenburg Board of Education on the 31st day of January, 1970.

This the 31st day of January, 1970.

_____
William C. Self

Sworn to and subscribed before me
this 31st day of January, 1970.

_____
Notary Public

My commission expires:_____

The Charlotte-Mecklenburg Schools

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity Base	1970-71 Capacity +12%	1969-70* B	1969-70* W	1969-70* T	1969-70* %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B	Additional Pupils to Transport (By State regulations)
Albemarle Rd.	432	484	4	510	514	1%	4	469	473	1%	
Allenbrook	540	605	61	452	513	12%	59	496	555	11%	
Ashley Park	621	696	27	574	601	4%	155	421	576	27%	
Bain	702	786	33	735	768	4%	25	706	731	3%	
Barringer	486	544	843	16	859	98%	203	320	523	39%	197
Berryhill	836	936	98	639	737	13%	247	574	821	30%	274
Beverly Woods	540	605	68	684	752	9%	8	648	656	1%	
Billingsville	594	665	596	0	596	100%	113	325	438	26%	259
Briarwood	540	605	6	680	686	1%	2	663	665	0%	
Bruns Ave.	675	756	759	10	769	99%	624	73	697	90%	
Chantilly	432	484	0	472	472	0%	142	303	445	32%	
Clear Creek	324	363	48	229	277	17%	43	266	309	14%	
Collinswood	621	696	111	443	554	20%	224	448	672	33%	233
Cornelius	459	514	181	235	416	44%	182	265	447	41%	
Cotswold	540	605	23	537	560	4%	128	449	577	24%	195
Davidson	324	363	104	186	290	36%	102	174	276	32%	
Marie Davis	756	847	662	0	662	100%	666	82	748	88%	
Dorita	783	877	150	678	828	18%	152	595	747	20%	
Devonshire	648	726	0	903	903	0%	0	925	925	0%	
Dilworth	648	726	90	317	407	22%	241	376	617	39%	
Double Oaks	675	756	836	0	836	100%	825	3	828	100%	
Druid Hills	486	544	472	3	475	99%	465	20	485	96%	
Eastover	648	726	42	559	601	7%	157	478	635	25%	62
Elizabeth	405	454	314	125	439	72%	112	294	406	28%	
Enderly Park	513	575	3	371	374	1%	119	238	357	33%	

* Not including Special Education in self-contained classes

The Charlotte-Mecklenburg Schools

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity Base	1970-71 Capacity +12%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B	Additional Pupils to Transport (By State regulations)
First Ward	702	786	805	0	805	100%	770	7	777	99%	
Hickory Grove	459	514	70	533	603	12%	74	556	630	12%	20
Hidden Valley	648	726	0	1100	1100	0%	1	1077	1078	0%	
Highland	297	333	69	305	374	18%	76	237	313	24%	
Hoskins	297	333	13	212	225	6%	124	219	343	36%	
Huntersville	675	756	145	531	676	21%	130	554	684	19%	
Huntingtowne Farms	594	665	7	603	610	1%	3	614	617	0%	
Idlewild	567	635	47	581	628	7%	59	549	608	10%	
Irwin Ave.			292	0	292	100%	*				
Amay James	378	423	462	3	465	99%	90	169	259	35%	
Lakeview	378	423	346	89	435	80%	119	285	404	29%	47
Lansdowne	756	847	75	802	877	9%	79	719	798	10%	
Lincoln Heights	648	726	711	0	711	100%	903	6	909	99%	
Long Creek	702	786	267	468	735	36%	259	523	782	33%	
Matthews	945	1058	86	802	888	10%	81	837	918	9%	
Merry Oaks	486	544	0	442	442	0%	0	557	557	0%	
Midwood	459	514	9	437	446	2%	116	401	517	23%	
Montclaire	675	756	0	718	718	0%	1	781	782	0%	35
Myers Park	432	484	22	444	466	5%	150	314	464	32%	
Nations Ford	621	696	43	669	712	6%	177	548	725	24%	153
Newell	594	665	74	438	512	14%	64	436	500	13%	
Oakdale	540	605	69	517	586	12%	202	460	662	31%	
Oakhurst	594	665	5	616	621	1%	92	504	596	15%	105
Oaklawn	594	665	584	0	584	100%	597	3	600	99%	
Olde Providence	540	605	80	512	592	14%	83	461	544	15%	

*distributed to surrounding schools

The Charlotte-Mecklenburg Schools

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity		1969-70				Board Plan				Additions Pupils to Transport (By State regulations)
	Base	+12%	B	W	T	%B	B	W	T	%B	
Park Road	540	605	44	548	592	7%	41	571	612	7%	
Paw Creek	594	665	27	609	636	4%	83	602	685	12%	
Paw Creek Annex	270	302	30	271	301	10%					
Pineville	486	544	136	356	492	28%	123	379	502	25%	
Pinewood	648	726	0	674	674	0%	0	900	900	0%	
Plaza Road	459	514	80	340	420	19%	181	350	531	34%	
Rama Road	648	726	1	815	816	0%	3	744	747	0%	
Sedgefield	540	605	3	548	551	1%	223	364	587	38%	
Selwyn	486	544	31	617	648	5%	32	459	491	7%	
Shamrock Gardens	486	544	0	515	515	0%	84	496	580	15%	
Sharon	459	514	72	361	433	17%	91	421	512	18%	
Starmount	648	726	25	712	737	3%	67	833	900	7%	
Statesville Road	648	726	333	522	855	39%	160	553	713	23%	
Steele Creek	378	423	5	509	514	1%	195	475	670	29%	86
Thomasboro	729	816	0	690	690	0%	135	777	912	15%	353
Tryon Hills	486	544	309	164	473	65%	200	342	542	37%	
Tuckaseegee	540	605	58	578	636	9%	57	510	567	10%	30
University Park	648	726	825	1	826	100%	735	132	867	85%	
Villa Heights	810	907	902	83	985	92%	877	170	1047	83%	
Westerly Hills	405	454	46	539	585	8%	144	332	476	30%	156
Wilmore	378	423	222	210	432	51%	153	250	403	38%	
Windsor Park	648	726	1	748	749	0%	1	782	783	0%	
Winterfield	648	726	48	688	736	7%	52	653	705	7%	140
Total	40,391	45,239	13,010	31,278	44,288		12,885	31,523	44,408		2,345

The Charlotte-Mecklenburg Schools

DESEGREGATION PLAN for 1970-71

Junior High Schools

School	1970-71 Capacity Base	+20%	1969-70 B	W	T	%B	Board Plan B	W	T	%B	Additions Pupils to Transport (By State regulations)
Albemarle Road	948	1138	63	995	1058	5%	19	753	772	2%	
Alexander	874	1049	328	761	1089	30%	303	698	1001	30%	
Cochrane	1190	1428	72	1544	1616	5%	571	1150	1721	33%	534
Coulwood	704	845	101	770	871	12%	313	551	864	36%	220
Eastway	1093	1312	61	1356	1417	4%	375	971	1346	28%	
Alexander Graham	996	1194	101	1028	1129	8%	261	888	1149	23%	
Hawthorne	850	910	550	472	1022	54%	276	704	980	28%	
Kennedy	801	961	802	9	811	99%	325	510	835	39%	
McClintock	923	1100	84	1288	1372	6%	25	1048	1073	2%	
Northwest	1068	1282	1032	1	1033		296	675	971	30%	
Piedmont	631	757	408	55	463	89%	758	84	842	90%	
Quail Hollow	1238	1486	129	1421	1550	9%	138	1144	1282	11%	
Randolph	972	1170	279	710	989	28%	307	683	990	31%	59
Ranson	851	1021	246	548	794	31%	295	558	853	35%	
Sedgefield	777	930	167	809	976	17%	234	612	846	28%	
Smith	1093	1312	51	1436	1487	4%	330	957	1287	26%	400
Spaugh	826	1091	262	839	1101	24%	346	752	1098	32%	
Williams	801	967	1081	0	1081	100%	336	722	1058	32%	
Wilson	1044	1253	60	1145	1205	5%	346	795	1141	30%	164
Carmel	558	670					2	555	557	0%	
J. H. Gunn (Wilgrove)	558	670					49	470	519	9%	
Total	18,796	22,546	5,877	15,187	21,064		5,905	15,280	21,185		1,377

Research Report
January 31, 1970

The Charlotte-Mecklenburg Schools

DESEGREGATION PLAN for 1970-71

Senior High Schools

School	1970-71 Capacity		1969-70				Board Plan				Additions
	Base	+20%	B	W	T	%B	B	W	T	%B	Pupils to Transport (By State regulations)
East Mecklenburg	1700	2040	215	1925	2140	10%	360	1716	2076	17%	273
Garinger	1874	2249	492	2148	2640	18%	721	1914	2635	27%	78
Harding	1202	1442	612	720	1332	45%	395	692	1087	36%	
Independence	1047	1256	101	1111	1212	9%	23	1241	1264	2%	
Myers Park	1679	2015	224	1767	1991	12%	426	1883	2309	18%	
North Mecklenburg	1158	1390	446	1185	1631	28%	440	998	1438	31%	
Olympic	807	968	351	512	863	41%	201	687	888	23%	
South Mecklenburg	1523	1828	90	2024	2114	5%	482	1846	2328	21%	600
West Charlotte	1593	1912	1641	0	1641	100%	597	1045	1642	36%	53
West Mecklenburg	1374	1649	141	1444	1585	9%	494	998	1492	33%	198
Total	13,957	16,749	4,313	12,836	17,149		4,139	13,020	17,159		1,202

Transcript of February 2 and 5, 1970 Proceedings

(Excerpts)

[43] • • •

WILLIAM C. SELF, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Waggoner:

Q. State your name and official position, please, sir. A. William C. Self, Superintendent, Charlotte-Mecklenburg Schools.

Q. Dr. Self, with reference to the plan for desegregation submitted on behalf of the Charlotte-Mecklenburg Board of Education, would you briefly review the circumstances leading to the adoption of this plan? A. The Board of Education was ordered to come up with a plan for desegregation. They employed the services of Systems Analysis, Inc., instructed this firm to use the technique of restructuring attendance lines with the express purpose of achieving a racial balance in schools.

Q. Did Systems Associates, Inc., submit to you a report of their efforts? A. Yes, they did.

Q. Is that attached to and forms a part of the plan for desegregation that was submitted to the Court? [44] A. I believe it was.

Q. I direct your attention to the document attached to the plan for desegregation entitled A plan for Student Desegregation by Systems Associates, Inc., and ask you, if you will, to briefly review the contents of this document for the benefit of the Court.

Mr. Chambers: I object. I think that document would speak for itself.

Court: Well, if the answer is brief enough, I'll overrule the objection. I assume he's asking for a brief summary of what it does or says.

A. The document contains several sections. The first one is entitled Scope and in that section the author of the document sets forth the objectives of the study, the three functions of the computer program, the computational rules that were employed, the criteria for selecting the various grade combinations. Section 2 consists of a set of recommendations. The great majority of those has to do with how we might improve our present system of pupils census operation. The third section consists of a section entitled Statistics, and in this section the statistics have to do with what the study was able to accomplish in the way of desegregating the various schools. They are shown by elementary schools, junior high schools and senior high schools. The Fourth section is the largest part of the document. In this section are attached [45] the maps of all of the attendance areas of the schools. The fifth section and the last is simply an account by the firm as to the chronology of events that took place.

Q. Dr. Self, with reference to the scope of the computer assisted approach to restructuring grid lines, would you briefly describe what was involved in this approach? A. Well, using pupil census data and computer programming techniques, the firm attempted to achieve a racial balance under the guilding principles that they would try to get as nearly as possible a 70-30 white to black ratio in every school, that they would attempt to preserve the compact or contiguous neighborhood school attendance area and would attempt to find a student body that would neither overcrowd nor underpopulate the school building.

William C. Self—for Defendant—Direct

Q. Could you briefly describe the method of computation that was used? A. The rules which governed the computation are listed on Page 3 of the document. The first one states that a combination of grids which is considered acceptable must contain only grids contiguous to one another on at least one full side, contain only grids contiguous to one another and at least must be contiguous on one full side to the grids in which the school is located and not contain the home grid of another school of a type similar to the one for which the computations are being made. The second rule had to do with the [46] capacity. Any combination containing a number of students whose total was less than 80% or more than 100% of the school's rated capacity is not considered acceptable in the initial computation.

Court: Mr. Waggoner, I don't want to interrupt you if this is pertinent, but all this is on the record in the previous evidence in this case filed last October and November and December.

Mr. Waggoner: If the Court please, this plan does differ in some slight . . .

Court: Don't you remember that you put it in the record?

Mr. Waggoner: Yes, sir, I remember I put it in the record for our other plans, but this present plan does differ and the results do differ somewhat from what was previously submitted.

Mr. Chambers: I have further objection that this document that Dr. Self is discussing is already in evidence and we can read that. Our objection is to the whole proceeding. It's just a further delaying tactic on the part of the School Board.

Mr. Waggoner: If the Court please, this is not a delaying tactic.

Court: I'll overrule the objection so proceed, but try not to duplicate stuff already introduced. This has been [47] before the Court four months.

Mr. Waggoner: All right.

Q. Continue, Dr. Self. A. I think I had completed the answer to your question.

Mr. Waggoner: I'd like for these to be marked as Defendant's Exhibit #3.

Court: If you have any other exhibits, get them marked now so we can proceed with them, or are they already marked?

Mr. Waggoner: One moment, Your Honor.

Court: The rolled up maps are just like the folded maps?

Mr. Waggoner: The rolled up will spread out smoothly.

Q. Dr. Self, I hand to you Defendant's Exhibit #3 and ask you if you can identify it. A. This is the computer printout on Midwood Elementary School.

Q. What do the various columns represent on this printout? A. The first two columns represent the racial breakdown in the school. The next column is a column entitled Cell Difference which is really a term that has to do with the compactness of the grid. The next columns have to do with the number of pupils, total black and white. The next column has to do with the capacity and the last columns are headed Cells Used and in these columns are listed the various grid combinations that can be used to make up the attendance area of the school.

[48] Q. All right, sir. I direct your attention to the last

page of that document and ask if you can tell the Court the number of combinations that were printed out for that particular school. A. The words at the bottom of the printout are "Number of records read 320, number of records printed 320."

Q. I next hand you another exhibit entitled Defendant's Exhibit #4 and ask you if this relates to another school. A. This relates to the Bruns Avenue Elementary School.

Q. I direct your attention to the last page as to the number of records read and records printed. A. The number of records read 1065, number of records printed 1065.

Q. Dr. Self, does that represent the total number of combinations the computer tried for the various schools to reach a grid configuration? A. Yes, it does.

Mr. Stein: Your Honor, could we have a description of these exhibits so we could have a list to know what he's talking about. Perhaps he could call off the exhibits he has marked and give us descriptions.

Court: Well, have you got copies of what he's talking about?

Mr. Waggoner: No, sir, these are the only copies. They are on rolls, tremendous sheets.

[49] Court: This hearing was called at the request of the defendant on short notice and it wasn't scheduled until last night after we found out everybody could be here and we may get along faster if you all come up here and look over his shoulder, which is a bit unusual. Dr. Self, if you'd like to get down here to the Clerk's desk so that everything you're displaying can be seen by all counsel, just stand there or sit, as the case may be. It may help everybody.

Mr. Waggoner: If the Court please, I don't plan to go into specifics. I'm just submitting these as examples of the nature of the work of the computer.

Court: Let me ask a question. Did the computer decide what line to draw for Midwood School or did people have to do that after looking at the printouts?

A. No, sir. A human factor entered the picture at this point. From all of the various grid combinations that were listed one was chosen and that combination was drawn on the map which is part of the court record.

Court: So the maps you've got are people plans instead of computer plans.

A. Well, the person actually made a choice from among the grid combinations but it wasn't a random choice. There were some criteria which were used in that selection and the criteria are listed on Page 5 of the report. There is also an example [50] given of how that selection was made which uses the Lakeview Elementary School and that begins on Page 7 and lasts through Page 10.

Mr. Chambers: Your Honor, we'd just like to know right now what is Exhibit 1 and 2, the plan the Board filed?

Court: Exhibit 1 is the minority opinion or statement made by Mrs. Mauldin and Rev. Kerry. I'm not sure that these are identical, but anyhow, #1 is Mr. Kerry's dissenting opinion. #2 is the combination plan and brief of the School Board that was filed the other day. Do you have copies of those?

Mr. Chambers: We have copies of those. I guess #3 is one of these documents.

Mr. Waggoner: Yes.

Court: Midwood computer data.

Mr. Waggoner: Those two as samples of the nature of the work performed by the computer and our next develops how it was used.

Court: Mr. Waggoner, if this is for my information, this has been exhaustively developed already in your previous testimony and I see no reason to go ahead with it.

Mr. Waggoner: This information has not been before [51] the Court prior to this time.

Court: I am aware that there are various pieces of information that may not be but if your purpose is to show the function of the computer, I think it's already been shown. It produces possible plans and then the people who draw the plan take the computer information and use it as a starting point to draw a plan. Now and then I suppose it would produce something you could just print and use. Does this help in any decision I have to make?

Mr. Waggoner: It would show an Appellate Court the great extremes we went to in trying to seek all the alternatives to redistrict the zones in this system.

Court: How much longer are you going to spend on this computer?

Mr. Waggoner: Not very long, Your Honor. We propose moving to the maps quickly.

Court: All right. If you promise not to take long, I will instruct Mr. Chambers not to object but give him an objection to all the rest of the testimony.

Q. Dr. Self, will you describe to the Court the manner in which the [52] printouts of the computer information as

appears on Exhibits 3 and 4 was utilized in preparing the maps that we will introduce later? A. From the various alternative grid selections one was selected in accordance with the criteria on Page 5 of the firm's report and the one that was selected was drawn on the map. At that point you go to the next school, print it out, make your selection of it, put it on the map. You determine whether or not there is a conflict between the attendance line of the second school and the attendance line of the first school. If there is, you attempt to resolve it and move on to another school. In that way you build the attendance lines of all of your schools in the district.

Q. So you took this information and then physically and manually plotted on the map the grid zones or school zones that are on the maps, is this correct? A. The actual selection of the grid combination was done by the consulting firm. The lines were put on the map by the firm. Our staff was involved in terms of reviewing this work and offering suggestions for modification.

Q. Dr. Self, were you submitted any statistics with references to the restructured lines that were proposed by Systems Associates? A. Yes. The statistics are a part of the report.

Q. Did your school staff participate in drawing the school lines [53] which appear on the maps? A. The school lines, we looked at what the consultant had done. We offered suggestions for revision or modification. We actually involved the principals of the schools in this examination and permitted them an opportunity to offer suggestions.

Q. Could you give us several examples of suggestions that would be made with reference not to particular lines but just generally? A. One suggestion that came in rather frequently from principals was you have altered my line and you've put some children out of my school and taken in some others, yet both of these groups of children are of

the same race so what do you profit by altering the line. Of course, in this case it was a valid point and on the basis of that the line could be restored to its original purpose. There were some cases where principals made suggestions conforming to natural boundary-type reasoning which were rejected because to accept them would have upset the racial balance achieved under using the grid pattern.

Q. All right, sir. Did the transportation or access to the school form any factors in the development of these school lines? A. It did not, not up to this point. I would say that there is probably some additional work that needs to be done on these lines [54] and that accessibility, blocked off sections of the community, things like that would have to be considered. I do believe that the consultant says that this adaptation can probably be accomplished and not change the statistical data by more than 2%.

Mr. Chambers: May I ask for a clarification and have Dr. Self define which consultant he's talking about.

Court: He's talking about Mr. Weil.

A. The consultant employed by the Board of Education, yes, sir.

Q. Dr. Self, based on this technique of restructuring attendance lines, could you give us comparisons between the 1969-70 school populations and those for the projected 1970-71 school year? A. I think to show that comparison, Mr. Waggoner, you would use the summary of the results page which is Page #23 of the report. Without going through elementary, junior and senior high schools, if you

look at the total at the bottom of the page, you can see the comparison of the two years in terms of the number of students and also by the number of schools that would be involved. The figures are listed by the percent of black pupils that would be in the schools. For example, using the percent black, let's say 16 to 41, these are schools in which the student population ranges from 16 to 41%. The number of black pupils in 69-70 is 15,852. Using the restructured attendance line technique, that number is tripled, [55] overtripled to 49,748.

Q. Dr. Self, I direct your attention to Page 25 and ask if you can indicate the percentage of students that would be in schools having a black student population ranging between 16% and 41%. A. That data would be at the bottom of the page. The percent of black students in that particular category would be 61.4.

Q. Dr. Self, are there any schools in this system which do not have white students that will be assigned to them? A. Examining pages 26, 27—I believe that there are three. I think you would find this fact by looking down the column entitled Black Students and if there were a zero in that column this would indicate that was a school which fell in the category you were trying to identify.

Q. This is all white you're talking about? A. That's right, sir. The three schools are Devonshire, Merry Oaks and Pinewood, I believe.

Q. Are there any black schools at which there are no white students? A. To answer that question you would move over to the column entitled white students and see if you found any zeros, and there are none.

Q. So there are no all black schools in the full sense of the term, is this correct? [56] A. According to these statistics and that assignment pattern, yes, sir.

Court: Have you got a copy of the report of the School Board describing the population of various schools under the proposed Board plan?

Mr. Waggoner: Yes, sir, we do.

Court: I thought I had one here but I don't seem to find it.

Mr. Stein: Your Honor, could we make an inquiry at this point? Mr. Waggoner began his questioning by going through the history of the process of the development of the plan and we'd like to know whether what he's talking about now are statistics relating to the plan submitted to the Court or whether they are statistics relating to proposals by Weil at some intermediate stage.

Court: What are you reading from, Dr. Self?

A. From the report.

Court: You're reading from Mr. Weil's information.

A. That's true.

Court: Let's get away from that and get to what you submitted to the Court.

A. If I might offer . . .

Court: Is that identical with the information sheet that was filed as a part of the proposed plan of the [57] Board?

A. There is one exception, if I'm not mistaken. The Weil plan presumes to continue the Erwin Avenue Elementary

School. Under the plan which the Board of Education submitted this school was closed. If there is variance in terms of the data submitted under the Weil plan and that supportive data sheet which is part of the Board's report, it's because Mr. Weil was working with pupil census data from October 1 and this has been updated to January 21 in the Board's report.

Mr. Chambers: Sir, I'd like to make one further inquiry. I understand Dr. Self is talking about three all white schools and getting his percentages from Pages 26 and 27.

A. I was not using percentages, Mr. Chambers, I was using numbers of pupils.

Mr. Chambers: May I make one further inquiry? Which column were you reading from, the last columns on Pages 26 and 27?

A. No, sir, the last line is percent. My information came from the third column which is entitled black students.

Mr. Stein: Your Honor, at this point we would suggest at this point if we go through statistics relating to October and then statistics relating to January, the Board could keep us here for two or three weeks and we think we have passed the stage where we have that [58] kind of time.

Court: Well, I've given an indication at the outset as to the amount of time that I can devote to this, so, Mr. Waggoner, you be guided as to how you spend the time.

William C. Self—for Defendant—Direct

Mr. Waggoner: If the Court please, the purpose we have is to develop our evidence as fully as we can and we will try to do it in the shortest time possible. We feel we must present our case in our own manner and this is what we propose doing and I am moving as quickly as I can. Now, with reference to the question Mr. Chambers asked, there is no substantial difference between the Weil statistics, the summaries, and those that the Board has submitted. Is this correct, Dr. Self?

A. That's correct.

Court: Well, I have studied the information submitted by the Board and have not studied the Weil information to know in what way it varies. I had not intended to go back and study the Weil figures in detail.

Mr. Waggoner: If the Court please, I am merely pointing out some broad categories. I haven't gotten into specifics except in the predominant figure of 16 to 41%.

[59] Court: Let me ask a question. Are there any schools with a black population of between 41 and 84%? Are there black schools either under 41 or over 83%?

Mr. Waggoner: Yes, sir, 84% is the minimum percentage in the all black schools.

Court: So you've got schools which run up to 41% black and a majority of white and then you have no schools with a black population anywhere between 41 and 84.

Mr. Waggoner: That's correct.

Court: So any reference to a collection of schools from 42 to 100% really means 84 to 100%, doesn't it?

Mr. Waggoner: That is correct and it is so clearly set out in the Weil report.

Q. Dr. Self, will you name the all black schools that will remain in that range of 84% and 100%? A. The elementary schools are Bruns, Marie Davis, Double Oaks, Druid Hills, First Ward, Lincoln Heights, Oaklawn, University Park, Villa Heights.

Q. Erwin Avenue has been closed, is this correct? A. That's correct.

Q. I understand there are certain schools that were predominantly black or are now predominantly black that will not be predominantly black under the projected figures. I direct your attention to Page 29. [60] Would you name those schools? A. The schools that were predominantly black in 69-70 or at this particular time and would not be predominantly black next year under the Board's plan are Barringer, Billingsville, Elizabeth, Amay James, Lakeview, Tryon Hills.

Q. Each of the schools you just named will have less than 41% black, is that correct? A. That's correct.

Q. Now, with reference to the elementary schools with 99 to 100% white population, which ones have been removed from that category under your projected figure? A. Those schools are Chantilly, Enderly Park, Oakhurst, Sedgefield, Shamrock Gardens, Steel Creek and Thomasboro.

Q. Dr. Self, I direct your attention to Page 31 and ask you to tell me those junior high schools which it is projected will have less than 15% black student population. A. One of those would be Albemarle Road with 2% black;

McClintock with 2%; Carmel Road with 0% and J. H. Gunn with 9%.

Q. I direct your attention to Quail Hollow. A. I beg your pardon, Quail Hollow would have 11%.

Q. Dr. Self, with reference to the high schools would you tell us the percentage of black students that it's projected would be attending those schools? A. West would be 33%; Olympic 23; Harding 36; West Charlotte 36; [61] South Mecklenburg 21; Myers Park 18; Garringer 27; East 17; Independence 2; North Mecklenburg 31.

Mr. Waggoner: If the Court please, can we take a short recess to get the maps on the board?

Court: They won't go on the board. Why don't you lay them on the floor. That's what I do with them so I can see them. Let's take a recess until 11:00 o'clock so these maps can be straightened out. Be ready to go again at 11:00.

SHORT RECESS

Q. Dr. Self, will you come down to the maps which are on the board which represent the Board maps that were submitted in connection with this plan for desegregation and I ask you to identify the first map that you see there. A. The first map is a map of the attendance areas of the elementary schools.

Q. Dr. Self, with reference to the lines that appear on that map, can you describe those lines for us? A. There are two sets of lines. First there is a dotted blue line which represents the attendance area as it exists at the present time. There are solid lines superimposed over those which represent the line as drawn by Systems Associates study.

Q. All right, sir. I direct your attention to the outlying or so-called county elementary schools and ask you if there

has been any substantial differences in the configuration of those [62] attendance lines. A. No substantial change in those.

Q. Where has the substantial change taken place? A. For the most part I think in the schools under this particular belt which would be the northwest to west to southwest section. There are some rather drastic changes through here. In other words, I guess you would call it the suburban area of the city.

Q. In what would be normally regarded as the city limits but the outer perimeter of that, is that correct? A. That's right.

Q. Dr. Self, applying the technique used in drawing those lines could you illustrate how one district may have been formed? A. Well, I think perhaps the best way to do that would be to trace the dotted line to show how it exists now and then to point out the grid line as it would be recommended. This is Nations Ford. The old attendance line comes down Highway 49, follows the branch here, comes out through the countryside, heads north again, again to open countryside for the most part, picks up with . . . I was wrong on this, that's South Blvd. This is Highway 49 and York Road . . . and uses the new north-south expressway at this point and goes cross country to join the line again. The new Nations Ford Road you can see is straight lines like this, following the general configuration of the old line in this section but departing from [63] it rather radically here to reach up into and take a part of what was the Amay James attendance area so as to bring the black student population up in Nations Ford.

Q. That is a rather long elementary district, is it not? A. Yes, it is.

Q. All right, sir. I direct your attention to the Marie Davis attendance district. A. Right here.

Q. Do you know what the racial population of that school will be approximately? A. Marie Davis is one of the schools we listed as predominantly black.

Q. What efforts were made to desegregate that school? A. Well, the same stipulation governed the attempt to change the Marie Davis line as did here. The difficulty is that as you move out from Marie Davis you get into a heavy student population and you have very soon rounded up enough pupils to fill your building to capacity. The net effect of the move is to leave the school as predominantly black.

Q. Do the surrounding schools to the attendance lines of Marie Davis have a substantial degree of desegregation? A. Yes. The neighboring school to Marie Davis is Barringer. That is one of the schools that I indicated would be changed from an all or predominantly black school to an approximately 70-30 ratio this next year.

[64] Q. With reference to the Barringer School where does its new attendance line extend generally? A. Well, it actually moves up into what is presently the Ashley Park area, crosses Wilkinson Blvd. to pick up a complement of white children. It excludes a section of black children in this particular section. The effect is to move black youngsters out and incorporate a group of white youngsters to get the racial balance in Barringer.

Q. Does it remove some of the students who live in the Barringer Woods subdivision or Rollingwood section? A. I'm sorry, I'm not that familiar with the section.

Q. Now, as I understand, this map does leave a substantial or some black schools in it in the so-called inner-city which lies generally northwest of Tryon Street, is that correct? A. That's correct.

Q. What efforts were made to desegregate those schools?

A. We looked at other possibilities. We thought in terms at one time of pairing or clustering arrangement with Marie Davis but to have done that would have upset the surrounding schools. The schools that are up in this particular section could not be desegregated through restructuring attendance lines.

Q. I direct your attention to Billingsville. What efforts were made to desegregate that school? A. Billingsville is desegregated by using restructured attendance [65] lines.

Q. I next direct your attention to the next map which I understand is the junior high attendance map. As I understand this map, many of the outlying junior high schools were not affected substantially by the desegregation on this map, is that correct? A. Well, I think the same condition prevailed with the junior high schools in the outer region of the county. For example, very little was done in terms of the Alexander Junior High School attendance lines. It is already desegregated.

Q. All right, sir. With reference to Northwest Junior High, what efforts were made to desegregate this school? A. We draw the attendance line and through that technique and through projecting the attendance lines out in a westerly direction, Northwest can be desegregated.

Q. I ask you about Williams Junior High. A. The same technique was employed except this time the direction was in the easterly direction.

Q. With reference to Cochran. A. The Cochran area was actually reduced a bit and the area extended in to pick up black students to get the black student complement for Cochran.

Q. I next direct your attention to the map called the senior high map under the Board of Education plan and

again ask you about the outlying or so-called county schools. [6]6 A. Well, the attendance lines at the senior high school level were affected by our attempts to desegregate West Charlotte.

Q. Could you say this is the beginning point in trying to formulate a desegregation of the senior high school system? A. I think that would be a true statement.

Q. Would you describe the former West Charlotte attendance area? A. The former West Charlotte attendance area is very compact, one located around the school itself. The northern boundary is Interstate 85, the southern or southwestern boundary is West Trade, for the most part the boundary on the east is Graham Street.

Q. What did the resulting attendance lines, what area did it encompass that it didn't formerly encompass? A. The major change, of course, was to extend the West Charlotte area westerly for this block of students and into an easterly direction for this block of students.

Q. That line extends to the Cabarrus County line, does it not? A. It does.

Q. I direct your attention to Harding. What efforts were made to reduce the black population for that school? A. Efforts were made to extend the surrounding school districts by Harding School in such a way as to pick up black students and bring the black ratio up in the surrounding schools and reduce it at Harding.

Q. I direct your attention to South Mecklenburg. Would you [67] describe the former attendance area there? A. The former attendance area produces some desegregation in South Mecklenburg by penetrating up into a section of the inner city. The revised attendance area does the same thing except branches out in to pick up more black students.

Q. I next direct your attention to East Mecklenburg.

Describe the present attendance line. A. The East Mecklenburg attendance lines, of course, start at the county. There is a section which is pie-shaped which accommodates East Mecklenburg at the present time, one of the boundaries being Central Avenue, Lawyers Road and out U. S. 74, and the other boundary being Randolph and Providence and going to the county line.

Q. What efforts were made to desegregate that school? A. The same technique as we used on South Mecklenburg, extend the area up into the city to bring in more black students.

Q. You may return to the stand. (The witness does so.) Dr. Self, I understand the Board plan contemplates providing transportation as permitted by state law. Under these revised attendance lines would there by any additional students transported? A. The Board's provision is correct as you stated it. We do not intend to extend the transportation system beyond its present limits. However, in Board deliberations it has been acknowledged that a hardship probably would be placed on some [68] students and for these students we would need to come back and make some sort of provisions for transportation. Our handicap, of course, in this is we must secure the funds with which to act.

Q. Now, I believe in the press of time you have requested Mr. J. D. Morgan to familiarize himself with the transportation information, is this correct? A. This is correct.

Q. Dr. Self, are you familiar with the Finger plan for desegregation of the schools? A. Yes, I am.

Q. Could you use the maps we now have to briefly describe the difference between his plan and the plan that the Board has submitted? A. Yes, sir.

Q. With reference to the high schools, describe in what way differently he treats the assignment of students. A. Well, looking at the high school map and at the figures which are a part of the Weil document, the thing that concerned Dr. Finger was the 2% black enrollment at Independence. He instructed our staff to try to modify the lines in such a way as to correct this factor. The way to do that is to designate a section of the inner city as a satellite district for Independence and bus those children to Independence High School.

[69] Q. Do you know generally where the area is that would be used as a satellite district? A. It is in the inner city section and I believe it's shown in color on the maps which Dr. Finger submitted.

Q. With reference to the junior high plan, how does his differ from the Board's plan? A. His concern with the junior high plans was the high percentage of black at Piedmont and the correspondingly low percentage of white in the schools that I named earlier, Albemarle Road, McClintock, Quail Hollow, Carmel Road and J. H. Gunn, and he instructed our staff to attempt to redraw the lines in such a way as to rectify this condition. Again through the use of satellite districts we were able to do this. It enabled us to redraw an attendance area around Piedmont and also to set up some satellite districts for those predominantly white junior high schools that I named.

Q. Under this junior high plan would it be basically busing the blacks out of the Piedmont district or cross-busing? A. Cross-busing if you think in terms of a system because the elongated junior high school district for Northwest and Williams would certainly require that white pupils be bused into them. Also the same would be the case for

Kennedy Junior High School. The black youngsters would be bused out to the predominantly white schools.

Q. All right, sir. Now, with reference to the elementary how [70] does his plan differ basically from that of the Board? A. Again, starting with the plan and examining it, Dr. Finger notes, of course, there were some all black schools and some all or predominantly white schools remaining.

Q. Let me ask you this, did he basically utilize the Board's restructured lines in these three systems to formulate his plan? A. I think it would be fair to say that Dr. Finger had access to these maps. He also thought that, at least he seemed to think that restructuring attendance lines was a legitimate approach to achieving desegregation.

Mr. Chambers: Objection.

Court: Why don't you confine yourself to your own opinions, Dr. Self, and observations instead of seeking to testify for him. That's the basis of the objection.

A. All right, sir.

Q. Now, with reference to the elementary plan, how does his plan differ from that of the Board of Education? A. It uses pairing for the schools that are all black and those that are all or predominantly white.

Q. Now, could you come down again to the elementary map and briefly describe the white schools he would propose pairing and the black schools he would propose pairing. (The witness does so.)

[71] Court: Have you got a list of those schools?

A. Yes, sir. They are a part of Dr. Finger's plan.

Court: That's what I was going to hand you if you wanted it. Go ahead.

A. The black schools that we mentioned earlier as being Bruns Avenue, Marie Davis, Double Oaks, Druid Hills, First Ward, Lincoln Heights, Oaklawn, Tryon Hills, University Park and Villa Heights, and they are found in this particular section. The white schools or predominantly white are Huntingtown Farms, Sharon, Starmount, Park Road, Pinewood, Briarwood, Devonshire, Hidden Valley, Beverely Woods, Lansdowne, Old Providence, Albemarle Road, Idlewild, Merry Oaks, Allenbrook, Paw Creek, Paw Creek annex as a part of Paw Creek, Tuckaseegee, Hickory Grove, Montclaire, Rama Road, Selwyn, Windsor Park and Winterfield.

Q. All right, sir. Would you basically describe how he would effect his pairing? A. The pairing plan assumes that the white schools that were named would become schools in which grades 1 through 4 are housed. The 5th and 6th grade youngsters would be taken out of those schools. The black schools would become schools in which grades 5 and 6 are housed. The 5th and 6th grade youngsters from the white neighborhood would be bused into the 5th and 6th grade schools in the inner city and at the same time the 1st through 4th grade black youngsters would be [72] bused into the white schools I named.

Q. Generally what is the size of a pairing group that he would propose here? A. It ranges in terms of the capacity of the schools but by and large it would be pairing a black school with either two or three whites. (The witness returns to the witness stand.)

Q. Dr. Self, with reference to the pairing plan proposed

by Dr. Finger, how does his plan propose getting the students to the schools? A. I believe that Dr. Finger recommends that children beyond a mile and a half distance from the school be transported.

Q. Do you know how many total students this would involve? A. You can come to a very rough approximation. Again, I think this figure could be polished, if you care to, in Mr. Morgan's testimony. The black inner city schools number approximately 7000 youngsters. If you assume you want a 70% white ratio in there, you must also assume that you're going to move 70% of the youngsters who are there. That would be approximately 5000 youngsters. If there are 5000 youngsters who are moved out of these schools, then 5000 white are moved in to replace them. This gives you a rough approximation of 10,000 youngsters involved in the paired schools.

Q. Is there additional busing that his plan contemplates? A. In the satellite districts of the junior and senior high schools, yes.

[73] Q. Dr. Self, do you as an educator have any preference with reference to Dr. Finger's plan or to the plan submitted to the Board?

Mr. Chambers: Objection.

Court: Well, answer the question if you can from the standpoint of the educational desirability of the two plans as to the three different levels of schools educationally and administratively, I suppose. You're asking both of those rather than personal opinion.

Mr. Waggoner: Yes, sir.

Court: Go ahead.

A. As far as the secondary schools are concerned—

Court: What do you mean secondary?

A. Junior and senior high schools. I think I could support the idea of using the elongated districts and, if necessary, the busing arrangement to achieve the racial balance in the secondary schools. I think that there is a basis for Dr. Finger's work in that area. In the elementary schools your question forces me to make a value judgment against the relative worth of the neighborhood school as against the benefits of the desegregated classroom. I think I have testified in this hearing before that I do think that there are values of a desegregated classroom. You're in a quandry as to whether or not the steps that would be necessary to achieve Dr. Finger's plan would be so traumatic that what you were [74] hoping would happen in a desegregated classroom would be beyond the realm of possibility. In other words, if people would be so upset this would never occur.

Court: You're talking now about whether people like it or not, aren't you?

A. I'm talking about whether the system can adapt to that drastic a change, whether teachers can be—

Court: Let's confine ourselves not to whether we like what the law requires but to the educational questions involved.

Mr. Waggoner: Can we get his testimony in the record?

Court: I don't think it's pertinent and I told you Monday that we're not holding a popularity hearing on this question, and I'm not going to do it today.

Mr. Waggoner: If the Court please, what he is stating is that the opinion of children and parents can so affect the educational system that the bene-

fits to be derived from desegregation can be submerged because of lack of popular support or acceptance.

Court: The Court is not going to entertain evidence on whether these things are popular or not. There is ample evidence of the unpopularity of the constitution in Mecklenburg County and I don't need expert opinion on that subject.

Mr. Waggoner: We would like to tender his answer.

[75] Court: I think his answer is adequately on the record.

Mr. Waggoner: May we tender his answer?

Court: Oh, yes, you may supply it later.

Mr. Waggoner: May he finish his answer that he was on, Your Honor?

Court: No, sir. I overruled the objection. You may supply the answer later for the record.

Mr. Waggoner: At the conclusion of his testimony?

Court: Any time you like.

Mr. Waggoner: May we do it now?

Court: I have instructed you not to call for any more evidence on the question of whether the people of Mecklenburg County like or don't like what the law requires. Now, if he wants to supply the answer to the Reporter privately, all right. I'm instructing you, Mr. Waggoner, not to proceed any further with comment on what people like or don't like about the law of the land.

Mr. Waggoner: If the Court please, we are not proceeding on what the people like or don't like about the law of the land. What we are proceeding on is in the area of education, the benefits. I think this is

something to be taken into account. If an educator says that the acceptance—

[76] Court: You may supply the answer after this witness has testified, Mr. Waggoner, but I don't want to hear any more on this subject.

Q. Dr. Self, the Court has expressed interest in the amount of time that would be required to implement a plan for desegregation this spring, have you given any thought and study to this? A. Yes, we have, Mr. Waggoner. The staff has attempted to devise what we call a planning network which would list the various events and activities that must unfold if the Charlotte-Mecklenburg schools are desegregated.

Q. Do you have a chart prepared indicating the steps that must be accomplished in the order? A. I do.

Mr. Waggoner: If the Court please, we would like for the witness to be permitted to use this rather long chart to illustrate the testimony. It's not large enough for everyone to see and perhaps if the witness could move close to the Court, he could describe what he's talking about.

Court: Go ahead. I think I can follow all right.

Mr. Chambers: May we see a copy of what we're talking about now?

Court: Do you have only one copy of this?

Mr. Waggoner: We have only one copy. v

[77] Mr. Chambers: We'd like to note another objection for the record. Mr. Waggoner, we submit, persists in trying to make this a popularity showing. We think that if he has pertinent evidence about the time schedule needed to desegregate that that

might be of some interest to the Court. But we submit that that, too, has been foreclosed in the decisions of the Fourth Circuit and the decisions of the Supreme Court. The courts explicitly held what the obligations of the School Board were and that doesn't include . . .

Court: Mr. Waggoner, you may go ahead and offer the exhibit if you think it's pertinent but I will be far more interested in getting a timetable sometime next week on implementation of the Court order than I am in evidence on the implementation of the Board plan or anything else as a theoretical matter at this point. Let me see the outline, do you have it? (Paper writing is handed to the Court.) You may certainly offer it and I'll accept it, but I think it will be time better spent if it's with some dates before us so the staff will know what job they're trying to do when.

Mr. Waggoner: That's the reason I wish to use the witness, Your Honor, to supply the dates.

Court: How much discretion do you think the Court has [78] on this in light of what the Chief Judge of this Circuit said about Greenville?

Mr. Waggoner: The Court has the discretion that it will not order an impossible or vain act. This dates through all the cases in the history of the law that I know, that the Court does not order a vain or useless act. They have ordered the Greenville and Darlington school districts to desegregate now. They said come up with a plan and whether or not the plan will produce actual and total mixing on the deadline is speculative at this point.

Court: Well, Mr. Waggoner, don't you understand that I'm going to allow just as much time as I believe the law will permit me to allow?

Mr. Waggoner: I feel certain that . . .

Court: And I cannot be controlled by whether it's somewhat disturbing or not. If you think the evidence will help, go ahead, but I'm already on your side from that standpoint and I think you know it. The problem is how far I can go in good conscience to extend the deadline which the Chief Judge of the Circuit has already put into effect in his hometown on three weeks notice.

Mr. Waggoner: Mr. Chambers has already indicated that he thinks March 1st is the latest this should be [79] accomplished.

Court: Let's don't conduct a hearing that that's controlling upon the Court nor that this evidence that you have here can be controlling.

Mr. Waggoner: Well, with Mr. Chambers commuting to Richmond these days on . . .

Court: Let's leave personalities out of the case.

Mr. Chambers: I object to that. Regardless of whether I go to Richmond or Washington I don't think it's pertinent to this case.

Court: Did I miss something funny? I was talking.

Mr. Waggoner: Well, the point I was making, Your Honor, Julius jokingly, Mr. Chambers jokingly asked me if I was prepared to be in Richmond tomorrow to meet with the Court of Appeals. So I feel if he is insistent upon his deadline there may be some application and it is our desire to protect our

record, so that we do have something on which you base your order.

Court: Let me get a little information from Dr. Self that I missed while you were asking about these plans. Dr. Self, looking at the Board's proposal with regard to senior high schools, as I understand it Dr. Finger has not presented any proposed change with regard to the Board's plan except that he proposed [80] that there be a transfer of some three or four hundred students from the central part of town out to Independence which is almost entirely white under the lines drawn by the Board.

A. This is true. This move causes a slight ripple effect in terms of adjusting other lines to capacity, but that's the major difference.

Court: Now, with regard to junior high schools, am I correct—leaving aside the problems of transportation right now, which may cut through the whole thing—with regard to the junior high schools am I correct that there again Dr. Finger's plan starts with the basic school attendance zones that the Board had prepared and that the main difference between those two plans is that the Board plan leaves Piedmont High School still substantially black, 90% or so, and that he has drawn a plan which does not leave any all black or nearly black schools?

A. That's correct.

Court: And is it correct that the Board plan could be, if it were decided there ought to be a change in

the Board plan, the choice would be between rezoning or transporting children back and forth, to and from Piedmont or closing Piedmont and reassigning those students to some of the outlying white junior high [81] schools.

A. That would be the alternative. The plan really revolves around Piedmont. If you say that the Board plan permits preponderance of black in Piedmont, do something about it, and if you do something about Piedmont you affect all the other schools as well. If you are considering closing Piedmont, I would have to say it's not a very good alternative because we're talking about the use and Dr. Finger projects the use of two junior high schools that are not now in existence. That's J. H. Gunn, in which the Clear Creek elementary youngsters are being housed while the new building is being built, and Carmel Road, which is under construction and will open next fall, which is another way of saying that we're tight capacitywise at the junior high school level and it would make it more difficult to close Piedmont.

Court: If the Court felt that under the decisions of the higher court in this area, if the Court felt that Piedmont could not be maintained as a nearly black school and if you assume the decision is made that that cannot be maintained, would you in that event feel that Dr. Finger's plan for the junior highs would be preferable to closing Piedmont?

A. I believe so, yes, sir.

Court: I'm not asking you to make the decision whether Piedmont can or cannot be maintained, but

[82] simply assuming it would have to be changed in its school population. That was the assumption of the question.

A. Yes, sir.

Court: Now, with reference to the elementary schools, is it correct to say that the Board's plan goes as far as you can go under the restrictions that all the school zones must be contiguous and that you not contemplate any substantial plans for transportation?

A. It is correct to say that.

Court: And is it correct to say that the Board's plan was drafted upon the premise that there was no duty to eliminate all of the black schools or at least that the plan might reasonably present that question for appellate review? I'm not trying to ask you another legal question, let me rephrase it. The plan for elementary schools is frankly drawn upon the assumption that there is no duty to eliminate all of the all black or nearly all black schools.

A. I believe the Board started out on a more positive assumption than that, Your Honor. I think they wanted to determine whether restructuring attendance lines could have a significant impact in terms of reaching better racial balance.

Court: And they found it could have a significant impact and it has had as reflected in the plan of the [83] Board.

A. That's correct.

Court: So with regard to all three levels of school population the plan proposed to the Court by the Board represents a very drastic improvement in the situation from the standpoint of progress towards racially indistinguishable schools.

A. That's correct, they do.

Court: Just how was the plan that is represented in the map and the figures of Dr. Finger, how was that plan arrived at with regard to the elementary? Did he start with substantially those attendance zones which when drawn by Mr. Weil and the Board's staff did result in the desegregation of a great many of the schools? Are those incorporated in what is referred to as the Finger plan?

A. They are, yes, sir.

Court: And the fundamental difference in those two plans starts after the Finger plan includes essentially those rezoned areas which have resulted in the desegregation of a great many schools.

A. That's right.

Court: And then the problem of what to do about the other schools has been dealt with by pairing or grouping black inner-city schools with outlying white [84] schools and providing for transportation.

A. That's correct.

Court: If children are assigned from a city school to a rural or a perimeter area school do they receive transportation under the present arrangement?

A. They do and the converse to that is true. If a child who resides in the county is moved to a city school, he is provided with transportation.

Court: I suppose the transportation estimates are still rather rough at this stage and there is no way to tell exactly what the net result of any one of these plans would be as far as ultimate increase in transportation costs.

A. I believe, Your Honor, that the transportation estimates are as accurate as we can possibly make them at this time.

Court: As near as you can tell it involves some 10,000 children elementary with some margin for error?

A. The 10,000 figure that I used in earlier testimony had to do with the paired elementary schools. I think there would be some additional transportation for the satellite zones in the junior high and for the senior high.

Court: Well, now, I have some recollection from previous testimony that the county pays somewhere around eighteen or $20.00 a year per pupil and the state cost for transportation is about eighteen or $20.00 a year [85] per pupil as a long range proposition for bus transportation.

A. I think the figure used in the earlier testimony was

around $19.00. I believe the figure this year is slightly higher than that.

Court: But if you add up all the costs, wherever the money comes from, it runs somewhere between thirty-seven or -eight and $40.00 a year per pupil for transportation.

A. I believe I'd have to let Mr. Morgan give specific data on that, sir.

Mr. Waggoner: May I continue, Your Honor?
Court: Yes. Thank you, Mr. Waggoner.

Q. Dr. Self, with reference to the required steps and the time required to perform the various functions to implement the Board plan, do you have an opinion satisfactory to yourself as to the steps needed? A. Mr. Waggoner, the planning network for the secondary schools is predicated upon the statement that you made in testimony in court on Monday, which anticipates an actual merging of student bodies three weeks prior to the close of school. The elementary plan assumes that we will attempt to move, if implementation is ordered, as quickly as possible and here we are concerned with whether or not we are dealing with an elementary school around which a new attendance line has been [86] drawn or with an elementary school which is associated with the pairing technique. If we're talking about the attendance line restructuring, then we have more or less an administrative logistic problem which must be handled and I think we can move fairly readily. But if we're talking about the paired schools, then transportation enters the picture and our efforts to determine how we could

respond to this transportation need has not been too encouraging.

Q. Can you give us some of the specific tasks that must be performed aside from transportation? A. I might say that the planning network was devised for use by our office. It was not intended as a part of the testimony. We were trying to prepare ourselves for the task. While it looks fairly complicated, there are two basic elements to the planning network. The rectangular shape on the planning network is simply a listing of the events which must take place. The Circle diagrams which run all over the page are the activities that must be performed by school personnel before that event can ever take place. The first event on the map is approval of the maps by the Board. That would mean approval of the maps as they are presented here with the final polishing being done, adaptation to the natural geographic lines. Of course, I don't think the Court is interested in all the administrative staff has to do to get it ready for the Board to approve.

[87] Q. How long do you anticipate that would take? A. We think that could be done by February 17.

Court: What is this you say could be done by then?

A. The approval of the maps by the Board, the refinement of them and placed before the Board for approval.

Q. These refinements, you say, would not vary substantially from the ratios of these lines now established, is that correct? A. We would have to see that it did not vary substantially from the racial balance. That was the object of restructuring the line to begin with. I'm talking now about the elementary schools which would be desegregated through use of restructured attendance lines.

Mr. Chambers: Your Honor, I assume we don't have to continue to note our objection. We would like to note objections to this testimony.

Court: All right. The objection is overruled.

A. The next three events occur simultaneously and we set aside March 6 for this task. The three tasks are preparation of the community, assignment of pupils and assignment of teachers. The next four events occur simultaneously and we have set those down for April 1. They are transfer of pupil records, preparation of the building, students reporting to school and have the revised transportation schedules in operation.

Q. Now, as I understand the chart that you have has a lot of [88] sub-tasks that must be performed to reach these events that you speak of, is this correct? A. They do. I think that we might emphasize that regardless of the date that is set, all of these tasks will have to be performed one way or another.

Q. Are the events and sub-tasks that must be performed accurate as they appear on that chart to the best of your knowledge? A. I must emphasize that they are judgment items. We have had to look at the task that was ahead and make some judgment as to how quickly we could perform them, how quickly all of the jobs could be done.

Mr. Waggoner: If the Court please, we would like at this time to offer the elementary chart as an exhibit.

Court: Let me ask a question about the last couple of minutes of testimony. Are you talking now about the elementary system or all three systems?

A. In our staff work, Your Honor, we have, just to keep things straight, divided the elementary schools from the secondary schools and one group of people worked on the schedule for implementation of any order that would effect the secondary schools. Another group worked on the elementary school task and in working with the elementary schools, we divided them, sub-divided them into two categories, those elementary schools affected by simply altering the attendance lines and those elementary schools that would be involved in pairing.

[89] Court: These working schedules that you're talking about, do they relate to which group of schools do they relate to? All three types of schools?

A. They do, yes, sir.

Court: You're handling these problems separately with a separate administrator and staff for senior high and junior high and elementary but you're working towards the same timetable for all of them?

A. No, sir. We are following a varying time schedule. The time schedule that I went through a moment ago had to do with the elementary schools desegregated by attendance lines. It's necessary to separate them in your thinking because. . . .

Court: That's what I'm trying to do.

Q. Dr. Self, with reference to the secondary schools, is there more difficulty in making the change of school for the students than there is in the elementary level? A. Yes, there is. I think it's related to the nature of the secondary school program and courses of study.

Q. Could you elaborate? A. May I do so simply through reciting the events that need to unfold?

Q. Yes, if you will.

Court: Let me go back to the elementaries for a minutes, Dr. Self. Assuming you had all the necessary transportation available, is it fair to say that the [90] easiest job as an administrative matter is the job that involves the grouping or clustering schools where the pupils are not being reassigned geographically but simply being taken as a school grade from one part of town to another?

A. From an administrative point of view, yes.

Court: And the hangup there is whether or not transportation can be had.

A. Can be had and can be supported financially.

Court: Now, the matter of redrawing the attendance zones and transferring children from one school to another where no serious transportation problem is involved is more difficult administratively but still something you think can be done, can be completed in a couple of months, perhaps by April 1.

A. Yes, it can. I think that it may be completed because of the skill or knowhow that we have acquired in the use of the computer.

Court: All right. Well, I think I've got my bearings now on what you've just told us.

William C. Self—for Defendant—Direct

Q. If you will, with reference to secondary schools describe the events. A. The first event. . . .

Q. Is this with reference to junior high schools? A. Junior and senior. The first major event is the same one as [91] for the elementary school, the adoption of the official maps by the Board of Education. We think that we can work our way through to the point where these can be presented to and approved by the Board by February 25th. At the same time that this work is going on with the maps, we would need to develop our staffing plan, our pupil assignment process and the curriculum that was to be offered in the schools in question. Simultaneously with that we would be attempting to develop or modify our transportation system. The next big event in terms of our pupils—and I think these are the common thread that go through all of this—is the assignment of pupils for the 70-71 term and we say that this can be done by March 25th and that pupils and parents can be notified about that immediately thereafter. The next major event is the assignment of teachers which can be done by May 1st. The teacher assignment to secondary schools is dependent a great deal upon the courses which the pupils have registered for because that tells you whether you need Social Studies teachers or math teachers and the like.

Court: Is your thinking in terms of starting the 1970-71 school year immediately after the shift over as far as the junior high and senior high are concerned?

A. Yes, it is.

Court: What are you thinking about the pupils who [92] are seniors in high school?

A. We would propose to advance the graduation date for the seniors in high school and, in effect, make room in the senior high schools so that we could move the rising 9th graders up to become a part of the new senior high school the last three weeks of the school term. At the same time this would give us room in the junior high schools to actually promote and involve the 6th grade students as a part of the junior high. So what we would really be doing would be organizing for the next school term.

Court: All right, go ahead.

A. There are four events actually which we are envisioning as occurring on May 26th and this would include event #1, teachers report to new assignments, event #2, students report to the new school assignments, event #3, the master schedule and the student schedule will have been completed, event #4, the bus transportation system would be operative.

Q. Dr. Self, the chart you have just read from contains the events and the sub-tasks that must be performed to reach those, is that correct? A. The events only. The subtasks, of course, I have not read.

Q. Are they sub-tasks required to reach the events according to the best of your knowledge or information? A. Yes, sir. There are quite a few of them.

Mr. Waggoner: If the Court please, we would like to [93] introduce these as Exhibits 5 and 6 to illustrate the testimony of the witness.

Mr. Chambers: Objection.

Mr. Horack: Excuse me, they are 13 and 14.

Mr. Chambers: Your Honor, again we are missing some exhibits. You've got 13 and 14 now?

Mr. Horack: Yes. These were marked earlier at the Judge's request.

Mr. Waggoner: If the Court please, Exhibit 13 is the planning network for desegregation of elementary schools and Exhibit 14 is the planning network for desegregation of secondary schools.

Mr. Chambers: Your Honor, we'd like to point out for the record that we have not seen either one of those exhibits.

Court: We are still operating under a somewhat unusual set of circumstances here.

Q. Dr. Self, have you given consideration to the planning network required for pairing these schools? A. Yes, we have.

Q. Would you describe the network for the events that you must reach to accomplish that desegregation? A. To save the time of the Court, Mr. Waggoner, the planning network is essentially the same as that for the elementary schools affected by restructuring attendance lines. The [94] handicapping feature is the transportation so while you can draw the planning network, it's difficult to put dates on it until such time as you clear the question of transportation entirely.

Q. Dr. Self, with reference to transportation you testified that the pairing alone would require the transportation of something in the neighborhood of 10,000 children. Dr. Finger's plan proposes transporting all students irrespective of where they live if they reside a mile and a half from their school. Do you know approximately how many stu-

dents would have to be transported additionally under Dr. Finger's plan?

Mr. Chambers: Objection.

A. Mr. Waggoner, I believe Mr. Morgan can answer the questions regarding transportation with more clarity.

Q. All right. Does your budget have funds for acquisition of a substantial number of buses? A. No, sir.

Mr. Waggoner: We have no further questions at this time.

Court: I don't mean to try to make a tough job seem easy but I do want to be sure I have a simple little accurate picture of what you have said to me. As I understand it, you think it would be administratively possible or practicable to complete the reassignment of the elementary students who are being relocated by [95] rezoning by the 1st of April or thereabouts.

A. Yes, sir.

Court: And the reassignment of the students who are to be relocated by pairing or clustering, if that is directed, will be dependent in any given case on what transportation can be arranged.

A. That's true, sir.

Court: Is it correct to say that the pairing and clustering of schools is a method which can be set up for any particular group or cluster of schools as a small amount of transportation does become avail-

able without waiting for the same thing to take place with respect to all the other pairs or clusters?

A. It's correct to assume that. I think we said earlier that the pairing arrangement usually identified one black school and two or three whites. If you had a limited amount of transportation available, you could move with those schools and move then with other clusters of schools as additional transportation became available.

Court: And your present recommendation would be to the Board that the transition for the junior and senior highs not actually take place until towards the end of May?

A. That would be my recommendation, yes, sir.

Court: You use the date May 26, what is the present [96] scheduled time for the completion of the conventional school year?

A. June 9.

Court: So this would give what, a full week?

A. It would give two, if I'm not mistaken.

Court: Well, you've got five more days in May. That's two weeks by the calendar, but is the graduation not usually removed by a few days from the end of the actual school year?

A. Yes, sir, usually the commencement exercise precedes the end of the school year.

Court: Have you got a calendar there?

A. No, sir. I looked for one and I do not have one.

Court: I was wondering when Easter is. Isn't it quite early in April this year?

Marshal Beam: 29th of March.

A. I have a calendar here now.

Court: April 1 is the Wednesday after Easter.

A. That's correct.

Court: At the present time by the number, just about half of the elementary students, black elementary students who are going to schools that are very nearly or all black or entirely black, are they not? Have you ever run a total on that?

A. I'm sure that we have although I find it very hard to keep all [97] the figures in my mind, Your Honor.

Court: How many students, Dr. Self, not in exact amounts but approximately, of the elementary students will be involved in the defective desegregation that will result from restructuring the elementary attendance lines?

Mr. Waggoner: If the Court please, I might direct his attention to Page 23 of the Weil report.

A. Let's see if we can piece this together. From Page 23 we can get an approximation of the number of students in the elementary schools as being approximately 45,000. The

children who would be involved in the pairing arrangement in the schools that I listed earlier would total 22,000.

Court: You mean they would be involved in it as persons attending those schools, not necessarily persons being transported.

A. That's right, they would be. In other words, all of the paired schools the total pupil population would be approximately 22,000. That would mean that in school A, which was a 1 through 4 school that the white pupils there would be in the school and counted in the 22,000. The black children would be bused in. Vice versa on the 5 through 6 schools. If you take 22,000 from the 45,000 you get a very rough approximation that 23,000 of our youngsters are in the zoned schools and about 22,000 are in the paired schools.

[98] Court: Do counsel for the plaintiffs have any questions of Dr. Self?

Mr. Chambers: Just one or two, Your Honor.

Cross Examination by Mr. Chambers:

Q. Dr. Self, were you present at the Board meeting where you decided to employ Systems Analysis to prepare this plan for you? A. Yes, sir.

Q. Do you recall what instructions, if any, you gave Systems Analysis to follow in the preparation of these plans? A. Yes, sir, and the instructions are part of the report.

Q. Did you instruct Systems Analysis not to consider pairing or clustering of any schools? A. We did.

Q. Did you agree to a contract price per hour or per day for the work by Systems Analysis? A. Yes, we did.

Q. What price was that?

Mr. Waggoner: Objection.
Court: Overruled.

A. The price varied according to the individuals who would be employed.

Q. Would you tell us the price per day or per hour for the work by Systems Analysis?

[99] Mr. Waggoner: If the Court please, this is totally irrelevant to the considerations before the Court. I think it's some attempt on the part of the plaintiffs to try to embarrass the Board in some way.

Court: Well, I believe lawyers and consultants all ought to be paid whether hired by the Board or appointed by the Court. I saw in his report, though, I believe that he had 200 days of work on it. I guess that's a good deal more than Jack Finger has been able to put on it in the last few weeks, isn't it? I don't think that's relevant.

Q. How much did you pay Systems Analysis, Dr. Self?

Mr. Waggoner: Objection.
Mr. Chambers: I'd like to get that in the record, Your Honor.
Court: Overruled. How much have you paid them up to now?

A. I don't really recall the exact figure, Your Honor. I can make an approximation.

Court: Give us your approximation.

Mr. Waggoner: Objection.
Court: Well, go on.

A. I'd say approximately ten to $11,000.00.

Court: So far. Do you think you got your money's worth?

[100] A. Yes, sir.

Court: Did having Dr. Finger here help in some ways to move along towards the solution of a very knotty bunch of problems?

A. Yes, sir.

Q. Now, on the high school map where you were talking about Piedmont, as I recall, just taking West Charlotte, for instance, your line proposed extends out to the county line, is that correct? A. That's correct.

Q. Now, I believe under the present state law you would be providing bus transportation for basically all of the students in the county coming into West Charlotte. A. That's true.

Q. It would just be the students now in this small area here who would not be receiving bus transportation? A. That's right.

Q. I believe that for East, as another example, your line goes up into the inner city but because East is in the county these students, too, would be receiving bus transportation. A. That's correct.

Q. The same thing would be true of South, I believe you talked about, too. A. That's right.

Q. In fact, you contemplate quite a bit of bus transporta-

tion [101] under your plan. A. Within the attendance area, yes, sir.

Q. The same would be true of the junior high schools. A. That's right.

Q. I think you told the Court a moment ago a kid residing in the city, assigned to a school in the county would receive bus transportation. A. Yes.

Q. Or assigned to a school annexed to the city subsequent to 1957. A. Until that date in April where all of this is supposed to reach a climax in the court.

Court: That's a different court.

Mr. Chambers: I understand, Your Honor.

Q. And vice versa for the kids in the county coming into inner-city schools. A. Transported?

Q. Yes. A. Yes.

Q. So under both plans, in order to desegregate the schools, you would require some bus transportation for the students. A. Yes.

Q. Now, Dr. Self, in preparation of your plan how did you intend to provide bus transportation for these students who under the state law would be entitled to bus transportation, if you [102] had to implement it this year? A. Well, the larger number of pupils we have under consideration here are at the secondary level and you notice in our planning network what we were intending to do was to assign the pupils, register them, build a master schedule and postpone the actual movement of the student into the school until that date of May 26. This has the effect of postponing the need for the buses until that time.

Q. Did you plan to get the buses by that time? A. We are investigating every possible means of acquiring buses.

William C. Self—for Defendant—Cross

Q. Was it your intent to inform the Court you were going to have bus transportation by that time?

Mr. Waggoner: Objection, if the Court please. Our plan has stated it proposed implementation in 1970, September.

Court: He's simply asking what the testimony was. My notation as to the testimony that gives rise to the question is that on the 26th of May the transportation system would be operating as far as the junior and senior high schools are concerned. That's what you said, I believe, wasn't it?

A. That's true. We set the date. It's our intent to either if we have the buses we will use them; if we don't, we'll try to implement some other technique such as staggering the opening of school, pressing activity buses into service, or something [103] of that nature, or perhaps use contract transportation.

Q. You did intend to have bus transportation by that time, did you not? A. Yes.

Q. Where were you planning to get the money for that? A. We would have to approach the County Commissioners and petition them for the money to purchase any additional buses needed and then, of course, we would overature the State to pick up the operational costs.

Q. In fact, you had intended to go back to the County Commissioners to get additional funds for buses. A. This amount of busing, yes, sir.

Q. Now, how many buses did you contemplate you would need under your plan? A. I don't have that detail. I think we'll have to have that testimony supplied by Mr. Morgan.

William C. Self—for Defendant—Cross

Q. Do you have any idea of how much money you would need to provide buses under your plan? A. No.

Q. Have you, in fact, or the Board consulted with the County Commissioners about the availability of additional funds? A. I have not.

Q. To your knowledge has this been done by the Board? A. If it has, it has not been done in formal board session.

Q. To your knowledge has it been done? [104] A. I think there have been conversations between Board members and members of the County Commissioner.

Q. Isn't it a fact, Dr. Self, that the Board has advised you that they might make funds available for bus transportation? A. No, sir, they have not.

Q. The County Commissioners have not?

Court: Mr. Chambers, I think this further pursuit of the transportation question is also irrelevant because as I read what the courts are saying, the fact it may cost some money is not a legal reason to do or not to do anything about it.

Mr. Chambers: All right, I'll pursue another subject.

Q. Dr. Self, how do you buy buses in the State for this system? A. I buy the buses through the State Department of Public Instruction.

Q. Does the State Department of Public Instruction maintain distribution centers around the State? A. I do not know.

Mr. Waggoner: If the Court please, we might shorten this. We have a man who is with the State Department here today to testify and he can give precise answers.

William C. Self—for Defendant—Cross

Court: Well, I always learn when I keep my mouth shut but I really think that within the limits of what we're talking about here are the things I have to do that won't be helped by knowing a lot of detail about [105] transportation, I really do.

Mr. Chambers: I'll withdraw the question, Your Honor, and go to another area.

Court: Dr. Self, am I correct in my recollection that the budget of the school system for this year is fifty million dollars?

A. Closer to forty-five million, I think, Your Honor.

Court: Does that include money supplied by the State?

A. Yes, it does.

Court: As well as local.

A. A combination of all sources, State, Federal and local.

Q. Looking at your time schedule that you introduced. Exhibits 13 and 14, why would it take until February 17 and February 25 to get Board approval of a map? A. The major reason can be found in the activities which precede that event. The work must be parceled out among a large number of people. The principals must be involved in this. It virtually will be necessary in some cases to ride the districts and actually make a visual survey where the computer did draw the lines and to take into account any hardships as far as transportations are concerned, and things like that. The time is not for Board approval. The time would be in the preparation of the maps where we would feel confident in recommending the maps to the Board for approval.

William C. Self—for Defendant—Cross

Q. Are you suggesting that those maps are not the maps for the [106] Board? A. They are the maps of the Board but in approving that—and I believe that's contained in the study as well—it is admitted that they will have to be examined very carefully with a view toward eliminating any discrepancies that have not yet been found.

Q. If the Court were to order implementation of the Finger plan, would you have to redraw those lines? A. Yes, sir.

Q. You don't think they are accurate? A. They are accurate, the lines are accurate. Our major problem is to adapt the grid line to an identifiable natural geographic marker. It may be necessary to even go so far as to say this lines goes between these two houses.

Q. Why would it be necessary to wait until March 25th before actual assignment of pupils? A. Because of the various activities that must be accomplished prior to that event.

Q. Why did you figure on starting a new year for the secondary students rather than transferring them now? A. For the most part because their curriculum in the new school would stand a pretty good chance of being altered from the course of study that they had in the old school. We figured it would be better to move the seniors on out to get over the problem of whether or not they would graduate from the school [107] they had attended, to make room in the senior school to accommodate the rising 10th grade class and start them off on a new year.

Q. If the Court were to order you to integrate the schools by March 1st, would you be able to accomplish it? A. If the Court would order us to integrate by March 1st, all the activities and events that you see outlined before you

would have to be accomplished in one way, shape or form before it could be done.

Q. In your opinion could it be done? A. No.

Court Reporter's Note: At this point in the proceedings there was applause from some of the spectators.)

Court: Any more demonstration and the courtroom will be cleared.

Q. Could it be done by April 1st? A. I think that we get back to comment that the judge offered in opening this case on Monday. He wanted the minimum amount of time but at the same time the amount of disruption to be considered. If you disregard the amount of disruption that would be caused to secondary pupils with April 1st transfers, I suspect it could be done administratively.

Court: Mr. Chambers, I think you've got a can-do man here and that's why I wanted his serious recommendations on the very practical problems that have got to be [108] dealt with. Let me ask another question about the technique of drawing some of these pupil attendance lines. How about turning to the junior high map. If you examine the Board's map for the rezoning of the junior high attendance lines, you find some of them with corridors a half-mile wide and five miles long, reaching from a suburban area into an inner-city pocket. From the standpoint of administration and ease and economy of transportation which is easier, to have a pocket of people in the center of town who are close together and easy to identify and have them transported by the most convenient route to some suburban school, or

in the opposite direction, as the case may be? Is that not more convenient than having a half-mile wide corridor which may have to attend the school several miles away?

A. Yes, sir. I think that the net effect in terms of your transportation system is that you probably would have one or two pickup points in that satellite zone and then express the bus to the school. Whereas in the corridor you would probably have a number of on route pickup points.

Court: Is that transportation problem compounded by the fact that the streets in Charlotte are laid off sort of slantwise or catercornered and these corridors run diagonally across the major thoroughfares?

[109] A. Well, I'm not sure whether that's the case in point. I think certainly our transportation problems, operating within the city limits, are going to be quite different from the transportation problems in the rural areas.

Court: Mr. Hicks, what's the name of that junior high on the lower left center which has a finger extending?

Mr. Hicks: Smith.

Court: Taking Smith Junior High as an illustration, doesn't the corridor extending north into the center of town from Smith Junior High extend as far as the satellite zone that Dr. Finger has set up for Smith Junior High?

A. Basically it does, yes, sir?

Court: That's true of Sedgefield and a number of others, is it not?

A. Yes, sir.

Court: It has to be true to get substantially the same result, doesn't it?

A. That's right.

Court: Is this part of the problem that needs to be worked out whichever one of these plans is used?

A. Yes, sir. Quite frankly, we do not have a perfect answer to the question of natural geographic lines versus grid lines. Grid lines give us the ability to manipulate data by the [110] computer and it has the disadvantage of not being visible to people so they can say I am in this school zone or that school zone. The natural geographic boundary has the advantage of being clearly identifiable by the citizenry but at the same time does not lend itself to mass manipulation of pupil data.

Court: I think I have run out of questions. Do you have any more, Mr. Waggoner?

Redirect Examination by Mr. Waggoner:

Q. With reference to Smith Junior High, is it not true that the junior high attendance districts are substantially larger than the elementary districts? A. Yes, they are.

Q. So, there's not quite a parallel between the Smith Junior High and the elementary cross-busing, is there, because you're dealing with different age students? A. Of course, you're dealing with different age students and if

you're speaking about a single school, you do not have the cross-busing. If you're talking about the school system, bringing into account the present all black junior highs, you're talking about two-way busing in that whites would be bused into Northwest, Williams, Kennedy.

Mr. Waggoner: I have no further questions.

Mr. Chambers: We have no further questions.

[111] Court: Thank you, Dr. Self.

Mr. Horack: If Your Honor please, we'd like to call Mr. J. D. Morgan.

Court: I'm going to run out of time in about a half-hour, Mr. Horack. Are you going to run out of witnesses by then?

Mr. Horack: I'd seriously doubt it.

If Your Honor please, in compliance with your suggestion earlier we had various exhibits which we went ahead and had marked. Mr. Chambers, you want these now?

Mr. Chambers: Are those all of them?

Mr. Horack: It's Exhibits 5 through 12 with the exception of 8 and 9 which I do not have copies. 5 through 12 are all offered in evidence.

* * * * *

[137] *Direct Examination by Mr. Horack:*

Q. State your name, please. A. My name is D. J. Dark.

Q. What is your position? A. My position is Director of the Division of Transportation, State Board of Education.

Q. And your office is in Raleigh? A. Yes, it is.

Q. I hand you Defendant's Exhibit #8 and ask you what it is and whether you are familiar with its contents.

Court: What is it?

Mr. Horack: It's a letter from the State Superintendent Craig Philips to Dr. Self.

Court: Let Mr. Dark testify about what he knows. I'll read the letter and see if it's competent. Did he write the letter?

A. No, I assisted in the preparation of it.

Q. Mr. Dark, although that letter is over the signature of Dr. Craig Philips have you indicated you did write it? A. Well, I did not write it. I had a part in its preparation.

Q. Do you agree with the analysis of Dr. Craig Philips as set forth herein as it relates to the availability of buses and financing for them?

Mr. Chambers: Objection.

[138] A. Yes, I do with one clarification. The availability of buses . . .

Court: The question is, Mr. Dark, do you know the facts in the letter, whatever they are?

A. Yes, I do.

Court: Use the letter to refresh your memory and go ahead and testify.

Q. The letter says there are 75 at a maximum, at the very outside, 75 buses can be made available. If you agree with that statement, please do so, if you do, and explain why. A. I agree. That is the largest number that we felt like that could be made available to Mecklenburg County until a new contract was let and a new order for buses placed.

Q. When is the earliest time that a new contract can be let? A. We hope that one can be let by March 27.

Q. After a new contract is let and an order is placed for buses, from your experience stemming from the past how long does it take to obtain a bus from a manufacturer after it's once ordered? A. Approximately six to seven months. This means that if conditions are favorable. If conditions are unfavorable it will take longer.

Q. Is there currently any unusual strain on the bus manufacturers as far as the amount of orders they are receiving? A. The usual rush period is from approximately March through September. At this time most manufacturers have as many [139] orders as they can fill during that period. The reason for this rush period, school administrators are purchasing buses. So to have them delivered prior to the opening of school, many orders have already been placed.

Q. The testimony has indicated that under the board's plan 104 buses will be required. How long would it take to fulfill the need for those 104 buses? A. I would say they could be delivered by October or November, in the fall.

Q. Under Dr. Finger's plan 297 buses are required . . .

Mr. Chambers: Objection.

Q. . . . purely on the basis that State law busing is provided and confined to that, how long would that take?

Mr. Chambers: Objection, Your Honor.
Court: Overruled.

A. That number could be delivered in about the same length of time.

D. J. Dark—for Defendant—Direct

Q. And you state that 75 buses is the maximum number that can now be made available to this system? A. That are in possession of the State Board of Education.

Mr. Horack: This is a letter, Your Honor, it's Defendant's Exhibit #9, a letter from the Supervisor of Purchases to the Charlotte-Mecklenburg Board of Education, of which you do not have a copy, Mr. Chambers.

[140] Q. Please read that letter and tell me whether you agree with the statement set forth therein. A. This letter is addressed to the Charlotte-Mecklenburg Board of Education, Post Office Box 149, Charlotte, North Carolina, Attention: Mr. J. R. Cameron. Gentlemen:

Mr. Chambers: I object to the reading of this letter. There is no foundation that Mr. Dark had any connection in the preparation of it.

Court: The letter is from whom?

A. This letter, Your Honor, is from Mr. A. W. Allers. He's Purchasing Agent, an Assistant Purchasing Agent for purchasing contracts.

Court: Objection is sustained.

Mr. Horack: That's all, Your Honor.

Mr. Chambers: Your Honor, I know the Court wants to leave but we would certainly have some examination of Mr. Dark. My understanding of the testimony presently is that it's concerned with purchasing new buses and we would like to examine him

relative not only to the new buses and present availability, but . . .

Court: Go ahead and examine him. I said a while ago I was going to take his testimony.

Cross Examination by Mr. Chambers:

Q. Mr. Dark, is there a distribution center for buses in the [141] State of North Carolina? A. Usually there are one or two distribution centers, depending on the number of manufacturers who are awarded contracts.

Q. Does the State Board of Education itself maintain a distribution center? A. No.

Q. Is there a center in Winston-Salem, North Carolina? A. This center is maintained by Wayne-Devco Corporation from Richmond, Indiana.

Q. Does the State have anything to do with it? A. Yes, it's on the State, well, it's on the Winston-Salem-Forsyth County school bus garage.

Q. And isn't it under your supervision as Director of Transportation for the State of North Carolina? A. After the buses are delivered to us, it becomes under our supervision, yes.

Q. Aren't there some buses there right now? A. Yes, there are some there.

Q. Tell the Court how many buses are there right now. A. There are approximately eighty buses there.

Q. Where is the other center for distribution in the State? A. At the present time?

Q. Yes, sir. A. Perley A. Thomas Car Works.

Q. Where is that? [142] A. High Point, North Carolina.

Q. Is that directly under your supervision also? A. That's under the Perley A. Thomas Car Works' supervision. However, they build buses for the State of North

Carolina and turned over to the State Board of Education.

Q. Don't you have some there right now, Mr. Dark? A. Yes, we do.

Q. Tell the Court how many you have there. A. I'm not sure how many is at High Point. I can tell you the total number that we have in North Carolina.

Q. What's the total number? A. At the present time on hand we have 412 buses.

Q. The other center I believe is in Wilson, isn't it? A. No center in Wilson. At the present time we have a few buses parked in Nashville, North Carolina.

Q. That's the eastern district distribution center. A. It is at the present time, but it could be in Salisbury, it could be in Wilson. At the present time that isn't a distribution center except at the present time we're storing a few buses there.

Q. What you do is just store these buses around at these areas we just talked about? A. We have for this year, yes.

Q. And you can sell those buses to any school board in the State? A. We could but we're not in a position to.

[143] Q. You can sell them to any school district in the state, can't you? A. Let me explain my answer.

Q. Would you say yes or no and then explain it? A. I don't think it's a yes or no question.

Court: The question is are you free to sell the buses to any local board that can pay for them.

A. Your Honor, we have obligations to a hundred counties in North Carolina.

Court: I think he's trying to find out if you can sell these buses to anybody you take a notion to sell them to.

D. J. Dark—for Defendant—Cross

A. No, sir, they can only be sold to the Boards of Education.

Court: Any Board of Education you choose to sell to, that's the question.

A. That is correct. However, may I substantiate that?

Court: Yes, sir.

A. When we said 75 buses to Charlotte-Mecklenburg, we promised or committed to them 12% of the buses we have on order and they are operating 3% of the buses in North Carolina. It seems that we extended our help there as much as possible. Let me go along further. At the present time there are approximately 10,000 buses in North Carolina in dire need of replacements. These buses that I've told you about have been purchased for replacements. It means that if 75 are sold to [144] Mecklenburg County, the children will have to suffer for lack of replacement buses that ride these other 1087 buse.

Court: How many buses do you buy and sell to county boards a year?

A. We had anticipated approximately 100 for this year.

Court: To all of them?

A. Yes, sir. We have anticipated about that number for next year.

This is an extraordinary situation.

Q. Mr. Dark, what would prevent you from replacing these buses you're talking about replacing in October

when you get the new order? A. We plan to place an order after July 1st. We've spent the money that's available for bus purposes up to July 1st.

Q. You do plan to purchase some more for this coming school year and you say they would be available in October or November, didn't you? A. That is correct.

Q. You've got 400 and some buses and you say some of them you intend to use to replace existing buses. A. That's correct.

Q. What would prevent you from using those buses you have now for Charlotte-Mecklenburg and replacing these other buses in October or November? A. We also have obligations to other counties all over the State who need capital outlay buses just like Mecklenburg County, [145] desegregated schools, and what have you.

Q. Do you have an order for those buses? A. No, but we will have.

Q. You don't have presently? A. Not at the present time.

Q. What do you do with buses that you replace? A. They are priced for sale eventually and sold.

Q. Don't you keep some on hand? A. Yes, we do.

Q. How many of those do you have on hand? A. We have 375.

Q. On hand now? A. On hand.

Q. I believe the State statute permits the Board to purchase a bus to operate or contracting service with some other service, is that correct? A. That is correct.

Q. In other words, Charlotte-Mecklenburg school system could contract with the City Bus Lines to operate buses in the city, could it not? A. It could if it had sufficient funds.

Q. Well, the State would pay the funds, as I understand

it, as long as they satisfied the State requirements. A. The State will pay per capita cost of that amount on the basis of what the cost is to Mecklenburg County to operate [146] their buses.

Q. You're familiar with General Statute 115-189? A. Is that the statute that has to do with contract transportation?

Q. That's right. A. Will you read that all the way through?

Q. Are you also familiar with 115-190, that's also dealing with contract transportation. A. I'm not familiar with all the numbers.

Mr. Waggoner: If he'd show the book to the witness, he could identify them. I can't recall these statutes either.

Mr. Chambers: I don't mind showing him the book.

Q. You're looking at 115-190? A. That's correct. That's the one I was talking about.

Q. It does provide for the State paying for transportation of students whose transportation is contracted? A. On what basis? Read the whole statute.

Q. You read it. A. I just told you that.

Mr. Horack: Your Honor, I don't think the witness ought to be asked to interpret the general statutes.

Court: What was the question?

Mr. Chambers: I was asking the witness only, Your Honor, what practice the State had followed with [147] respect to contracting bus services.

Court: Objection overruled. What practice does the State follow in contracting bus services?

A. At the present time the State does not contract any transportation and so far as I know very little, if any, is contracted other than Special Education with transit bus companies. A contract as you mentioned in the law there, with the transit bus company or any other company, would be done by local boards of education rather than the State Board of Education and the statute specifies that the local unit could use any State money that it would generally use for the operation of its buses, regular buses. It also specifies that local boards can supplement the amount necessary if they prefer contracts to pay these contracts.

Q. Mr. Dark, the only thing I'm asking is under the present practice of the State wouldn't the local board be able to contract to provide transportation with the City Bus Company where the children would qualify for bus transportation under the State law? A. Under the law, they would.

Q. And their transportation expenses would be paid for by the State of North Carolina. A. Not necessarily in total.

Q. Well, whatever the State would allow for transportation, is that correct? [148] A. Whatever they would cost on a per pupil basis on the regular transportation.

Q. So your agreement with this letter of February 3rd would have to be taken subject to what you have just testified to? Do you recall this letter of February 3, 1970? A. What's your question?

Q. I think you said you agreed that only 75 buses would be available. A. That is correct.

Q. But you also said you had 400 and some buses new

and 400 and some used buses? A. I can qualify that by saying we have obligations to one hundred counties.

Court: Answer the question and then qualify it.

A. Yes.

Court: You've got about 400 new buses and 375 old buses?

A. Yes.

Court: Are those the figures you said?

A. Yes. Could I qualify those? Insofar as the used buses, if they had been in such shape . . . . first let say these buses that have been replaced and the ones that I have mentioned that need to be replaced are thirteen and fourteen years old. They have been in service that long. Had they been in such shape that we would have wanted to continue them in operation, we [149] wouldn't have replaced them in the first place, we wouldn't have authorized them being replaced. And your second question is what?

Q. I just wanted to follow that up a little bit. As I recall, the State practice was to take these buses back and doctor them up and then resell them to other groups? A. They are priced for sale but they are sold as is where they are.

Q. And several groups buy them and use them? A. And recondition them, that's correct.

Mr. Chambers: I have nothing further at this time.

Court: Anything else?

D. J. Dark—for Defendant—Redirect

Redirect Examination by Mr. Horack:

Q. Mr. Dark, are these buses that have been retired and obsolete, why are they obsolete? Don't they include junked buses and you say typically they are about twelve to fourteen years old? A. Yes, they are at least that.

Q. Are these buses suitable for bringing into a system such as Charlotte-Mecklenburg and put into a bus transportation system like ours? A. In my opinion they would not be.

Q. Would we have an assurance that those buses when they're being driven from wherever they are now to Charlotte that they'd make it? [150] A. I wouldn't guarantee it.

Motion for Hearing on Plans for Desegregation of Charlotte-Mecklenburg Public Schools

(Filed February 6, 1970)

The Defendants, the Charlotte-Mecklenburg Board of Education and the individual Board members, respectfully move the Court that:

1. Before issuing any Order in response to the Plaintiffs' "Motion for Immediate Desegregation of the Public Schools in Charlotte and Mecklenburg County" (dated January 19, 1970) a hearing be held at a time to be fixed by the Court regarding the "Plan for Desegregation of Schools" filed by the Charlotte-Mecklenburg Board of Education on February 2, 1970, and the Plan filed or to be filed by Dr. John A. Finger, Jr. in response to the December 1, 1969 Order of the Court.

2. At said hearing the Defendants be heard and permitted to introduce evidence relating to the "Board Plan" and the "Finger Plan" and the implementation of these Plans.

3. Dr. John A. Finger, Jr. be present at said hearing and available for examination by the Defendants regarding each of the above-mentioned Plans.

4. In the alternative, if said hearing is not held as requested in this Motion, the Defendants be permitted to tender pertinent evidence regarding the two Plans and related matters.

In support of this Motion the Defendants show the Court that the hearing and evidence referred to herein is necessary for a full explanation and evaluation of each of the two Plans and with reference to the implementation re-

quested in the above-mentioned Motion heretofore filed by the Plaintiffs.

WHEREFORE, the Defendants respectfully pray the Court that it grant the request of the Defendants as set forth in the foregoing Motion.

This 4 day of February, 1970.

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Order dated February 5, 1970

On December 2, 1969, this court appointed Dr. John A. Finger, Jr., of Providence, Rhode Isand, to study the Charlotte-Mecklenburg school system and advise the court how the schools could be desegregated. The defendant school board, by order of December 1, 1969, had been extended a fourth opportunity to submit a plan if they wished. Dr. Finger went to work; the school staff worked with him; and they have produced some extremely useful information and reports, which will be referred to in this order as the Board plan and the Finger plan.

Hearings on the plans were conducted on February 2 and February 5, 1970.

The Board plan, prepared by the school staff, relies almost entirely on geographic attendance zones, and is tailored to the Board's limiting specifications. It leaves many schools segregated. The Finger plan incorporates most of those parts of the Board plan which achieve desegregation in particular districts by re-zoning; however, the Finger plan goes further and produces desegregation of all the schools in the system.

Taken together, the plans provide adequate supplements to a final desegregation order.

The court would like again to express appreciation to Dr. Finger for the intelligence, resourcefulness and tact with which he has pursued his difficult assignment, and to Dr. William Self, Superintendent of the schools, and to his able staff, for the excellent work done by them in their difficult role of helping prepare one plan to comply with what the court believes the law requires, and simultaneously preparing another plan to suit the majority of the School Board who, at last reckoning, still did not appear to accept the court's order as representing the law of the land.

The court is also grateful to the Board's outside consultant, Mr. Weil, of Systems Associates, Inc., whose two hundred days of work and whose computer studies formed the building blocks, or points of departure, for much of the work of the others.

Recent appellate court decisions have hammered home the message that sixteen years of "deliberate speed" are long enough to desegregate tax supported schools. On October 29, 1969, in *Alexander* v. *Holmes County*, 369 U.S. 19, the Supreme Court ordered numerous Deep South school districts to be completely desegregated by January 1, 1970; schools in Atlanta, Miami and parts of Chicago have been ordered totally desegregated; the Supreme Court in January ordered February 1, 1970, desegregation of 300,000 pupils in six Gulf Coast states; the Fourth Circuit Court of Appeals in *Nesbit* v. *Statesville*, —— F.2d. —— (December 2, 1969), ordered elimination by January 1, 1970, of the racial characteristics of the last black schools in Durham, Reidsville and Statesville, North Carolina; and in *Whittenberg* v. *Greenville, South Carolina*, the Fourth Circuit Court of Appeals, in an opinion by Chief Judge Clement F. Haynsworth, Jr., has just last month ordered the desegregation by February 16, 1970, of the 58,000 students in Judge Haynsworth's own home town. Judge Robert Martin of Greenville, pursuant to that mandate, on February 2, 1970, ordered all the Greenville schools to be populated by February 16, 1970, on a basis of 80% white and 20% black.

In the *Greenville* opinion the court said:

> "These decisions leave us with no discretion to consider delays in pupil integration until September 1970. Whatever the state of progress in a particular school

district and whatever the disruption which will be occasioned by the immediate reassignment of teachers and pupils in mid-year, there remains no judicial discretion to postpone immediate implementation of the constitutional principles as announced in *Green* v. *County School Board of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (Oct. 29, 1969); *Carter* v. *West Feliciana Parish School Bd.*, —— U.S. —— (Jan. 14, 1970)."

These decisions are binding on the United States District Court for the Western District of North Carolina. Unless that were true, the Constitution would mean whatever might be the temporary notion of whichever one of 340-odd federal judges happened to hear the case. This is a matter of law, not anarchy; of constitutional right, not popular sentiment.

The order which follows is not based upon any requirement of "racial balance." The School Board, after four opportunities and nearly ten months of time, have failed to submit a lawful plan (one which desegregates all the schools). This default on their part leaves the court in the position of being forced to prepare or choose a lawful plan. The fairest way the court knows to deal with this situation was stated clearly in the December 1, 1969 order, as follows:

> "In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to

understand that variations from that norm may be unavoidable."

THEREFORE, and in accordance with the specific, detailed, numbered guidelines of this court's order of December 1, 1969, IT IS ORDERED:

1. That the defendants discontinue the operation of segregated schools.

2. That the defendants take such action as is necessary to desegregate all the schools—students and faculty.

3. That desegregation of faculty be accomplished, as previously ordered, by assigning faculty (specialized faculty positions excepted) so that the ratio of black and white faculty members of each school shall be approximately the same as the ratio of black and white faculty members throughout the system.

4. That teachers be assigned so that the competence and experience of teachers in formerly or recently black schools will not be inferior to those in the formerly or recently white schools in the system.

5. That no school be operated with an all-black or predominantly black student body.

6. That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students.

7. That transportation be offered on a uniform nonracial basis to all children whose attendance in any school

necessary to bring about the reduction of segregation, nd who live farther from the school to which they are signed than the Board determines to be walking distance. stimates of the number of children who may have to be ansported have run as high as 10,000 or more. Since the st to the local system is about $18 or $20 a year per upil, and the cost to the state in those areas where the tate provides transportation funds is about another $18 r $20 a year per pupil, the average cost for transportation apparently less than $40 per pupil per year. The local chool budget is about $45,000,000 a year. It would appear hat transporting 10,000 additional children, if that is ecessary, and if the defendants had to pay it all, would dd less than one per cent to the local cost of operating the chools. The significant point, however, is that the cost is ot a valid legal reason for continued denial of constitu- ional rights.

8. That if geographic zones are used in making school ssignments, the parts of a zone need not be contiguous.

9. That the defendants maintain a continuing control ver the race of children in each school, just as was done or many decades before *Brown* v. *Board of Education*, nd maintain the racial make-up of each school (including ny new and any re-opened schools) to prevent any school rom becoming racially identifiable.

10. That "freedom of choice" or "freedom of transfer" nay not be allowed by the Board if the effect of any given ransfer or group of transfers is to increase the degree of egregation in the school from which the transfer is re- uested or in the school to which the transfer is desired.

11. That the Board retain its statutory power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Administrative transfers shall not be made if the result of such transfers is to restore or increase the degree of segregation in either the transferor or the transferee school.

12. That if transfers are sought on grounds of "hardship," race will not be a valid basis upon which to demonstrate "hardship."

13. That the Board adopt and implement a continuing program, computerized or otherwise, of assigning pupils and teachers during the school year as well as at the start of each year for the conscious purpose of maintaining each school and each faculty in a condition of desegregation.

14. That the defendants report to the court weekly between now and May 15, 1970, reporting progress made in compliance with this order; and that they report thereafter on July 15, August 15, September 15 and November 1, 1970, and on February 1 and May 1, 1971.

15. That the internal operation of each school, and the assignment and management of school employees, of course be conducted on a non-racial, non-discriminatory basis.

16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger,

Jr., are *illustrations of means or partial means to that end.*[1] The defendants are encouraged to use their full "know-how" and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*

17. The choice or approval or partial approval of any proposed desegregation plan is subject to all the requirements and restrictions of the preceding sixteen paragraphs, as well as to any later requirements or restrictions set out in this order.

18. Subject to the above, the Board's pupil assignment plan for senior high school pupils is approved, with one

1. The following are exhibits to this order:
   A. The Board's map of proposed senior high school attendance zones.
   B. The Board's list of proposed senior high school populations.
   C. The Board's map of proposed junior high school attendance zones.
   D. The Board's list of proposed junior high school populations.
   E. Dr. Finger's map of proposed junior high school attendance zones.
   F. Dr. Finger's list of proposed junior high school populations.
   G. The Board's map of proposed elementary school attendance zones.
   H. The Board's list of proposed elementary school populations.
   I. Dr. Finger's map of proposed elementary school attendance zones.
   J. Dr. Finger's list of proposed elementary school populations.
   K. Dr. Finger's list of pairing and grouping of elementary schools and grades.

exception. This exception is that black students, some 300 in number, should be assigned from map grids 294D, 295C, 295D, and 318A, to attend Independence High School.

19. Although the Board junior high school plan is inferior in design and results to Dr. Finger's plan, it is a purely "home grown" product and the court would like to approve it, if it can be brought into compliance with law by desegregating Piedmont Junior High School, and by adding transportation as above indicated, and by increasing the black attendance at several outlying schools. The Board may if it wishes consider (1) re-zoning; (2) two-way transporting of pupils between outlying schools and Piedmont; (3) closing Piedmont and assigning the pupils to Albemarle Road, Carmel, McClintock and Quail Hollow. Unless the court has been notified in writing by noon of February 6, 1970, of an affirmative decision adopting one of these choices by formal Board action, the junior high schools are directed to be desegregated according to Dr. Finger's plan, as illustrated by exhibits E and F.

20. The Board's plan for elementary schools, illustrated by exhibits G and H, cannot be approved because (1) it retains nine schools 83% to 100% black, serving over half the black elementary pupils, and (2) it leaves approximately half the 31,500 white elementary students attending schools that are 86% to 100% white; and (3) it promises to provide little or no transportation in aid of desegregation, even though the plan's zones in some cases are apparently five or six miles long. The Board plan for elementaries openly rejects the duty to eliminate all the black schools.

The Finger plan uses many of the same basic attendance lines as the Board plan; however, it does not stop short of

ERRATA

Order dated February 5, 1970

the constitutional requirements, and by pairing and clustering groups of schools it achieves full desegregation of the elementary schools. The school staff worked out the details of this plan and are familiar with it. Its attendance zones are illustrated on the map, exhibit I; its elementary school populations are listed in exhibit J; and the pairing and grouping of the outlying and inner-city schools, grade by grade, are shown in detail on exhibit K. Subject to the qualifications previously stated, the Board is directed to follow the Finger plan with reference to elementary schools.

21. THE TIME TABLE: Deadlines to complete various phases of the program required in this order are as follows:

SENIOR HIGH SCHOOLS.—Seniors may remain in their present schools until the end of the school year; the Board may make any decision they deem wise about allowing seniors to transfer before graduation to schools where their race will be in the minority. *Eleventh and tenth graders* will be transferred to their new schools not later than the 4th day of May, 1970.

JUNIOR HIGH SCHOOLS (Grades 7, 8, 9).—Complete desegregation shall be accomplished not later than the 1st day of April, 1970.

ELEMENTARY SCHOOLS (Grades 1-6).—Complete desegregation shall be accomplished not later than the 1st day of April, 1970.

FACULTY.—Complete desegregation of the various faculties shall be accomplished by the various times set out above for desegregation of the student bodies.

22. MODIFICATIONS.—The intention of this order is to put on the Board the full duty to bring the schools into compliance with the Constitution as above outlined, but to leave maximum discretion in the Board to choose methods that will accomplish the required result. However, it is directed that leave of court be obtained before making any material departure from any specific requirement set out herein. The court will undertake to rule promptly on any such requests for deviation from prescribed methods.

23. APPEAL.—The court claims no infallibility and does not seek to prevent appeal from all or any part of this order, and will allow the making of any record needed to present on appeal any contention the parties desire to make, and will do what this court can to expedite such appeal. However, in accordance with *Whittenberg* v. *Greenville, supra,* this order will not be stayed pending appeal, and immediate steps to begin compliance are directed.

24. All evidence in the cause and all findings and conclusions in previous orders which support or tend to support this order are relied upon in support of this order.

25. Jurisdiction of this cause is retained for further orders.

This the 5th day of February, 1970.

.....

James B. McMillan
United States District Judge

the constitutional requirements, and by pairing and clustering groups of schools it achieves full desegregation of the elementary schools. The school staff worked out the details of this plan and are familiar with it. Its attendance zones are illustrated on the map, exhibit I; its elementary school populations are listed in exhibit J; and the pairing and grouping of the outlying and inner-city schools, grade by grade, are shown in detail on exhibit K. Subject to the qualifications previously stated, the Board is directed to follow the Finger plan with reference to elementary schools.

21. THE TIME TABLE: Deadlines to complete various phases of the program required in this order are as follows:

SENIOR HIGH SCHOOLS.—Seniors may remain in their present schools until the end of the school year; the Board may make any decision they deem wise about allowing seniors to transfer before graduation to schools where their race will be in the minority. *Eleventh and tenth graders* will be transferred to their new schools not later than the 4th day of May, 1970.

JUNIOR HIGH SCHOOLS (Grades 7, 8, 9).—Complete desegregation shall be accomplished not later than the 1st day of April, 1970.

FACULTY.—Complete desegregation of the various faculties shall be accomplished by the various times set out above for desegregation of the student bodies.

22. MODIFICATIONS.—The intention of this order is to put on the Board the full duty to bring the schools into compliance with the Constitution as above outlined, but to leave maximum discretion in the Board to choose methods that will accomplish the required result. However, it is directed

the constitutional requirements, and by pairing and clustering groups of schools it achieves full desegregation of the elementary schools. The school staff worked out the details of this plan and are familiar with it. Its attendance zones are illustrated on the map, exhibit I; its elementary school populations are listed in exhibit J; and the pairing and grouping of the outlying and inner-city schools, grade by grade, are shown in detail on exhibit K. Subject to the qualifications previously stated, the Board is directed to follow the Finger plan with reference to elementary schools.

21. THE TIME TABLE: Deadlines to complete various phases of the program required in this order are as follows:

SENIOR HIGH SCHOOLS.—Seniors may remain in their present schools until the end of the school year; the Board may make any decision they deem wise about allowing seniors to transfer before graduation to schools where their race will be in the minority. *Eleventh and tenth graders* will be transferred to their new schools not later than the 4th day of May, 1970.

JUNIOR HIGH SCHOOLS (Grades 7, 8, 9).—Complete desegregation shall be accomplished not later than the 1st day of April, 1970.

FACULTY.—Complete desegregation of the various faculties shall be accomplished by the various times set out above for desegregation of the student bodies.

22. MODIFICATIONS.—The intention of this order is to put on the Board the full duty to bring the schools into compliance with the Constitution as above outlined, but to leave maximum discretion in the Board to choose methods that will accomplish the required result. However, it is directed

Research Report
January 31, 1970

The Charlotte-Mecklenburg Schools

Exhibit B

DESEGREGATION PLAN for 1970-71

Senior High Schools

School	1970-71 Capacity Base	1970-71 Capacity +20%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B
East Mecklenburg	1700	2040	215	1925	2140	10%	360	1716	2076	17%
Garinger	1874	2249	492	2148	2640	18%	721	1914	2635	27%
Harding	1202	1442	612	720	1332	45%	395	692	1087	36%
Independence	1047	1256	101	1111	1212	9%	23	1241	1264	2%
Myers Park	1679	2015	224	1767	1991	12%	426	1883	2309	18%
North Mecklenburg	1158	1390	446	1185	1631	28%	440	998	1438	31%
Olympic	807	968	351	512	863	41%	201	687	888	23%
South Mecklenburg	1523	1828	90	2024	2114	5%	482	1846	2328	21%
West Charlotte	1593	1912	1641	0	1641	100%	597	1045	1642	36%
West Mecklenburg	1374	1649	141	1444	1585	9%	494	998	1492	33%
Total	13,957	16,749	4,313	12,836	17,149		4,139	13,020	17,159	

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Research Report
January 31, 1970

The Charlotte-Mecklenburg Schools

Exhibit D

DESEGREGATION PLAN for 1970-71

Junior High Schools

School	1970-71 Capacity Base	1970-71 Capacity +20%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B
Albemarle Road	948	1138	63	995	1058	5%	19	753	772	2%
Alexander	874	1049	328	761	1089	30%	303	698	1001	30%
Cochrane	1190	1428	72	1544	1616	5%	571	1150	1721	33%
Coulwood	704	845	101	770	871	12%	313	551	864	36%
Eastway	1093	1312	61	1356	1417	4%	375	971	1346	28%
Alexander Graham	996	1194	101	1028	1129	8%	261	888	1149	23%
Hawthorne	850	910	550	472	1022	54%	276	704	980	28%
Kennedy	801	961	802	9	811	99%	325	510	835	39%
McClintock	923	1100	84	1288	1372	6%	25	1048	1073	2%
Northwest	1068	1282	1032	1	1033		296	675	971	30%
Piedmont	631	757	408	55	463	89%	758	84	842	90%
Quail Hollow	1238	1486	129	1421	1550	9%	138	1144	1282	11%
Randolph	972	1170	279	710	989	28%	307	683	990	31%
Ranson	851	1021	246	548	794	31%	295	558	853	35%
Sedgefield	777	930	167	809	976	17%	234	612	846	28%
Smith	1093	1312	51	1436	1487	4%	330	957	1287	26%
Spaugh	826	1091	262	839	1101	24%	346	752	1098	32%
Williams	801	967	1081	0	1081	100%	336	722	1058	32%
Wilson	1044	1253	60	1145	1205	5%	346	795	1141	30%
Carmel	558	670								
J. H. Gunn (Hilgrove)	558	670								

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DESEGREGATION PLAN for Charlotte-Mecklenburg Schools

Junior High Schools

School	1970-71 Capacity Base	1970-71 Capacity +20%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Court Consultant Plan B	Court Consultant Plan W	Court Consultant Plan T	Court Consultant Plan %B
Albemarle Road	948	1138	63	995	1058	5%	292	696	988	30%
Alexander	874	1049	328	761	1089	30%	335	690	1025	33%
Cochrane	1190	1428	72	1544	1616	5%	370	984	1354	27%
Coulwood	704	845	101	770	871	12%	245	568	813	30%
Eastway	1093	1312	61	1356	1417	4%	351	839	1190	30%
Alexander Graham	996	1194	101	1028	1129	8%	359	938	1297	28%
Hawthorne	850	910	550	472	1022	54%	290	677	967	30%
Kennedy	801	961	802	9	811	99%	184	606	790	23%
McClintock	923	1100	84	1288	1372	6%	386	925	1311	30%
Northwest	1068	1282	1032	1	1033		336	736	1072	31%
Piedmont	631	757	408	55	463	89%	243	538	781	32%
Quail Hollow	1238	1486	129	1421	1550	9%	339	1050	1389	25%
Randolph	972	1170	279	710	989	28%	402	832	1234	33%
Ranson	851	1021	246	548	794	31%	264	583	847	31%
Sedgefield	777	930	167	809	976	17%	171	641	812	21%
Smith	1093	1312	51	1436	1487	4%	350	929	1279	27%
Spaugh	826	1091	262	339	1101	24%	324	807	1131	29%
Williams	801	967	1081	0	1081	100%	308	727	1035	30%
Wilson	1044	1253	60	1145	1205	5%	230	570	800	29%
Carmel	558	670					142	444	586	24%
J. H. Gunn	558	670					49	475	524	9%
Total	18,796	22,546	5,877	15,187	21,064		5,970	15,255	21,225	

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity Base	1970-71 Capacity +12%	1969-70* B	1969-70* W	1969-70* T	1969-70* %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B
Albemarle Rd.	432	484	4	510	514	1%	4	469	473	1%
Allenbrook	540	605	61	452	513	12%	59	496	555	11%
Ashley Park	621	696	27	574	601	4%	155	421	576	27%
Bain	702	786	33	735	768	4%	25	706	731	3%
Barringer	486	544	843	16	859	98%	203	320	523	39%
Berryhill	836	936	98	639	737	13%	247	574	821	30%
Beverly Woods	540	605	68	684	752	9%	8	648	656	1%
Billingsville	594	665	596	0	596	100%	113	325	438	26%
Briarwood	540	605	6	680	686	1%	2	663	665	0%
Bruns Ave.	675	756	759	10	769	99%	624	73	697	90%
Chantilly	432	484	0	472	472	0%	142	303	445	32%
Clear Creek	324	363	48	229	277	17%	43	266	309	14%
Collinswood	621	696	111	443	554	20%	224	448	672	33%
Cornelius	459	514	181	235	416	44%	182	265	447	41%
Cotswold	540	605	23	537	560	4%	128	449	577	24%
Davidson	324	363	104	186	290	36%	102	174	276	37%
Marie Davis	756	847	662	0	662	100%	666	82	748	88%
Dorita	783	877	150	678	828	18%	152	595	747	20%
Devonshire	648	726	0	903	903	0%	0	925	925	0%
Dilworth	648	726	90	317	407	22%	241	376	617	39%
Double Oaks	675	756	836	0	836	100%	825	3	828	100%
Druid Hills	486	544	472	3	475	99%	465	20	485	96%
Eastover	648	726	42	559	601	7%	157	478	635	25%
Elizabeth	405	454	314	125	439	72%	112	294	406	28%
Enderly Park	513	575	3	371	374	1%	119	238	357	33%

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity Base	1970-71 Capacity +12%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B
First Ward	702	786	805	0	805	100%	770	7	777	99%
Hickory Grove	459	514	70	533	603	12%	74	556	630	12%
Hidden Valley	648	726	0	1100	1100	0%	1	1077	1078	0%
Highland	297	333	69	305	374	18%	76	237	313	24%
Hoskins	297	333	13	212	225	6%	124	219	343	36%
Huntersville	675	756	145	531	676	21%	130	554	684	19%
Huntingtowne Farms	594	665	7	603	610	1%	3	614	617	0%
Idlewild	567	635	47	581	628	7%	59	549	608	10%
Irwin Ave.	378	423	292	0	292	100%	*			
Amay James			462	3	465	99%	90	169	259	35%
Lakeview	378	423	346	89	435	80%	119	285	404	29%
Lansdowne	756	847	75	802	877	9%	79	719	798	10%
Lincoln Heights	648	726	711	0	711	100%	903	6	909	95%
Long Creek	702	786	267	468	735	36%	259	523	782	33%
Matthews	945	1058	86	802	888	10%	81	837	918	9%
Merry Oaks	486	544	0	442	442	0%	0	557	557	0%
Midwood	459	514	9	437	446	2%	116	401	517	23%
Montclaire	675	756	0	718	718	0%	1	781	782	0%
Myers Park	432	484	22	444	466	5%	150	314	464	32%
Nations Ford	621	696	43	669	712	6%	177	548	725	24%
Newell	594	665	74	438	512	14%	64	436	500	13%
Oakdale	540	605	69	517	586	12%	202	460	662	31%
Oakhurst	594	665	5	616	621	1%	92	504	596	15%
Oaklawn	594	665	584	0	584	100%	597	3	600	99%
Olde Providence	540	605	80	512	592	14%	83	461	544	15%

*distributed to surrounding schools

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity Base	1970-71 Capacity +12%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B
Park Road	540	605	44	548	592	7%	41	571	612	7%
Paw Creek	594	665	27	609	636	4%	83	602	685	12%
Paw Creek Annex	270	302	30	271	301	10%				
Pineville	486	544	136	356	492	28%	123	379	502	25%
Pinewood	648	726	0	674	674	0%	0	900	900	0%
Plaza Road	459	514	80	340	420	19%	181	350	531	34%
Rama Road	648	726	1	815	816	0%	3	744	747	0%
Sedgefield	540	605	3	548	551	1%	223	364	587	38%
Selwyn	486	544	31	617	648	5%	32	459	491	7%
Shamrock Gardens	486	544	0	515	515	0%	84	496	580	15%
Sharon	459	514	72	361	433	17%	91	421	512	18%
Starmount	648	726	25	712	737	3%	67	833	900	7%
Statesville Road	648	726	333	522	855	39%	160	553	713	23%
Steele Creek	378	423	5	509	514	1%	195	475	670	29%
Thomasboro	729	816	0	690	690	0%	135	777	912	15%
Tryon Hills	486	544	309	164	473	65%	200	342	542	37%
Tuckaseegee	540	605	58	578	636	9%	57	510	567	10%
University Park	648	726	825	1	826	100%	735	132	867	85%
Villa Heights	810	907	902	83	985	92%	877	170	1047	83%
Westerly Hills	405	454	46	539	585	8%	144	332	476	30%
Wilmore	378	423	222	210	432	51%	153	250	403	38%
Windsor Park	648	726	1	748	749	0%	1	782	783	0%
Winterfield	648	726	48	688	736	7%	52	653	705	7%
Total	40,391	45,239	13,010	31,278	44,288		12,885	31,523	44,408	

DESEGREGATION PLAN FOR CHARLOTTE-MECKLENBURG SCHOOLS

Elementary Schools

School	1970-71 Capacity Base	1970-71 Capacity +20%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Court Consultant Plan B	Court Consultant Plan W	Court Consultant Plan T	Court Consultant Plan %B
Albemarle Rd.	432	434	4	510	514	1%	162	338	500	32%
Allenbrook	540	603	61	452	513	12%	135	341	476	28%
Ashley Park	621	696	27	574	601	4%	175	426	601	29%
Bain	702	786	33	735	768	4%	25	706	731	3%
Barringer	486	544	843	16	859	98%	203	320	523	39%
Berryhill	836	936	93	639	737	13%	247	574	821	30%
Beverly Woods	540	605	68	684	752	9%	186	446	632	29%
Billingsville	594	665	596	0	596	100%	113	325	438	26%
Briarwood	540	605	6	680	686	1%	256	479	735	35%
Bruns Avenue	675	756	759	10	769	99%	252	540	792	32%
Chantilly	432	484	0	472	472	0%	142	333	475	30%
Clear Creek	324	363	48	229	277	17%	43	266	309	14%
Collinswood	621	696	111	443	554	20%	224	406	630	36%
Cornelius	459	514	181	235	416	44%	182	265	447	41%
Cotswold	540	605	23	537	560	4%	128	404	532	24%
Davidson	324	363	104	186	290	36%	102	174	276	32%
Marie Davis	756	847	662	0	662	100%	193	532	725	27%
Derita	783	877	150	678	828	18%	167	625	792	21%
Devonshire	643	726	0	903	903	0%	333	624	957	35%
Dilworth	648	726	90	317	407	22%	241	376	617	39%
Double Oaks	675	756	836	0	836	100%	234	496	730	32%
Druid Hills	486	544	472	3	475	99%	158	303	461	34%
Eastover	648	726	42	559	601	7%	157	445	602	26%
Elizabeth	405	454	314	125	439	72%	132	304	436	30%
Enderly Park	513	575	3	371	374	1%	150	270	420	36%

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DESEGREGATION PLAN for Charlotte-Mecklenburg Schools

Elementary Schools

School	1970-71 Capacity		1969-70				Court Consultant Plan			
	Base	+20%	B	W	T	%B	B	W	T	%B
First Ward	702	786	805	0	805	100%	265	686	951	28%
Hickory Grove	459	514	70	533	603	12%	272	439	711	38%
Hidden Valley	643	726	0	1100	1100	0%	310	679	989	31%
Highland	297	333	69	305	374	18%	76	237	313	24%
Hoskins	297	333	13	212	225	6%	139	244	333	36%
Huntersville	675	756	145	531	676	21%	130	554	684	19%
Huntingtowne Farms	594	665	7	603	610	1%	205	414	619	33%
Idlewild	567	635	47	581	628	7%	190	410	600	32%
Irwin Avenue			292	0	292	100%	*			
Amay James	373	423	462	3	465	99%	105	194	299	35%
Lakeview	378	423	346	39	435	80%	139	280	419	33%
Lansdowne	756	847	75	802	877	9%	207	496	703	29%
Lincoln Heights	648	726	711	0	711	100%	241	456	697	35%
Long Creek	702	786	267	468	735	36%	239	523	782	33%
Matthews	945	1058	36	302	880	10%	31	837	913	9%
Merry Oaks	486	544	0	442	442	0%	106	236	342	31%
Midwood	459	514	9	437	446	2%	116	446	562	21%
Montclaire	675	756	0	718	718	0%	200	504	704	36%
Myers Park	432	484	22	444	466	5%	150	445	595	25%
Nations Ford	621	696	43	669	712	6%	177	582	759	23%
Newell	594	665	74	438	512	14%	74	546	620	12%
Oakdale	540	605	69	517	586	12%	250	460	710	35%
Oakhurst	594	665	5	616	621	1%	197	534	731	27%
Oaklawn	594	665	584	0	584	100%	226	594	820	28%
Olde Providence	540	605	80	512	592	14%	145	351	496	29%

* Assigned from area to increase desegregation

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Elementary Schools

School	197071 Capacity Base	+20%	1969-70 B	W	T	%B	B	W	T	%B
Park Road	540	605	44	548	592	7%	148	359	507	29%
Paw Creek	594	665	27	609	636	4%	160	395	555	29%
Paw Creek Annex	270	302	30	271	301	10%	83	209	292	28%
Pineville	486	544	136	356	492	28%	123	379	502	25%
Pinewood	648	726	0	674	674	0%	283	697	980	29%
Plaza Road	459	514	80	340	420	19%	181	350	531	34%
Rama Road	648	726	1	815	816	0%	273	493	766	36%
Sedgefield	540	605	3	548	551	1%	223	364	587	38%
Selwyn	486	544	31	617	648	5%	150	309	459	33%
Shamrock Gardens	486	544	0	515	515	0%	174	511	685	25%
Sharon	459	514	72	361	433	17%	123	245	368	33%
Starmount	648	726	25	712	737	3%	217	441	658	33%
Statesville Road	648	726	333	522	855	39%	160	553	713	23%
Steele Creek	378	423	5	509	514	1%	195	475	670	29%
Thomasboro	729	816	0	690	690	0%	230	770	1000	23%
Tryon Hills	486	544	309	164	473	65%	107	262	369	29%
Tuckaseegee	540	605	58	578	636	9%	119	300	419	28%
University Park	648	726	825	1	826	100%	260	461	721	36%
Villa Heights	810	907	902	83	985	92%	265	668	933	28%
Westerly Hills	405	454	46	539	585	8%	144	332	476	30%
Wilmore	378	423	222	210	432	51%	153	250	403	38%
Windsor Park	648	726	1	748	749	0%	272	561	833	33%
Winterfield	648	726	48	688	736	7%	261	537	798	33%
Total	40,391	45,239	13,010	31,278	44,288		12,984	31,386	44,370	

Exhibit K, pg

ELEMENTARY SCHOOLS TO BE PAIRED

Present School .o Count	1 - 4 B	1 - 4 W	5 - 6 B	5 - 6 W
Albemarle Road	2	338	2	174
Allenbrook	0	341	0	156
Beverly Woods	1	446	1	249
Briarwood	4	477	2	220
Bruns Avenue	526	0	246	0
Marie Davis	431	59	193	26
Devonshire	0	624	0	276
Double Oaks	585	2	232	0
Druid Hills	310	2	158	1
First Ward	533	0	262	0
Hickory Grove	54	329	16	208
Hidden Valley	0	677	0	302
Huntingtowne Farms	0	414	0	195
Idlewild	0	410	0	163
Lansdowne	2	496	1	291
Lincoln Heights	456	0	239	0
Merry Oaks	0	236	0	119
Montclaire	0	504	0	217
Oaklawn	405	0	193	0
Olde Providence	2	351	1	146
Park Road	0	300	0	160
Paw Creek	16	395	11	214
Paw Creek Annex	27	209	3	53
Pinewood	0	697	0	346
Rama Road	3	493	0	244
Selwyn	0	284	0	188
Sharon	0	245	0	117
Starmount	19	441	6	218
Tryon Hills	218	110	91	54
Tuckaseegee	49	300	19	171
University Park	550	0	260	0
Villa Heights	683	114	264	48
Windsor Park	0	515	1	233
Winterfield	0	494	0	199
Total	4,876	10,303	2,201	4,998

Exhibit K.

Charlotte-Mecklenburg Schools
ELEMENTARY SCHOOLS PAIRED

Grade 1-4 Schools	B	W	T	%	Grade 5-6 Schools	B	W	T	%
ingtowne Farms on ount	545	1100	1645	33	Bruns Avenue	252	540	792	32
Road ood	431	1056	1487	29	Marie Davis	193	532	725	27
rwood nshire	589	1103	1692	35	Double Oaks	234	496	730	32
en Valley	310	679	989	31	Druid Hills	158	303	461	34
rly Woods downe Providence	538	1293	1831	29	First Ward	265	686	951	28
marle Road wild y Oaks	458	984	1442	32	Lincoln Heights	241	456	697	35
mbrook Creek Creek Annex aseegee	497	1245	1742	29	Oaklawn	226	594	820	28
tory Grove	272	439	711	38	Tryon Hills	107	262	369	29
clair a Road	553	997	1550	36	University Park	260	461	721	36
wyn dsor Park terfield	683	1407	2090	33	Villa Heights	265	668	933	28
Total	4,876	10,303	15,179			2,201	4,998	7,199	

Motion to Add Additional Parties Defendant and for Further Relief

(Filed February 13, 1970)

On February 5, 1970, this Court entered an order directing the Charlotte-Mecklenburg Board of Education and the individual members of the Board to proceed immediately to desegregate the public schools of Charlotte-Mecklenburg County. The Court directed that students be assigned to the various schools under plans presented and adopted by the Board and a plan prepared by the Court consultant, Dr. John A. Finger. The order provided for changing attendance zones of some schools, pairing of some schools, and transportation of students living beyond "walking distance" from the schools to which assigned. The order further directed that the plan be implemented for elementary schools no later than April 1, 1970 and for secondary schools no later than May 4, 1970. The School Board was specifically directed to begin immediately to take steps to implement the plan.

Prior to the filing of the order on February 5, 1970, [redacted] B. Harris, G. Don Roberson, A. Breece Breland, James [redacted] Postell, William E. Rorie, Jr., Chalmers R. Carr, and Robert T. Wilson, on their behalf and on the behalf of the Concerned Parents Association, an unincorporated association, brought a proceeding in the Superior Court of Mecklenburg County, by their attorney, William H. [redacted] to obstruct and prevent the School Board from implementing the orders directed by this Court. They obtained from the Superior Court of Mecklenburg County an *ex parte* order specifically enjoining the Superintendent from implementing the order of this Court directing the Board to pay the expenses and fees of the Court consultant.

Motion to Add Additional Parties Defendant and For Further Relief

Following the order of February 5, 1970, Tom B. Harris, G. Don Roberson and others of the Concerned Parents Association have sought and are seeking by various means to obstruct and prevent implementation of the Court's orders. On February 12, 1970, they obtained from the Honorable William K. McLean, Judge Presiding in the Superior Court of Mecklenburg County, an order enjoining the School Board from spending any funds to purchase and operate school buses as directed by this Court.

The Honorable Robert H. Scott, Governor of the State of North Carolina, on February 11 and 12, 1970, objected to the Court's order and directed that no public funds, state or local, be expended for the purpose of implementing the order. The Honorable Dr. A. Craig Phillips, State Superintendent of Public Instruction, and the North Carolina State Board of Education, defendants herein, joined with the Governor in objecting to the Court's order and in directing that no public funds be used for the purpose of implementing the order.

On February 6, 1970, Honorable James Carson, a member of the Mecklenburg Delegation to the North Carolina House of Representatives, threatened to and is preparing to file similar proceedings in the State Court of North Carolina to obstruct and thwart the enforcement of the Court's orders.

These parties, along with divers others, are seeking to obstruct and prevent implementation of the Court's orders directing compliance by the school authorities with their constitutional obligations.

Despite the Court's directive to the School Board to proceed forthwith with all necessary steps to implement the order, the School Board, the State Superintendent and the

Motion to Add Additional Parties Defendant and For Further Relief

State Board of Education have failed to do so. Plaintiffs are advised that no efforts have been made to secure the necessary buses for transporting students as directed by the Court. Plaintiffs are also advised that such buses as may be necessary can be ordered and manufactured by the time directed by the Court for implementation of the plan. The failure of the School Board to act now in securing the necessary facilities for transportation may prevent desegregation of the schools in the time directed.

Plaintiffs are advised, believe and so allege that the activities and conduct of the defendants and each of them are pursuant to a design to thwart, impede and prevent desegregation of the public schools of Charlotte-Mecklenburg County and that the acts, activities and conduct of the defendants were calculated and intended to incite disobedience of the law and the overthrow of law and order and to coerce, intimidate, and compel school officials from performance of their constitutional responsibilities to desegregate the public schools of this system.

In order to insure full implementation of the Court's order within the time directed, plaintiffs, by their undersigned counsel, respectfully move the Court that the following parties be added as parties-defendant in this proceeding:

Honorable Robert H. Scott, Governor of the State of North Carolina;

Honorable A. C. Davis, Controller of the State Department of Public Instruction;

Honorable William K. McLean, Judge of the Superior Court of Mecklenburg County;

Tom B. Harris, G. Don Roberson, A. Breece Breland, James M. Postell, William E. Rorie, Jr., Chalmers R. Carr,

Motion to Add Additional Parties Defendant and For Further Relief

Robert T. Wilson, and the Concerned Parents Association, an unincorporated association in the Mecklenburg County; James Carson and William H. Booe.

Plaintiffs further pray the Court for a temporary and permanent injunction dissolving the injunctive orders of the Superior Court of Mecklenburg County entered in the proceeding of Tom B. Harris, et al. v. William C. Self, et al., 70 CVS 1097, and temporarily and permanently restrain any further proceedings in the action.

Plaintiffs further pray the Court for a temporary and permanent injunction against all defendants and all other parties having notice of the Court's order enjoining all parties in this action and all parties having notice of the orders of this Court from initiating or proceeding with any action in any State Court which has the purpose or effect of interfering with outstanding orders in this cause.

Plaintiffs further pray that the Court enter a temporary and permanent injunction restraining the Governor, the State Board of Education, the Controller of the State Department of Public Instruction, and the State Superintendent of Public Instruction from denying State funds or taking any other steps which would prevent or tend to prevent the implementation of the orders of this Court.

Plaintiffs further pray the Court for a temporary and permanent injunction directing the local Board of Education, its members individually, the Governor of the State, the State Board of Education, the State Superintendent of Public Instruction and all other persons having an authority or responsibility in the administration of the public schools in Charlotte-Mecklenburg County to proceed forthwith with all necessary steps to implement the orders of

this Court, including the provisions requiring transportation of students living more than "walking distance" from the schools to which they are assigned. Plaintiffs further pray the court for a temporary and permanent injunction restraining all defendants from taking any steps or action which would inhibit or prevent or tend to prevent compliance with the order of this Court.

Plaintiffs further pray the court that they be allowed their costs in this proceeding and reasonable counsel fees.

Plaintiffs further pray that the court direct the United States Marshal to personally serve a copy of the complaint, the amended complaint, and all orders, including the injunctive order prayed for herein, upon all defendants named herein.

Respectfully submitted,

CONRAD O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina

CHAMBERS, STEIN, FERGUSON & LANNING
216 West 10th Street
Charlotte, North Carolina

JACK GREENBERG
JAMES M. NABRIT, III
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10 Columbus Circle
New York, New York 10019

Notification and Request for Designation of Three-Judge Court

(Filed February 20, 1970)

Several orders, starting April 23, 1969, have been entered by this court dealing with pending motions for desegregation of the Charlotte-Mecklenburg schools. The orders of December 1 and December 2, 1969, and February 5, 1970, are attached as Exhibits A, B and C to this motion.

The December 2, 1969 order appointed Dr. John A. Finger, Jr. to assist the court in the preparation of a plan for the desegregation of the schools. The February 5, 1970 order directs the schools to be desegregated according to various principles described or referred to in the order, including the requirement erroneously advertised as "involuntary bussing to achieve racial balance" which reads as follows:

> "That transportation be offered on a uniform nonracial basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance."

A suit has been filed in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, No. 70-CVS-1097, entitled "Tom B. Harris, G. Don Roberson, et al., Plaintiffs, vs. William C. Self, Superintendent of Charlotte-Mecklenburg Schools, and Charlotte-Mecklenburg Board of Education, Defendants," and pursuant to allegations made in that action, Judge W. K. McLean, of the Superior Court of North Carolina, has entered an order temporarily restraining the School Board

and the Superintendent from paying Dr. Finger's bills until they have been approved by the Board of Education, and ordering that "the defendant Charlotte-Mecklenburg Board of Education and its agents, servants and employees be and they hereby are enjoined and restrained from expending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district."

The complaint, the amended complaint and the two orders of Judge McLean dated February 12, 1970, are attached hereto as Exhibit D.

The Governor of North Carolina has made a public statement, Exhibit E, and has written a letter to the Department of Administration, Exhibit F.

The State Superintendent of Public Instruction, a party to this case, has made a public statement, Exhibit G.

Reports received from the School Board on February 12, 1970 and February 19, 1970 fail to mention Judge McLean's order, and fail to indicate that the Board have appealed or intend to appeal Judge McLean's order; and these reports also reveal no action by the Board or school staff addressed to the transportation problem. It appears that whether the action of Judge McLean and the other state officials do or do not directly conflict with this court's orders, the practical effect of those actions is or may be to delay or defeat compliance with the orders of this United States Court.

The plaintiffs have filed a motion to make additional parties, and have requested this court to enter orders dis-

Notification and Request for Designation of Three-Judge Court

solving Judge McLean's restraining orders and directing the Governor, the State Department of Instruction and the "Concerned Parents Association" and their attorneys and others not to interfere further with the compliance of the School Board with the orders of this court.

Some of the issues raised by this situation may involve the constitutionality of a state statute and others may be matters cognizable by a single judge.

It appearing to the court that pursuant to Title 28, U.S.C.A., this matter should be heard and determined by a district court of three judges.

Now, THEREFORE, it is respectfully requested that the Chief Judge of the United States Court of Appeals for the Fourth Circuit designate two other judges, at least one of whom shall be a circuit judge, to serve with the undersigned district judge as members of the court to hear and determine the action.

This the 19th day of February, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Tender of Evidence *Nunc Pro Tunc* and Objections

(Filed February 24, 1970)

Defendants, the Charlotte-Mecklenburg Board of Education, and the individual members of the Board of Education, pursuant to the oral statements of the Court during the hearing on February 5, 1970, and pursuant to the order of the Court dated February 5, 1970, hereby tender, nunc pro tunc, evidence which would have been offered by the defendants for the consideration of the Court which was excluded by reason of the time limitations imposed by the Court or by formal rejection of the evidence hereby tendered by rulings of the Court. The evidence tendered is disclosed in the following affidavits:

1. Affidavit of Dr. William C. Self, Superintendent of the Charlotte-Mecklenburg public schools.

2. Affidavit of Mr. J. D. Morgan, Assistant Superintendent of business services of the Charlotte-Mecklenburg public schools.

3. Affidavit of Mr. Louis W. Alexander, Assistant Director of the Division of Transportation of the North Carolina Board of Education.

4. Affidavit of Mr. Herman J. House, Director of Traffic Engineering of the City of Charlotte, North Carolina.

5. Affidavit of Mr. Robert L. Deaton, Assistant General Manager of Charlotte City Coach Lines, Inc.

In addition to the foregoing, the defendants tender pertinent portions of the report and recommendations of the Court appointed consultant, Dr. John A. Finger, which report and recommendations do not appear of record at this

Tender of Evidence Nunc Pro Tunc and Objections

ne. Accordingly, these defendants deem it appropriate tender same as a portion of the record in this cause. The defendants renew their objection to the refusal of Court to permit full evidentiary hearings with respect the two plans presented to the Court and offered into idence on February 2, 1970, and further object to the fusal of the Court to consider all evidence prior to entry its order on February 5, 1970.

Respectfully submitted this 24th day of February, 1970.

/s/ WILLIAM J. WAGGONER
WILLIAM J. WAGGONER
WEINSTEIN, WAGGONER, STURGES, ODOM AND BIGGER
1100 Barringer Office Tower
Charlotte, North Carolina

/s/ BENJ. S. HORACK
BENJ. S. HORACK
ERVIN, HORACK AND MCCARTHA
806 East Trade Street
Charlotte, North Carolina

/s/ BROCK BARKLEY
BROCK BARKLEY
Law Building
Charlotte, North Carolina

Affidavit of William C. Self, Superintendent of Charlotte-Mecklenburg Public Schools

(Referred to in Foregoing Tender of Evidence)

William C. Self, being duly sworn, deposes and says:

1. I am the Superintendent of the Charlotte-Mecklenburg public schools and am responsible for the administration and operation of the school system.

2. At the hearing conducted on February 5, 1970, I would have testified as follows in the event the Court had permitted more time or had permitted answers to certain questions posed by the School Board attorney. Such testimony would have been as follows.

3. The administrative staff explored the possibility of pairing one or more of the predominantly black schools with neighboring predominantly white schools. This alternative was rejected since such a move would have caused the paired schools to become predominantly black in a short period of time. Pairing of a predominantly black school with an adjoining desegregated school would produce a predominantly black school body in both schools. Many schools in the system have quickly changed from white to black. Since 1954-55 school term, eleven (11) schools have experienced such a turnover. Schools which have changed from all white to predominantly black during this period are Barringer, Bethune, Elizabeth, First Ward, Lakeview, Seversville, Zeb Vance, Villa Heights, Wesley Heights, Hawthorne and Piedmont. These schools or their successors experienced a more rapid shift to predominantly black once their racial ratio reached approximately 35 to 40 per cent black. Any pairing arrangement between contiguous schools would exceed this percentage.

Affidavit of William C. Self, Superintendent of Charlotte-Mecklenburg Public Schools

4. The Board of Education plan for further desegregation represents utilization of racially gerrymandered lines to the greatest extent possible in seeking maximum racial balance and at the same time preserve a bare semblance of the neighborhood school concept.

5. Further desegregation of the Charlotte-Mecklenburg public schools should take into account the educational advantages to be gained. As an educator, I cannot justify an abrupt mid-year desegregation move on educational grounds for the amount of disruption, inconvenience, and hardship to the educational processes would nullify such advantages for the vast majority of black and white students. A better procedure would be to schedule the moves near the end of the regular school term. This would allow the school administration to bring one school year to a close and to plan the new operation as if it were the beginning of another school term. Such a move would allow for general orientation of students and teachers to their new surroundings and would also have the effect of relieving uncertainty about next year's school assignment. Such change should not take place earlier than the last two weeks of school which is ample time to complete orientation.

6. As a professional educator, I am quite aware of the fact that opinions of children, parents and the community with reference to an educational program often offer positive or negative contributions to such programs. Their opinions may so affect the educational system that the benefits to be derived from a particular program will be submerged and thereby impaired to the point that the program offers a negative value because of the absence of

popular support or acceptance. This would apply with equal force to the opinions of parents, students and the community to further desegration or to the time for implementation thereof. In any event, substantial efforts will be made to gain community acceptance of any action which must be taken.

This the 24th day of February, 1970.

William C. Self

(Sworn to February 24, 1970)

ffidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools

(Referred to in Foregoing Tender of Evidence)

J. D. MORGAN, being duly sworn, deposes and says that:

1. I am Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools, and am responsible for the administration and operation of the school bus transportation system of the Charlotte-Mecklenburg Schools.

2. All statistical data and information attached hereto or referred to herein were prepared by me or under my direct control and supervision, are incorporated as a part of this Affidavit and correctly set forth the facts and estimates to which they refer.

3. I am thoroughly familiar with the bus transportation system for the Charlotte-Mecklenburg Schools as it is presently being operated and with the Board Plan and the Finger Plan for desegregation which were in evidence at the February 5, 1970 hearing and referred to in the Court's Order of the same date. I have made a careful, detailed analysis of both of those Plans and alternate proposals, particularly with reference to their effect upon transportation of students, bus routes and schedules, transportation costs, availability of facilities and related matters.

4. Under North Carolina law and applicable regulations as they apply to the Charlotte-Mecklenburg School System any school child is entitled to free transportation to and from the school he attends if he resides more than 1½ miles

from his school and (a) if he resides in the part of Mecklenburg County located outside the Charlotte city limits as they existed immediately prior to the 1957 annexation or (b) if he resides in the City and attends a school located within that portion of the County. Based on December 1, 1969, records, 22,545 children were being transported pursuant to the State law by a fleet of 267 school buses. In addition, the System is presently furnishing with local funds 13 buses to transport the 738 black students who accepted assignments to outlying white schools when certain inner city schools were closed last year. In the aggregate, the Charlotte-Mecklenburg Schools has a fleet of 280 buses which now transport daily 23,283 students.

5. The Board Plan proposed to provide transportation for those children who are eligible under the present State law. The Finger Plan proposes to provide transportation for all students not within walking distance of their school, regardless of the location of their residence or the schools they attend. The Board has accepted the State standard for walking distance as being less than 1½ miles. Either of the proposed plans for desegregation will require buses and expenditures in *addition* to the 280 buses presently being used to transport 23,283 students. A summary of pertinent data, including the *additional* children, buses and costs which would be required under each desegregation proposal is as follows:

Affidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools

	Board Plan	*Finger Plan*
No. of Children Bussed	4,935	23,384
No. of Buses	104	526
No. of Trips Daily	104	526
Aver. No. Trips Daily	1	1
Aver. No. Pupils Per Trip	47	44
Aver. No. Miles Daily	30	30
Total Mileage Daily	3,120	15,780
Aver. Per Pupil Cost Annually	$ 29.29	$ 31.26
Cost of Buses	$589,889.56	$2,947,048.94
Cost of Parking Lots, Etc.	56,200.00	337,400.00
Cost of Operating	175,627.92	888,271.98
Cost of Personnel	42,960.00	177,120.00
Total Cost	$864,677.48	$4,349,840.92

From the foregoing it will be observed that, compared with existing transportation, the Finger Plan adopted by the Court will double the number of children bussed (an increase from 23,283 to a total of 46,667) and almost triple the number of buses required (an increase from 280 to 806). Supporting details for this summary are shown on attached Schedules Nos. 1 and 2. In each instance the additional requirements tabulated above are based upon the System's experience regarding the number of students who actually use such transportation—rather than the much larger number who are eligible therefor.

6. For the most part, the school buses are driven by high school students recruited by the high school principals and are paid the $1.60 per hour minimum wage prescribed by

Affidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools

State law for student drivers. Student drivers are presently in very short supply as are also the extra substitute relief drivers which we must have in case of the illness or absence of regular drivers. A student driver parks his bus at his home overnight. In order to minimize unnecessary mileage, wherever possible a student driver is assigned a bus route that begins near his home. On the morning of each school day he starts his student pick ups near his home and continues on his route until he deposits the children at the school served by the route. All buses, by State law, must be routed within a mile of a student's home. In most instances, it is necessary for a bus to be routed off main streets and roads to pick up points less than a mile for two reasons: First, to insure safety in loading and unloading students and secondly, to provide for better traffic safety and flow for the general public. If a bus route is not too long, the driver will be assigned a second route or trip. This trip begins after unloading at the first school so that he can pick up a second load of children for another school. At present, the daily trips per bus providing State transportation average 1.8, reflecting the double use of about four fifths of the buses. If the route distance is too long or requires a long time because of congested or city traffic, a bus may be able to make only one trip. At the end of his morning run the student driver will park his bus and proceed to his high school. After school, the process is repeated in reverse. At present each bus averages about 40.8 miles per day, which includes both the morning and afternoons runs. In order to complete their runs most student drivers miss one instruction period.

Affidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools

7. Bus routes are arranged to make maximum use of the capacity of the buses. However, in spite of our best efforts, sometimes the children on a route destined for a particular school are insufficient in number to utilize the full capacity of a bus. State regulations allow the rated seating capacity of a bus to be exceeded by not more than 25%. When the full capacity of a bus is utilized on a particular route, normally the children on the morning run who cannot get a seat are those who board the bus last. This is normally within a short distance of their school. On the afternoon run at the close of school the same is true in reverse. For the sake of the safety of our children, we try to minimize the need for standing in the aisles—particularly by elementary children. The risk of student injury is substantially increased when the children are required to stand up for long periods or in heavily congested traffic.

8. Due to senior high schedules, length of time required on some routes and point of bus route termination, we are unable to use student drivers. Therefore, we employ some adult drivers who are paid the prescribed minimum wage of $1.95 per hour. Even greater difficulty is experienced in finding and retaining competent and reliable adult drivers. Because the system is responsible for the welfare of its students (particularly young children and girl students) great care must be exercised in screening candidates and investigating their moral character and past records as well as their driving abilities. Since adult employment is not provided on a full workday basis (but only for the few hours in the morning and afternoon) and because of the low pay, reliable adult drivers are hard to find and keep.

Affidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools

Unlike student drivers who park their buses at school, substantial additional bus mileage is incurred when at the end of a morning or afternoon run adult drivers must return empty buses to the central bus depot until they are picked up for the next

9. Both student and adult drivers must obtain a special school bus driver's license. At least five days are required to obtain such a license and to train the prospective drivers for the operation of their buses, instruct them in safety and operating rules and regulations and familiarize them with their bus schedules and routes.

10. Safe, convenient parking areas must be provided for the loading and unloading of bussed children and the parking of these buses during school hours in order that they may be serviced with gas, oil and minor repairs. The Charlotte-Mecklenburg System is already hard pressed to provide such areas. School buses load and unload through a door at the right front of each bus. Safety of children is the key consideration. Parking areas must be arranged so children alighting from or boarding a school bus can do so without being endangered by the movement of other buses or traffic. Attached Schedule No. 3 explains the pertinent considerations, layouts, traffic flow, areas and other matters involved in providing these necessary bus parking areas. Parked school buses are not permitted to block dedicated or public streets and rights of way. Safe ingress and egress must be provided for buses entering and leaving public streets and roads. Bus parking areas should provide sufficient space to allow maintenance and service trucks

to gas and oil the parked buses during school hours. Depending upon the length of the bus route, some buses require servicing every day and some every other day. Because of terrain, limited school sites and similar factors, some schools cannot accommodate bus parking areas. In such situations, parking areas must be purchased or leased or the buses must be taken back to a central bus depot until needed for the next run. Playgrounds cannot be used for bus parking areas without curtailing the physical education program and without likely damage to the parked buses. Attached Schedule No. 1 shows school by school the students to be transported and the buses and parking areas required to provide the additional State law transportation prescribed under the Board Plan and the attached Schedule No. 2 shows the same information under the Finger Plan. In each instance, these schedules show whether the required parking area is presently non existent (N), unsatisfactory (U) or satisfactory (S). Attached Schedule No. 3 documents the costs involved in providing bus parking. Apart from the cost of any needed land acquisitions, a $56,200 capital outlay will be required to provide *additional* bus parking under the Board Plan and $337,400 *additional* under the Finger Plan for those schools where bus parking areas are available.

11. Among the 23,384 *additional* students that must be transported under the Finger Plan will be 5,150 white 5th and 6th graders bussed into, and 5,150 black 1st, 2nd, 3rd and 4th graders bussed out of, the center city to eliminate the 9 predominantly black elementary schools which remain under the Board Plan. Also included are the students

which must be bussed under the Finger Plan to eliminate Piedmont Junior High as a predominantly black school. A careful evaluation has been made of the bus trips and routes which would be required to achieve these objectives of the Finger Plan or any alternate plan which has as its purpose the elimination of these ten predominately black inner city schools. This evaluation reveals that bus trips to and from the center city schools will average 15 miles one way (30 miles round trip) and many of them will require a travel time of 1¼ hours one way (2½ hours round trip). A child involved in 2½ hours daily bus travel will spend 452.5 hours in a school bus during his 181 day school year. Prolonged travel is not only costly in terms of dollars and cents, but in terms of the time expended by children, parents, teachers, principals and other school administrative personnel, which will most definitely affect the instructional programs and the on-going operation of the school system. The tranportation of students into and out of the center city will necessarily involve bus routes through the heavily congested parts of the inner city and perimeter areas. From a safety standpoint this is undesirable. Under North Carolina law, traffic going both ways must come to a halt when a school bus stops. The stop-and-go schedules of school buses transporting 23,384 *additional* children will seriously clog the already over burdened city and perimeter thoroughfares.

12. The average 15 mile trip (30 miles per day) into and out of the center city to eliminate these predominantly black schools under the Finger Plan wll preclude the use of student drivers, because the trips will be too long and too time-consuming to permit them to operate the buses and main-

tain their own class schedules at the high schools they attend. As a practical matter, adult drivers will have to be employed to do the job. The estimated operating costs documented in attached Schedules Nos. 1 and 2 are based entirely on the use of student drivers. As indicated above, reliable and competent adult drivers are already in short supply and involve much more empty bus mileage than do student drivers. Even if adult drivers could be found, it is estimated that the operating costs of providing the transportation required by the Finger Plan would exceed the amounts shown on those Schedules by 40% to 60%, mainly because of the increased salaries and the additional mileage that would be required.

13. School buses for the Charlotte-Mecklenburg Schools (as well as those for the other North Carolna school systems) are procured through the State Board of Education's Division of Transportation. Under State law, when an additional bus is purchased it must be paid for entirely with local funds. At present the average cost of a school bus is $5,387.64, but it is anticipated that there soon will be a significant increase in this figure. Assuming student drivers, the maximum life of a school bus is about 12 to 15 years. If adult drivers are used the life of a bus is much less because of the increased mileage. The wear and tear on a school bus is greater than that of most buses because of the roads they travel, the stop-and-go driving involved in student pickup routes and the hard usage occasioned by the young children they transport. The State pays for replacement buses. When school buses are retired they are either junked or sold at public auction. There is very little,

if any, use left in a bus that has been retired. The repair and upkeep of such buses is prohibitive and usually they are unfit and unsafe for the transportation of school children.

14. Contingent upon availability of funds, at the present time only 75 additional new buses could be procured from the State and of these, 27 are required as past-due replacements for our existing fleet. If the State has other new buses on hand they have been allocated to some or all of the 99 other North Carolina County school systems which also need overdue replacements. March 27, 1970, is the earliest date that State cotnracts can be let for the purchase of additional buses. As stated above, 104 additional buses will be required under the Board Plan and 526 under the Finger Plan. Spring and summer is a rush time for bus manufacturers because this is when schools all over the country customarily place their orders for new buses. Under normal conditions it takes about 120 days before the first bus chassis is delivered to the body fabricator and about 45 days thereafter before the completed bus is delivered and ready for use. With the exception of the 75 buses referred to above, the first of the buses needed to provide the transportation required by either of the Plans would not be delivered to our system until the Fall of 1970 and it is expected that an order placed to satisfy the requirements of the Finger Plan would not be completed until the Spring of 1971. In the meantime, we will have a continuing need for replacements.

15. Some suggestion has been made that, in order to meet the proposed demands of the Finger Plan, the

Affidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools

Charlotte-Mecklenburg Schools could use some or all of the several hundred retired obsolete buses that are stored in various areas of the State pending the arrival of new buses. These old buses are either junk or near junk. On average, they have been used 12 to 15 years and are unserviceable for school purposes or they would not have been declared obsolete and scheduled for replacement in the first place. With coaxing and care some of them can be made to run, but they are totally unsuitable for use to transport school children in a system as large and as complex as ours. Their performance would be completely unreliable—even with maximum attention to repairs and maintenance. They would not hold up under the strain and requirements of the long routes and urban congestion involved in our system. Quite apart from the mechanical unreliability of these resurrected replacements, many of them are unsafe. We cannot afford to put our children on buses which are discards and whose reliability and safety are suspect.

16. We have investigated the possibility of working out contract arrangements with Charlotte's public transit system, Charlotte City Coach lines, Inc., to provide some of the transportation that will be required under the desegregation proposals. City Coach Lines is willing to help the schools in any way it can, but is able to provide only 5 buses to assist any desegregation effort. These buses can carry an average of 65 children each—making a total of 325. This total could be increased to some degree if the schools went on staggered schedules to make greater use of the available equipment.

Affidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools

17. It is observed that 280 buses are now being used to transport 23,283 school children but that 526 more buses will be required for the *additional* 23,384 pupils who must be transported under the Finger Plan. There are very obvious reasons why this is so. The existing 280 bus fleet now transports the 28,283 predominantly County children on comparatively short runs, allowing many of the buses to serve more than one school by making more than one trip—the buses now averaging about 1.8 trips daily. By way of contrast, the Finger Plan requires massive cross-bussing and satelite bussing to and from the center city and outlying areas. Under the Finger Plan the average one-way run will be about 15 miles (much of it in congested city and suburban traffic) and some of the routes will involve travel time of approximately 1¼ hours—too far and too long to permit the multiple use of buses to serve several schools as is frequently possible under our existing setup. The initial capital expenditure for buses required to implement the Finger Plan could be reduced by 35% to 50% if schedules for the opening and closing of the various schools were staggered. However, as previously noted, this would necessarily require the use of adult drivers—which would increase operational costs by 40% to 60%, due mainly to increased drivers' salaries and additional mileage. The extensive staggered school schedules that would be necessary to minimize the number of buses required under the Finger Plan give rise to many practical problems—causing inconvenience and hardship for children and parents and disruption of school activities. It is anticipated that under any program of staggered school openings and closings (that significantly reduce bus re-

quirements) some children would have to leave home as early as 6:40 a.m., and others would not get back home until 5:00 p.m.

18. As already observed, the Charlotte-Mecklenburg School System is now operating a complex and costly transportation system as required by State law for about 27% of its total 84,000 students. Under the Court's Finger Plan almost 55% of these students will be bussed daily. This will serve only to compound drastically the burden, expense, hardship, inconvenience, hazards, expenditure of unproductive time and the added administrative problems occasioned by any bussing program. The extra costs of the Finger Plan will make serious inroads upon our ability to finance and maintain quality facilities and instructional programs for our youngsters.

19. The implementation of the Finger Plan presupposes not only the availability of the buses, but also the availability of the funds (either locally or from the State) with which to finance the capital outlay and operational costs occasioned by the *additional* transportation necessary to effect the racial balances that the Plan seeks to achieve. We have no indication that these funds will be forthcoming—either locally or from the State.

20. Neither the Finger Plan nor any other plan which has as its objective the elimination of the predominately black 9 elementary and 1 junior high schools in the center city can be implemented without a massive bussing program. It is unrealistic to assume that any such plan

Affidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools

can be put into effect during this school year. We do not have the buses and we cannot get them. Even if we had the buses, we have no reasonable prospect of recruiting and training the student and adult drivers to operate them. Even if the buses and drivers were available, we have no prospects of obtaining the necessary financing.

/s/ J. D. Morgan
J. D. Morgan

(Sworn to July 13, 1970.)

BOARD OF EDUCATION PLAN

CHARLOTTE-MECKLENBURG SCHOOLS

1. Cost of Buses	$ 589,889.56
2. Cost of Parking Area	56,200.00
3. Cost of Operation	175,627.82
4. Personnel	42,960.00
5. Total Cost First Year	$ 864,677.46

BOARD OF EDUCATION PLAN
SENIOR HIGH SCHOOL

1. Clerical Outlay

A. 30 Buses @ $5,387.64	$161,629.20
B. Equipment	750.00
C. Service Vehicles	
Service Trucks - 2	5,000.00
Gasoline Deliver, Trucks - 1	5,000.00

2. Cost Operation

	Daily	Annual
1. Drivers' Salaries	$153.90	$ 27,855.90
2A Gas, oil, grease, anti-freeze	27.90	5,045.90
3 Mechanics' Salaries	38.70	7,004.70
4A Repair Parts	7.20	1,303.20
4B Tires and Tubes	-	-
TOTAL	$230.40	$ 41,702.40
Depreciation $ .055 per mile	49.50	8,959.50
GRAND TOTAL	$279.90	$ 50,661.90

3. Personnel

A. Supervisory - 1	$ 6,200.00
B. Clerical - 1	6,720.00

BOARD OF EDUCATION PLAN
JUNIOR HIGH SCHOOL

1. Capital Outlay

A. 33 Buses @ $5,387.64	$177,752.12
B. Equipment	625.00
C. Service Vehicles	
Service Trucks - 1	2,500.00
D. Gasoline Delivery Trucks - 1	5,000.00

2. Cost of Operation

	Daily	Annual
1. Drivers' Salaries	$168.29	$ 30,641.49
2A. Gas, oil, grease, anti-freeze	30.69	5,554.89
3. Mechanics Salaries	42.57	7,709.17
4A Repair Parts	7.52	1,433.32
4B Tires and Tubes	-	-
TOTAL	$253.44	$45,872.64
Depreciation @ .055 per mile	54.45	9,855.45
GRAND TOTAL	$307.89	$55,728.09

3. Personnel

A. Supervisory - 1	$ 8,200.00
B. Clerical - 1	6,120.00

BOARD OF EDUCATION PLAN
ELEMENTARY SCHOOL

1. Capital Outlay

A. 41 Buses @ $5,387.64	$220,892.24
B. Equipment	500.00
C. Service Vehicles	
Service Trucks - 2	5,000.00
Gasoline Delivery Trucks - 1	5,000.00

2. Cost of Operation

	Daily	Annual
1. Drivers' Salaries	$210.33	$ 38,069.73
2A Gas, oil, grease, and anti-freeze	38.13	6,901.53
3 Mechanics' Salaries	52.65	9,573.03
4A Repair Parts	9.84	1,781.04
4B Tires and Tubes	-	-
Total	$314.83	$ 56,993.25
6. Depreciation @ .055 per mile	67.65	12,244.65
GRAND TOTAL	$382.53	$ 69,247.93

3. Personnel

A. Supervisory - 1	$ 6,200.00
B. Clerical - 1	6,120.00

ADDITIONAL TRANSPORTATION REQUIRED

BOARD OF EDUCATION PLAN OF DESEGREGATION

SENIOR HIGH SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING AREA	COST
Mecklenburg	273	7	S	
ger	78	2	N	$ 3,400.
ing			N	
pendence			S	
s Park			N	
h Mecklenburg			S	
pic			S	
nd Ward				
h Mecklenburg	600	15	U	$ 6,000.
Charlotte	53	2	U	$ 800.
Mecklenburg	198	5	U	$ 2,000.
e in Attendance Areas		10		
Total	1202	41		$12,200.
Less reduction to prevent duplicate use of school buses		11		
Net number of buses		30		

ADDITIONAL TRANSPORTABILITY DETAIL

BOARD OF EDUCATION PLAN OF DESEGREGATION

JUNIOR HIGH SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING	
Albemarle Road			S	
Alexander			S	
Cochrane	534	10	U	$
Randolph	59	1	S	
Coulwood	220	4	S	
Eastway			U	
Alexander Graham			U	
Hawthorne			N	
Irwin Avenue				
McClintock			S	
Northwest			N	
Piedmont			N	
Quail Hollow			S	
Ranson			S	
Sedgefield			N	
Smith	400	8	S	
Spaugh			N	
Williams			N	
Wilson	164	3	U	$
York Road			N	

Change in Attendance Areas		12
Total	1398	38
Less reduction to prevent duplicate use of school buses		5
Net number of buses		33

ADDITIONAL TRANSPORTATION REQUIRED

BOARD OF EDUCATION PLAN OF DESEGREGATION

ELEMENTARY SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	Bus Parking	COST
arle Road			S	
brook			S	
y Park			N	
			U	
inger	197	4	N	$4,200.
yhill	274	5	S	
rly Woods			D	
ingsville	259	5	N	$4,600.
rwood			U	
s Avenue			N	
tilly			N	
r Creek			U	
linswood	233	5	S	
nelius			N	
swold	195	4	N	$4,200.
idson			N	
rita				
onshire				
lworth				
ble Oaks				
id Hills				
stover	62	1	N	$3,000.
lizbeth				
derly Park				
st Yard				
bury Downs				

ADDITIONAL TRANSPORTATION REQUIRED

BOARD OF EDUCATION PLAN OF DESEGREGATION

ELEMENTARY SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	Bus Parking	
Hidden Valley				
Highland				
Hoskins				
Huntersville				
Huntingtowne Farms				
Idlewild				
Amay James				
Lakeview	47	1	N	$1,00
Lansdowne				
Lincoln Heights				
Long Creek				
Marie Davis				
Matthews				
Merry Oaks				
Midwood				
Montclaire	35	1	U	$ 4
Myers Park				
Nations Ford	153	3	S	
Newell				
Oakdale				
Oakhurst	105	2	N	$1,0
Oaklawn				
Olde Providence				
Park Road				
Paw Creek				
Pineville				
Plaza Road				

ADDITIONAL TRANSPORTATION REQUIRED

BOARD OF EDUCATION PLAN OF DESEGREGATION

ELEMENTARY SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	Bus Parking	COST
Road				
efield				
yn				
rock Gardens				
ton				
rmount				
tesville Road			S	
ele Creek	353	7	N	$5,400.
nsboro				
von Hills	30	1	N	$3,000.
kaseegee				
iversity Park				
lla Heights	156	3	N	$3,800.
esterly Hills				
lcore				
indsor Park	140	3	N	$3,800.
interfield				
Pinewood				$38,600
Total	2345	48		

Less reduction to prevent duplicate use of school buses 7

Net number of buses 41

DR. JOHN FINGER PLAN

CHARLOTTE-MECKLENBURG SCHOOLS

1.	Cost of Buses	$ 2,947,048.94
2.	Cost of Parking Area	337,400.00
3.	Cost Operation	868,271.98
4.	Personnel	177,120.00
5.	Total Cost First Year	$ 4,329,840.92

[illegible]

[illegible]

1. Capital Outlay

A. [illegible]	[illegible]
B. Equipment	[illegible]
C. Service Vehicles	[illegible]
5 Service Trucks	[illegible]
2 Gasoline Delivery Trucks	

2. Cost Operation

	Daily	Annual
Drivers Salaries	[illegible]	[illegible]
Gasoline, Oil, Grease, Anti-freeze	[illegible]	[illegible]
Mechanics Salaries	[illegible]	[illegible]
Repair Parts	27.35	1,958.00
Tires & Tubes		
Sub	[illegible]	[illegible]
Mileage Cost	[illegible]	[illegible]
Grand Total	[illegible]	[illegible]

3. Personnel

	Annual
A. Superintendent - 1	[illegible]
B. Clerks - 2	[illegible]
C. Bus Dispatchers - 2	[illegible]

LT. JOHN FINLEY HILL
JUNIOR HIGH SCHOOLS

1. A. 119 Buses @ $5387.61 Ea. — $640,[illegible]
   B. Equipment — 2,975.00
   C. Service Vehicles
      3 Service Trucks — 12,[illegible]
      2 Gasoline Delivery Trucks — 10,[illegible]

2. Cost Operation

	Daily	Annual
Drivers Salaries	$[illegible].47	$[illegible]
Gas, Oil, Grease, anti-freeze	110.67	20,[illegible]
Mechanics Salaries	[illegible].11	27,[illegible]
Repair Parts	28.53	5,[illegible]
Tires & Tubes		
TOTAL	$913.92	$165,[illegible]
Mileage Costs	[illegible]	35,[illegible]
GRAND TOTALS	$1,110.27	$200,956.67

3. Personnel

		Annual
A. Supervisor - 1	$	$ 32,[illegible]
B. Clerical - 2		12,[illegible]
C. Bus Inspector - 1		7,[illegible]

[illegible]

[illegible]

[illegible]

[illegible] Valley

[illegible] Buses @ $5587.00 Ea.	$2,5[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
Service Vehicles	
38 Service Trucks	[illegible]
5 Gasoline Delivery Trucks	[illegible]

[illegible] Operation

	Daily	Annual
[illegible] Drivers Salaries	$2,[illegible]	$[illegible]
[illegible], Oil, Grease, Anti-Freeze	$[illegible]	[illegible]
Mechanics Salaries	$[illegible]	$[illegible]
[illegible] Parts	[illegible]	[illegible]
Tires & Tubes	[illegible]	[illegible]
[illegible]	$2,[illegible]	$[illegible]
[illegible]	[illegible]	[illegible]
[illegible] Costs	$2,[illegible]	$[illegible]

[illegible]

	Annual
[illegible]	[illegible]
[illegible] - 5	[illegible]
[illegible] - 3	[illegible]
[illegible] - 2	[illegible]
Assistant Bus Dispatchers - 2	[illegible]

DR. JOHN FINGER'S PLAN OF DESEGREGATION.

SENIOR HIGH SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING AREA	
East Mecklenburg	323	8	S	
Garinger	862	22	N	11,8
Harding	420	11	U	7,7
Independence	270	7	S	
Myers Park	776	2[illegible]	N	10,9
North Mecklenburg			S	
Olympic			S	
Second Ward				
South Mecklenburg	485	12	U	7,6
West Charlotte	810	2[illegible]	U	10,6
WestMecklenburg	157	4	U	3,2
Changes in Attendance Areas		10		
TOTALS- High School	4,105	114		51,2
TOTALS-Junior High	6,129	119		72,0
TOTALS-Elementary	13,144	293		218,2
GRAND TOTALS	23,386	526		330,9

Estimated daily mileage is from 15 to 50 miles per bus. It is estimated that the average daily miles would be approximately 30 miles per bus.

Estimated travel averages 12 miles per hour. This would require an estimated average travel time of 2-1/2 hours per day per bus.

JUNIOR HIGH SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PANELS AREA	
arle Road	267	5	S	
nder			S	
ace	270	5	U	4,600
h Randolph	90	2	S	
ord	126	3	S	
ver	693	12	U	7,400
ander Graham	732	14	N	8,200
horne	468	9	N	6,200
ce				
intock	325	6	U	5,000
hrest	747	14	N	8,200
ent	424	8	N	5,800
Keller	183	4	U	4,200
ood			S	
efield	252	5	N	4,600
t	360	7	S	
h	288	6	N	5,000
ers	630	12	N	7,400
on			S	
Road	365	7	N	5,400
TALS	6,189	319		72,000

DR. JOHN FINCH'S PLAN OF DESEGREGATION

ELEMENTARY SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PAIRING AREA	
Albemarle Road	176	4	U	4,
Allenbrook	156	3	S	
Ashley Park	197	4	N	4,
Bain			S	
Barringer	292	6	N	5,
Berryhill			S	
Beverly Woods	27?	?	S	
Billingsvile	259	5	N	4,
Briarwood	222	5	U	4,
Bruns Avenue	528	12	N	7,
Chantilly			S	
Clear Creek			S	
Collinswood	168	3		
Cornelius			S	
Cotswold	195	4	N	4,
Davidson			S	
Derita			S	
Devonshire	276	6	S	
Dilworth	25	1	U	3,
Double Oaks	587	12	N	7,
Druid Hills	312	6	N	5,
Eastover	237	5	N	4,
Elizabeth	95	2	N	3,
Enderly Park			S	
First Ward	533	12	U	7,
Hickory Grove			S	

ELEMENTARY SCHOOLS

School	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING AREA	
n Valley	342	7	N	5,400
land			S	
ins			S	
ersville			S	
ntryside Farms	220	5	N	4,600
ld	178	4	U	4,200
Lane			S	
ler			S	
lome	354	7	N	5,800
ole Heights	456	9	N	6,200
Creek			S	
e Parks	473	10	N	6,600
ns			S	
r Oaks	149	3	N	3,800
ood	4	1	N	3,000
rlaire	252	5	N	4,600
s Park	183	4	N	5,200
ons Ford			S	
ell			S	
ale			S	
ut			S	
ton	405	9	N	6,200
Pennsboro	175	4	U	4,200
Road	265	5	N	4,800
Creek	173	3	U	4,600
ville			S	
Road			S	
ood	4 [illegible]	2	N	3,200

DR. JOHN FINGER'S PLAN OF DESEGREGATION

ELEMENTARY SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING AREA
Rama Road	277	6	N
Sedgefield	198	4	N
Selwyn	391	8	N
Shamrock Gardens	213	4	N
Sharon	230	5	N
Starmount	256	6	N
Statesville Road			S
Steele Creek			S
Thomasboro	258	5	N
Tryon Hills	95	2	N
Tuckaseegee	265	6	N
University Park	502	12	N
Villa Heights	728	15	N
Westerly Hills	137	3	N
Wilmore	55	1	N
Windsor Park	304	7	N
Winterfield	338	7	N
5th & 6th grade students	140	3	
Closed Schools			
Changes in Attendance Areas		17	
TOTALS	13,349	293	

885a

TYPICAL COSTS FOR SCHOOL BUS [illegible]

One Bus $5,000.00

Each Additional Bus 400.00

BREAK DOWN OF COSTS

Entrance Drives = 2 - 20' X 50'
One Bus Lot = 50' X 140'

Grading (Min.)	=	200.00
Stone	=	[illegible]
Paving	=	[illegible]
Sub-Total	=	$1,492.00
Vertical Curb	=	[illegible]
City Stand. Curb	=	[illegible]
		2712.00
Storm Drain	=	288.00
TOTAL	=	2912.00
ROUNDED	=	3000.00

EACH ADDITIONAL BUS (15' X 140').

Grading	=	20.00
Stone	=	148.00
Paving	=	161.00
		329.00
Vertical Curb	=	80.00
		$409.00
ROUNDED		400.00

Bus Loading at Schools

General Recommendations

1. Safety of pupils should be the primary consideration in locating vehicle
tion on the school site. Convenience, directness and economy are secondary
considerations.

2. The bus parking area should be designed in connection with the unloading a
area. It should be independent of other driveways and so designed that b
the buses can be avoided.

3. The bus parking area should be so planned that the movement of buses on the
site will be kept to a minimum.

4. The bus parking area should be of sufficient size to accommodate, at one ti
buses serving the school. Additional space, possibly undeveloped space, f
buses should be reserved for future growth.

5. The bus parking area should be located away from playground areas, and shou
separate from all other vehicle parking areas.

6. The bus parking area should be constructed on a level lot. It should be w
drained and all-weather surfaced. Designated spaces and control signs are

7. The bus parking area should be planned in such a manner that:
   a. Pupils unloading from the bus door will walk away from the bus toward t
   schoolhouse entrance.
   b. Pupils will not cross any driveway on which other vehicles may be movi
   c. Buses entering on the lot will not cut through the line of pupils walki
   schoolhouse entrance.

8. Driveways to the bus parking lot should never circle the schoolhouse.

9. Driveway turns over which school buses will travel should be laid out so the
long radius of each will adequately accommodate maximum length school buses in

10. Sufficient space should be so provided that a convenient plan can be worked o
bus movements to drive completely through from one end to the other to avoid

, ngle (diagonal) parking is preferable to perpendicular parking. Angle parking lets itself more readily to loading and unloading pupils, avoiding tangles with pedestrians and moving buses out of line.

, thus the two lanes at any one time created can be twelve buses, two separate parking areas located apart from one another with separate entrances would conserve time in receiving and dismissing buses and prevent undue confusion in loading and unloading pupils.

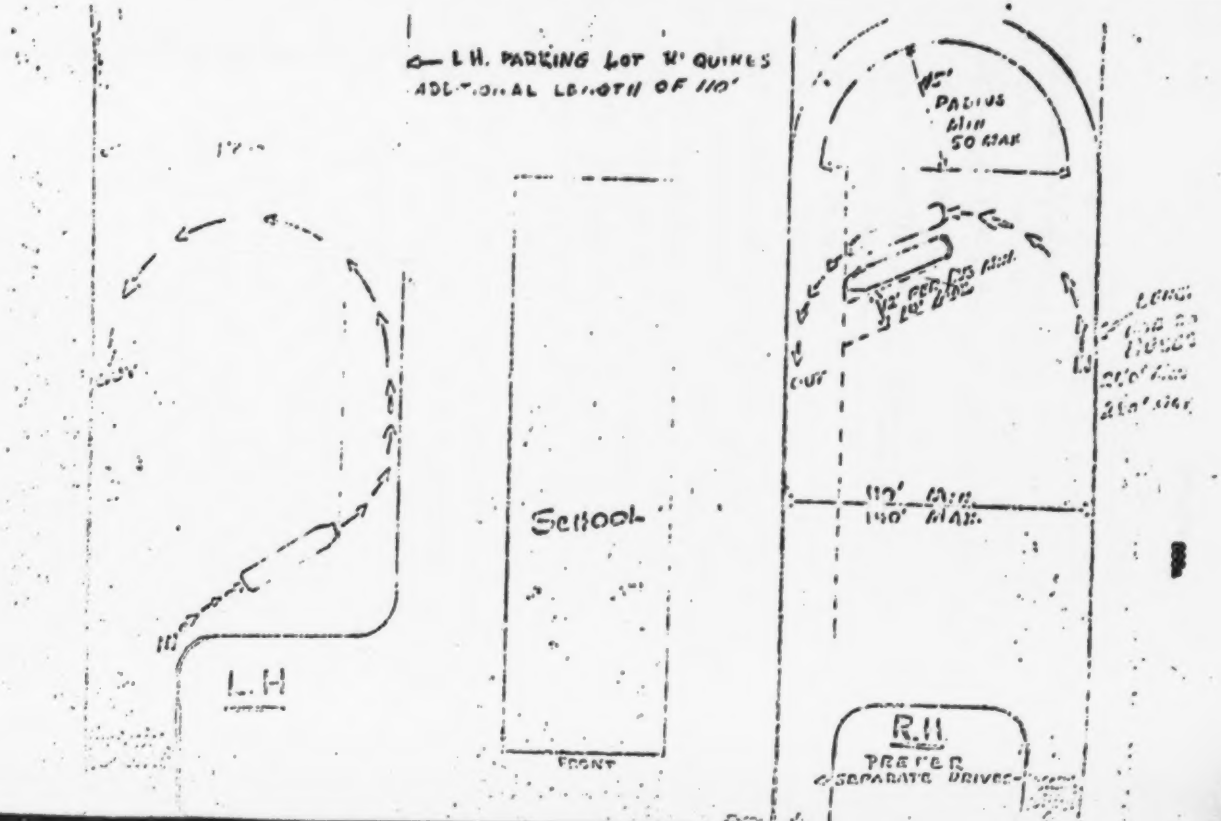
ested Layouts

The accompanying diagrams on the following sheets illustrate suggestions for layouts of driveways and parking areas for buses.

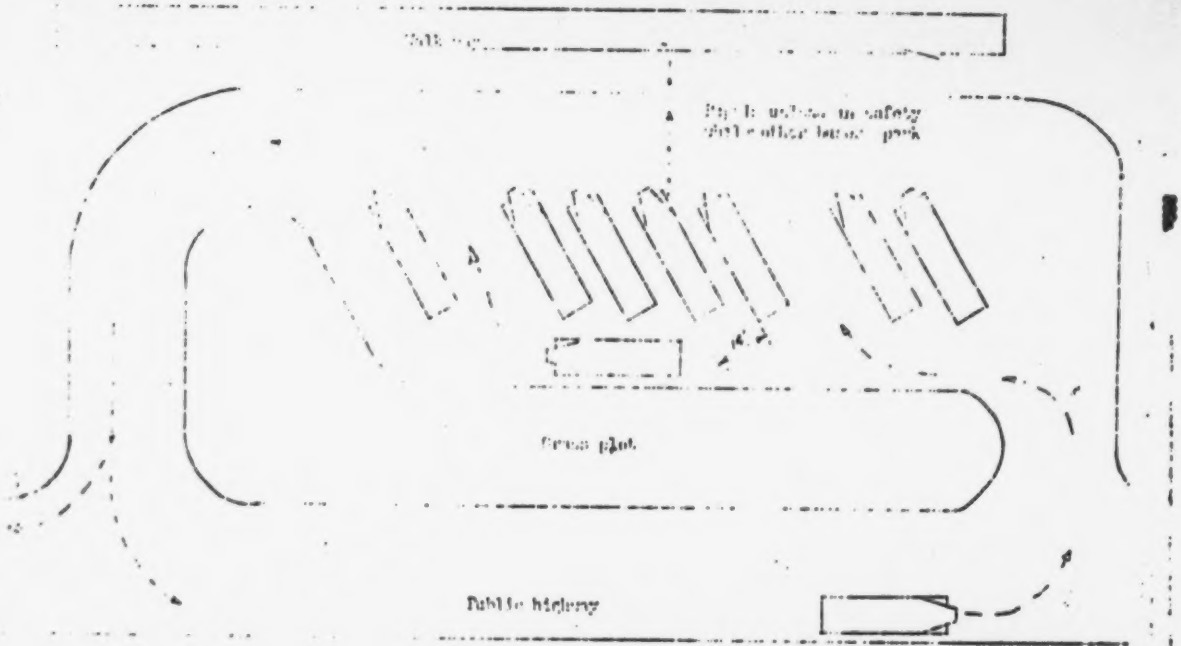
The suggested parking area layout may be used equally as well for elementary, also, junior high or senior high schools.

Those that make central bridge should be parked in position nearest the parking area exit to provide freedom of parking and without having through the lines of pupils unloading or loading.

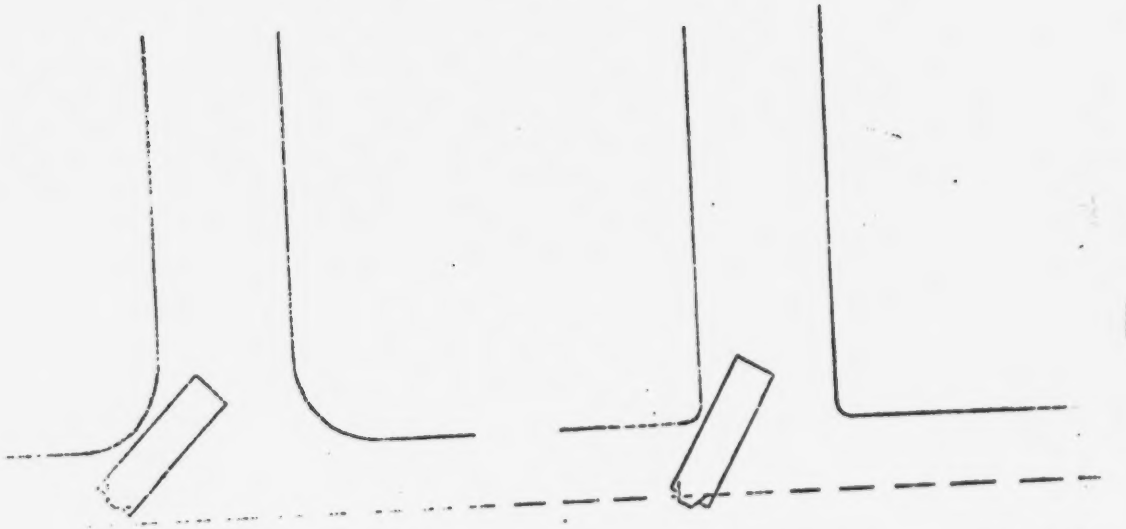
It is realized by any that while pupils are loading or unloading, or while buses are coming in or off the area, the operation must be under close direction of assigned school personnel to insure safety.


L.H. PARKING LOT W/ QUIKES
ADDITIONAL LENGTH OF 110'
School
L.H
FRONT
R.H
PREFER
SEPARATE DRIVES
112' MIN
190' MAX.

Parking, unloading, loading and moving
to cut off the school grounds for
maximum pupil safety



Driveways to bus parking areas



Flared Entrance Drive

Without wide driveway at juncture with public road, bus may cross on wrong side of center in leaving school grounds

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Affidavit of Louis W. Alexander, Assistant Director of Division of Transportation of State Board of Education

(Referred to in Foregoing Tender of Evidence)

LOUIS W. ALEXANDER, being duly sworn, deposes and says that:

1. I am Assistant Director of the Division of Transportation of the North Carolina State Board of Education, a position which I have held for the past three years. For the preceeding fifteen years, I was School Bus Route Supervisor for the Western Area of North Carolina (which included Mecklenburg County) and as such was responsible to the Division of Transportation of the North Carolina State Board of Education.

2. In the performance of the duties and responsibilities of my present position, I am familiar with school bus transportation systems throughout the state, with the procurement and operation of school buses and other facilities, with bus routes and schedules, with state laws concerning transportation of school children, safety requirements and standards, and with the various other things that relate to the transportation of school children in North Carolina.

3. I have carefully analyzed the affidavit of J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools (dated February 13, 1970) and the facts and information set forth therein. I have personally conferred with Mr. Morgan and members of his staff regarding the Pupil Assignment Plans referred to in his affidavit—particularly as they affect the transportation of school children, bus routes and schedules, transportation costs, availability of facilities and the many

other facets involved in the movement of a great number of children in the Charlotte-Mecklenburg School System. I have examined the maps showing the assignment proposals under the Board Plan and the Finger Plan and all locations of the schools with particular attention to the transportation that would be required to implement either of these plans.

4. Based upon my experience with school transportation systems in this state (particularly Mecklenburg County) in my judgment, the statements made by Mr. Morgan in his affidavit are sound and well considered. In making my evaluation of these facts and statements, I have, of course, relied upon the data and information furnished me regarding the number of additional children to be transported and the school bus routes to implement either of the two plans. However, I received from Mr. Morgan and his staff, a detailed explanation of the basis upon which the data and information set forth in his affidavit were computed and the many factors which were taken into account. Mr. Morgan's statements regarding the number of buses and other facilities that are required, the length and time of bus routes, the capital and operating expenses, the utilization of equipment, safety factors and other related matters are well in line with what I would expect.

5. In my opinion, the addition of any significant number of buses (irrespective of which plan is used) would create an intolerable situation not only for the Charlotte-Mecklenburg Schools but the public as well. In the operation of any school bus program, the *safety* and well-being of the children are our primary concerns. Even if the buses and

Affidavit of Louis W. Alexander, Assistant Director of Division of Transportation of State Board of Education

drivers were available, the busing of children into and out of the center of the city along streets and highways already jammed with heavily congested traffic is unwise and unsafe. This is true whether student or adult drivers are used. I would particularly emphasize the difficulties and hazards involved where there are insufficient or inadequate bus parking and other loading and unloading facilities.

LOUIS W. ALEXANDER

6. The above observations were made upon the request of Mr. J. D. Morgan, Assistant Superintendent and Mr. Benjamin S. Horack, Board Attorney.

Louis W. Alexander

(Sworn to February 17, 1970)

Affidavit of Herman J. Hoose, Director of Traffic Engineering for the City of Charlotte, North Carolina

(Referred to in Foregoing Tender of Evidence)

HERMAN J. HOOSE, being duly sworn, deposes and says that:

1. I am now, and have been for the past 22 years, Director of Traffic Engineering for the City of Charlotte. I am charged with primary responsibility for all matters relating to traffic on city streets and thoroughfares. By reason of my position, I also thoroughly familiar with matters relating to traffic in the portions of Mecklenburg County located outside the city limits. The direction and control of inner city traffic must be and is carefully coordinated with that of the outlying areas.

2. I have carefully reviewed with Mr. J. D. Morgan, Assistant Superintendent for Business Services of the Charlotte-Mecklenburg Public Schools, his affidavit (dated February 13, 1970) relating to the transportation requirements of the Board Plan and the Court approved Finger Plan referred to in that affidavit—particularly as they would affect traffic patterns, facilities and safety within the City of Charlotte.

3. The peak traffic rush hours in Charlotte are from 7:30 to 9:30 in the morning and from 4:30 to 6:30 in the evening. As is true with most other cities, the control and movement of vehicular traffic along our already over burdened streets and thoroughfares constitutes one of our most critical problems.

4. The main traffic arteries in the city (as well as those in the perimeter) are already jammed almost to the break-

ing point. Consistent with vehicular and pedestrian safety (which, of course, must be our primary concern), it is the objective of my Department to devise traffic patterns and controls that will expedite the orderly movement and flow of traffic within the city. The addition of a large number of school buses to the congested inner city thoroughfares would occasion serious problems—both from the standpoint of traffic movement and safety.

5. By State law a loaded school bus cannot be operated on a public street or road at a speed in excess of 35 miles per hour. Many of our inner city traffic arteries prescribe a 40 or 45 mile maximum in order to speed up the movement of traffic. The cross-bussing and satellite bussing required of the Court's Finger Plan will necessarily require the school buses to use these thoroughfares. This would make a shambles out of our city traffic—particularly during the morning rush hours and, if staggered school schedules involve bussing after 4:30 p.m., during the evening rush hour as well. We have some expressways in the city that prescribe maximum speeds of 55 or 60 miles per hour. In my judgment it would be completely impractical to expect to allow school buses to use these expressways. Under State law traffic must stop while a school bus is loading or unloading children. To the extent that pickup and discharge points are located on public streets and roads, the movement of traffic would come to a complete standstill. This will create an intolerable situation. Stop-and-go traffic of slow moving school buses in congested traffic would constitute a real danger for both the school buses and other traffic. From a safety standpoint, children will be particularly vulnerable at the points where they are picked up and

dropped off by school buses. This hazard can be minimized to the extent that school buses load and unload children on school grounds or other off street locations. However, it is anticipated that many of the pickup and dropoff points would be on streets which children reach only by crossing busy streets and intersections and where children will congregate to board or get off the school buses.

6. Of special concern to my Department would be the problems caused by the entry of loaded school buses into the main traffic arteries from secondary and residential streets—particularly during rush hour traffic. Police or traffic controls (which frequently would not otherwise be needed) would be required at these intersections to reduce the hazards occasioned by the entry of the buses into the mainstream of traffic. This in turn will further slow down traffic and clog the already over burdened thoroughfares of the city. Similar problems will exist where loaded school buses enter and leave bus parking areas.

7. It is anticipated that the difficulties involved in the movement of large numbers of children within the city by bus will be further compounded by the increased congestion that will result on bad weather days when parents will forego the use of school buses and will drive their children to school in the morning and pick them up at school in the afternoon.

8. Traffic safety and control will be seriously impaired by any program of mass bussing of school children within the City of Charlotte. Substantially similar problems would be encountered outside the city—although perhaps not as

Affidavit of Herman J. Hoose, Director of Traffic Engineering for the City of Charlotte, North Carolina

acute where the buses are able to use secondary roads that run through the less densely populated areas of the county. The Charlotte-Mecklenburg Public Schools already operate a large bus fleet to provide the transportation that the State law requires. This existing bussing occasions many problems—which should not be unnecessarily aggravated by additional movement of a large number of children as will be required to implement the plans referred to in Mr. Morgan's affidavit.

/s/ HERMAN J. HOOSE
Herman J. Hoose

(Sworn to February 24, 1970)

Affidavit of Robert L. Deaton, Assistant General Manager of Charlotte City Coach Lines, Inc.

(Referred to in Foregoing Tender of Evidence)

ROBERT L. DEATON, being first duly sworn, says that:

1. I am the Assistant General Manager and an officer of Charlotte City Coach Lines, Inc., which operates the public transit system in the City of Charlotte. We operate under an exclusive franchise granted by the City of Charlotte which permits us to furnish our regular service within the City and the two mile perimeter beyond the city limits. We also hold a Certificate issued by the North Carolina Utilities Commission which permits us to operate a charter or contract service anywhere in Mecklenburg County.

2. At present Charlotte City Coach Lines has a fleet of 128 busses. 114 of the busses are required to furnish the normal transportation needs of the public. Of the remaining 14 busses, 2 are already under contract commitments and 7 more must be kept in reserve as replacement spares when busses used for our regular service break down or are in need of repairs. We should keep at least 10% of our fleet available for replacement spares. Therefore, a replacement reserve of only 7 busses is substantially less than what we normally consider to be our minimum needs in this respect. With our present fleet, 5 busses are the maximum that we could make available on a contract basis to provide transportation for school children. The largest bus in our fleet has a seating capacity for 53 adults. By utilizing standing room in the aisles, we anticipate that each of the busses could transport 65 school children or a total of 325 for the 5 busses that would be

available. Some additional children could be transported by the use of these busses if the opening and closing hours of the various schools are staggered so that we can make greater use of our equipment by permitting one bus to serve more than one school.

3. The busses we have in our fleet cost approximately $38,000 to $39,000 each. It is not economically feasible for us to expand our fleet by the addition of more busses for the sole purpose of providing transportation for school children in the mornings and afternoons of school days. Further, it takes some 8 to 10 months to obtain delivery of a new bus. Nor is it economically feasible for us to supplement our fleet by the acquisition of used busses, since our experience indicates that the maintenance cost of such busses is prohibitive.

4. We would be willing to negotiate with the Charlotte-Mecklenburg Schools on a contract basis for the use of these 5 available busses to transport school children. As fixed by the North Carolina Utilities Commission, our normal contract rate per bus is $18.00 per hour (or fraction) for the first hour and $10.00 for each additional hour (or fraction). Our hourly rates are charged from the time a bus leaves its garage until it returns. Although we do not now know the specifics of the proposed school routes which might be served by our busses on a contract basis, we anticipate that the time of a morning or afternoon run would be about 30 minutes for the short urban routes and 1 hour and 15 minutes or more for the longer routes out in the County. We might be able to negotiate some reductions in our normal contract rates. However,

Affidavit of Robert L. Deaton, Assistant General Manager of Charlotte City Coach Lines, Inc.

we will be unable to do so until we know what the routes and schedules will be and anticipate that (after we are advised of the children to be transported) we will need about 3 weeks to analyze the routes before coming up with a rate proposal. Any contract rates which may be negotiated with the Schools must be approved by the North Carolina Utilities Commission.

/s/ Robert L. Deaton
Robert L. Deaton

(Sworn to February 10, 1970.)

Order

(Filed February 25, 1970)

Upon motion duly made, IT IS HEREBY ORDERED that the following persons and organizations described in the petition of the plaintiffs as additional parties-defendant be, and they are hereby made parties herein:

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina

HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction

HONORABLE WILLIAM K. MCLEAN, Judge of the Superior Court of North Carolina

TOM B. HARRIS, Charlotte, North Carolina

G. DON ROBERSON, Charlotte, North Carolina

A. BREECE BRELAND, Charlotte, North Carolina

JAMES M. POSTELL, Charlotte, North Carolina

WILLIAM E. RORIE, JR., Charlotte, North Carolina

CHALMERS R. CARR, Charlotte, North Carolina

ROBERT T. WILSON, Charlotte, North Carolina

CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County, North Carolina

JAMES H. CARSON, JR., Attorney, Charlotte, North Carolina

WILLIAM H. BOOE, Attorney, Charlotte, North Carolina

It is directed that service of the following documents be made immediately by certified mail, return receipt requested, upon the additional parties hereby made:

1. MOTION TO ADD ADDITIONAL PARTIES DEFENDANT AND FOR FURTHER RELIEF, with attached POINTS OF AUTHORITY, served by plaintiffs on February 13, 1970.

2. NOTIFICATION AND REQUEST FOR DESIGNATION OF THREE-JUDGE COURT, dated February 19, 1970, including exhibits referred to therein, as follows:

   Exhibit A—OPINION AND ORDER filed December 1, 1969.

   Exhibit B—ORDER filed February 5, 1970.

   Exhibit C—ORDER filed December 2, 1969.

   Exhibit D—Complaint, amended complaint and two orders entered by Judge William K. McLean on February 12, 1970, in suit pending in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, bearing No. 70-CVS-1097.

   Exhibit E—Statement made by Governor Robert W. Scott on February 11, 1970.

   Exhibit F—Letter dated February 12, 1970, written by Governor Robert W. Scott to Dr. W. L. Turner, Director of the North Carolina Department of Administration.

   Exhibit G—Statement made by Dr. A. Craig Phillips on February 11, 1970.

3. DESIGNATION OF THREE-JUDGE COURT, filed February 24, 1970.

The plaintiffs are directed to prepare and file on or before Monday, March 2, 1970, proposed findings of fact and conclusions of law and a proposed order, and a brief in support of their position.

Order

The other parties are directed to prepare and file on or before Friday, March 6, 1970, proposed findings of fact and conclusions of law and a proposed order, and a brief in support of their position.

If there is any additional evidence which any party desires to introduce by deposition or affidavit, the court will receive such evidence, in written form, up to and including Friday, March 6, 1970. It is not contemplated that any more oral testimony in a court hearing will be necessary.

The hearing before the three-judge court will not be an evidentiary hearing, but will be a hearing based upon the record which has been developed by the time of the hearing.

This the 25th day of February, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

A True Copy

TESTE:

THOS. E. RHODES, Clerk

By: Mildred L. Loozer
Deputy Clerk

Notice of Appeal

(Filed February 25, 1970)

Notice is hereby given that the Charlotte-Mecklenburg Board of Education, a public body corporate; William E. Poe, Henderson Belk, Dan Hood, Ben F. Huntley, Betsy Kelly, Sam McNinch, III and Carlton G. Watkins, defendants above named hereby appeal to the United States Court of Appeals for the Fourth Circuit from the following orders entered in this action on the dates indicated:

Opinion and Order dated April 23, 1969,

Two Orders dated June 4, 1969,

Opinion and Order dated June 20, 1969,

Order dated August 15, 1969,

Order dated August 29, 1969,

Order dated October 10, 1969,

Order dated November 7, 1969,

Opinion and Order dated December 1, 1969,

Order dated December 2, 1969, and

Order dated February 5, 1970,

together with the findings of fact and conclusions of law relied upon by the Court in support of the foregoing orders.

Notice of Appeal

This 25th day of February, 1970.

WILLIAM J. WAGGONER
William J. Waggoner
Weinstein, Waggoner, Sturges, Odom
and Bigger
1100 Barringer Office Tower
Charlotte, North Carolina

BENJ. S. HORACK
Benj. S. Horack
Ervin, Horack and McCartha
806 East Trade Street
Charlotte, North Carolina

Attorneys for Defendants

Motion to Add Additional Parties Defendant and For Further Relief

(Filed February 27, 1970)

On February 5, 1970, this Court directed that the Charlotte-Mecklenburg Board of Education and other defendants proceed immediately with a plan for complete desegregation of the Charlotte-Mecklenburg Schools. On February 26, 1970, this Court entered an order adding additional parties and directing that they show cause why they should not be enjoined from interfering with or otherwise preventing the implementation of the February 5 order. The additional parties defendant had taken steps and conspired to thwart, inhibit and in any way frustrate the orders of this Court. Some of the additional parties defendant had secured patently illegal orders from the State Superior Court purportedly enjoining implementation of the orders of this Court.

On Sunday night, February 22, at approximately 10:16 p.m., a time when plaintiffs understand the courts of this State are normally closed for business purposes, approximately 50 people, some of whom have now been added as parties defendant, filed in the Superior Court of Mecklenburg County another complaint seeking to enjoin implementation of the orders of this Court. They secured from the Honorable Frank Snepp, Resident Judge of the Superior Court of Mecklenburg County, an order purportedly enjoining the Charlotte-Mecklenburg School Board from instituting or implementing or putting into effect the order of this Court. The order of the Superior Court of Mecklenburg County was dated Sunday, February 22, 1970 and was filed in the Superior Court of Mecklenburg County on the same date at 10:16 p.m. This is the third order of the Mecklenburg County Superior Court seeking to frus-

trate and to prevent implementation of the orders of this Court. With full knowledge of the lack of jurisdiction of the Superior Court to enjoin orders of the Federal Court declaring constitutional rights, Superior Courts of the State have repeatedly entered such orders and, plaintiffs are advised and so allege, will continue to do so unless and until enjoined by this Court.

It is clear that the plaintiffs involved in the proceeding in the Superior Court of Mecklenburg Couty and the Superior Court well knew the lack of jurisdiction of the Superior Court to restrain or enjoin orders entered by this Court. The timing of the order, the continued efforts of the plaintiffs in that proceeding clearly show the ingenuous efforts of the parties in those proceedings to attempt to frustrate, inhibit and prevent the implementation of the orders of this Court.

At great expense, plaintiffs have sought to secure the enjoyment of their rights as protected and secured by the Constitution of the United States. At great expense, plaintiffs have been harassed, intimidated and threatened because of their efforts to enjoy their rights. The efforts of the parties in the proceedings in the Superior Court of Mecklenburg County and of the parties added as defendants by this Court having inhibited nd frustrated the efforts not only of the black students in this System to enjoy constitutionally protected rights but have similarly frustrated the efforts of black teachers and school personnel. Black teachers and school personnel have been threatened and intimidated by said parties solely as an effort to prevent implementation of the orders of this Court. Only unless this Court proceed immediately to deal with these patently illegal acts and practices of these parties will Negro chil-

dren, Negro teachers and Negro parents in the community be able to enjoy their rights as secured by the Constitution.

The parties involved in the latest proceeding filed in Superior Court of Mecklenburg County are as follows: Mrs. Robert Lee Moore, for herself and for her minor children, Oscar Moore, Lois Moore, Grace Moore and Jerry Moore; J. D. Little, Jr. and Bettie C. Little, for themselves and for their minor child, Alec Little; John T. Vernon and Nancy H. Vernon, for themselves and for their minor children, David Vernon and Patty Vernon; Floyd T. Boyce and Louise D. Boyce, for themselves and for their minor children, Lou Ann Boyce and Lisa C. Boyce; V. Don Perrin and Nancy G. Perrin, for themselves and for their minor child, Vic Perrin; Jack V. Scott and Jane B. Scott, for themselves and for their minor children, Kenny Scott and Craig Scott; Mrs. Martha M. Glenn, for herself and for her minor child, Connie Glenn; William M. Hood, Jr. and Mary D. Hood, for themselves and for their minor children, Roby Hood, Wrenn Hood, William M. Hood, III and Mary Lib Hood; John D. Hasty, for himself and for his minor children, John D. Hasty, Jr. and Renee Hasty; Aubrey E. Easterlin, Jr., for himself and for his minor children, Billy Easterlin, Vickie Easterlin and Kim Easterlin; James E. King, for himself and for his minor children, Leigh King, Cynthia King, Susan King and Jan King; Melvin D. Childers, Jr., for himself and for his minor child, Cynthia Childers; Thomas S. Weaver and Margaret S. Weaver, for themselves and for their minor children, Libby Weaver and Terry Weaver; Ted E. Manning and Jackie Manning, for themselves and for their minor child, Steven Manning; Horace Davis, Jr. and Evelyn A. Davis, for themselves and for their minor children, Horace Davis, III,

Motion to Add Additional Parties Defendant and For Further Relief

Evelyn Davis and Susan Davis; Orrie B. Oats, for herself and for her minor child, Leroy Oats, Jr.; Thomas B. Harris, for himself and for his minor children, Steve Harris and Kelly Harris; Lorene H. Dresser, for herself and for her minor child, Michell Dresser; John H. Horner, for himself and for his minor children, Laura Horner, John Horner and Brian Horner; Shirley C. Nail, for herself and for her minor children, Kim Nail and Deana Nail; G. Donald Robberson, for himself and for his minor child, Charles Roberson; Raymond Kenneth Young and Edna R. Young, for themselves and for their minor child, Kathy Young; William K. Summerville, for himself and for his minor children, Michael Summerville and Craig Summerville; James L. Kiser, for himself and for his minor child, Kimberly Kiser; Charles N. Briley, for himself and for his minor children, Allison Briley and Nathaniel Briley; William R. Dowtin and Marion W. Dowtin; J. Frank Newton and Frances M. Newton; W. Baine Martin and Elizabeth M. Martin; Edward S. Fisher and Emily S. Fisher; Thomas E. McCabe and Ann R. McCabe; Lloyd Ellis Zedaker, Jr. and Mary Frances Zedaker; Brenda A. Hill; Baxter L. Dixon; and Horace N. Williamson. Attorneys William H. Booe and Whiteford S. Blakeney brought suit on behalf of said parties. The Honorable Frank Snepp issued the restraining order on behalf of the parties. The temporary restraining order issued by Judge Snepp is returnable before him on the 3rd day of March, 1970 at 9:30 a.m.

Plaintiffs respectfully pray that the Court issue an order joining the following as additional parties defendants: Mrs. Robert Lee Moore, for herself and for her minor children, Oscar Moore, Lois Moore, Grace Moore and

Motion to Add Additional Parties Defendant and For Further Relief

Jerry Moore; J. D. Little, Jr. and Bettie C. Little, for themselves and for the minor child, Alec Little; John T. Vernon and Nancy H. Vernon, for themselves and for their minor children, David Vernon and Patty Vernon; Floyd T. Boyce and Louise D. Boyce, for themselves and for their minor children, Lou Ann Boyce and Lisa C. Boyce; V. Don Perrin and Nancy G. Perrin, for themselves and for their minor child, Vic Perrin; Jack V. Scott and Jane B. Scott, for themselves and for their minor children, Kenny Scott and Craig Scott; Mrs. Martha M. Glenn, for herself and for her minor child, Connie Glenn; William M. Hood, Jr. and Mary D. Hood, for themselves and for their minor children, Roby Hood, Wrenn Hood, William M. Hood, III and Mary Lib Hood; John D. Hasty, for himself and for his minor children, John D. Hasty, Jr. and Renee Hasty; Aubrey E. Easterlin, Jr., for himself and for his minor children, Billy Easterlin, Vickie Easterlin and Kim Easterlin; James E. King, for himself and for his minor children, Leigh King, Cynthia King, Susan King and Jan King; Melvin D. Childers, Jr. for himself and for his minor child, Cynthia Childers; Thomas S. Weaver and Margaret S. Weaver, for themselves and for their minor children, Libby Weaver and Terry Weaver; Ted E. Manning and Jackie Manning, for themselves and for their minor child, Steven Manning; Horace Davis, Jr. and Evelyn A. Davis, for themselves and for their minor children, Horace Davis, III, Evelyn Davis and Susan Davis; Orrie B. Oats, for herself and for her minor child, Leroy Oats, Jr.; Thomas B. Harris, for himself and for his minor children, Steve Harris and Kelly Harris; Lorene H. Dresser, for herself and for her minor child, Michell

Dresser; John H. Horner, for himself and for his minor children, Laura Horner, John Horner and Brian Horner; Shirley C. Nail, for herself and for her minor children, Kim Nail and Deana Nail; G. Donald Roberson, for himself and for his minor child, Charles Roberson; Raymond Kenneth Young and Edna R. Young, for themselves and for their minor child, Kathy Young; William K. Summerville, for himself and for his minor children, Michael Summerville, and Craig Summerville; James L. Kiser, for himself and for his minor child, Kimberly Kiser; Charles N. Briley, for himself and for his minor children, Allison Briley and Nathaniel Briley; William R. Dowtin and Marion W. Dowtin; J. Frank Newton and Frances M. Newton; W. Baine Martin and Elizabeth B. Martin; Edward S. Fisher and Emily S. Fisher; Thomas E. McCabe and Ann R. McCabe; Lloyd Ellis Zedaker, Jr. and Mary Frances Zedaker; Brenda A. Hill; Baxter L. Dixon; Horace N. Williamson; William H. Booc; Whiteford S. Blackeney; and the Honorable Frank Snepp.

Plaintiffs further pray that the Court issue a temporary restraining order dissolving the injunctive order entered in the proceeding by the Honorable Frank Snepp entitled: *Mrs. Robert Lee Moore, et al.* v. *Charlotte-Mecklenburg Board of Education, et al.*, 70 CVS 2045, and temporarily and permanently restraining any further proceedings in the action.

Plaintiffs further pray that the Court specifically enjoin Honorable Frank Snepp and all other State Court judges from issuing temporary injunctive orders or entering further proceedings designed to or which have the effect of restraining, preventing, prohibiting or in any way inhibiting the order of this Court.

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Plaintiffs further pray the Court for a temporary and permanent injunction against all defendants, including the additional parties defendant added and requested herein to be added and all parties having notice of the orders of this Court from initiating or proceeding with any action in any state court which has the purpose or effect of interfering with outstanding order in this cause.

Plaintiffs further pray the Court for a temporary and permanent injunction restraining all parties defendant from in any way intimidating the plaintiffs, students and teachers who seek in this proceeding to enjoy their constitutionally protected rights.

Plaintiffs further pray that the Court temporarily and permanently enjoin all defendants from in any way taking steps to inhibit or frustrate the orders of this Court.

Plaintiffs further pray the Court that they be allowed their costs in this proceeding and reasonable counsel fees.

Plaintiffs further pray that the Court direct the United States Marshal to personally serve a copy of the Complaint, the Amended Complaint, the Motion for Further

Relief and all orders, including the injunctive order prayed for herein upon all defendants named herein.

Respectfully submitted,

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Attorneys for Plaintiffs

Motion for Temporary Restraining Order and for Contempt

(Filed February 27, 1970)

Plaintiffs, by their undersigned counsel, respectfully move the Court for a temporary restraining order and an order finding all members of the Charlotte-Mecklenburg Board of Education and the Superintendent of the Charlotte-Mecklenburg Public Schools in contempt and exacting a fine of each of the said defendants in the amount of $10,000.00 per day or imprisonment pending compliance by said defendants with the orders of this Court. As grounds for said motion, plaintiffs respectfully show the following:

1. On Sunday night, February 22, 1970, the Honorable Frank Snepp of the Mecklenburg Superior Court entered an *ex parte* temporary restraining order purporting to enjoin the School Board from complying with the orders of this Court. The *ex parte* order of the Mecklenburg Superior Court was patently in violation of the supremacy clause of the Constitution of the United States.

2. On February 26, 1970, the defendants, Charlotte-Mecklenburg Board of Education and Superintendent of the Charlotte-Mecklenburg Public Schools removed the State proceeding to this Court.

3. Knowing the patent invalidity of the State Court order, the Charlotte-Mecklenburg Board of Education and the Superintendent of Charlotte-Mecklenburg Public Schools have now decided to ignore the orders of this Court and to follow the unconstitutional order of the State Superior Court. Said defendants have never intended and do not intend now to implement the orders of this Court

and, in the absence of some immediate steps by this Court, will continue to frustrate and deny the constitutional rights of plaintiffs herein.

4. On four different occasions, plaintiffs have alleged the contemptuous practices of these defendants of ignoring the clear directives of the Court and the rights of the plaintiffs. On each occasion, the Court has reserved decision. The patience of the Court now places the plaintiffs in the position of having declared constitutional rights which are being and will continue to be illegally frustrated and denied by the lawless actions of these public officials who have refused to obey every substantive directive of this Court.

5. In order to insure implementation of the Court's orders and the enjoyment by plaintiffs of their constitutional rights immediate and effective steps need be taken now by the Court. In the order entered by this Court on February 26, 1970, adding additional parties the Court directed the added parties-defendant to show cause on March 10, 1970, why the relief requested by plaintiffs should not be granted. Plaintiffs requested, on February 27, 1970, that other additional parties be added, parties who initiated and obtained the temporary restraining order issued by the Mecklenburg Superior Court. To wait now for the March 10, 1970 hearing would clearly frustrate and prevent implementation of the February 5, 1970 order of this Court.

WHEREFORE, plaintiffs respectfully pray that the Court issue immediately a temporary restraining order enjoining the enforcement of the State Court orders which infringe

upon outstanding orders of this Court; enjoining any further efforts by all defendants from taking steps which would prevent and inhibit the implementation of the orders of this Court and finding all members of the Charlotte-Mecklenburg Board of Education and the Superintendent of the Charlotte-Mecklenburg Public Schools in contempt of the orders of this Court and imposing a fine of not less than $10,000.00 or imprisonment for each day that said defendants fail to implement the orders of this Court.

Respectfully submitted,

CONRAD O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina

CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, North Carolina 28202

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN CHACHKIN
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

Affidavit of J. LeVonne Chambers in Support of Order

J. LeVonne Chambers, being first duly sworn, deposes and says:

That he is one of counsel for plaintiffs in the above-styled case.

That since the filing of the most recent motion by plaintiffs for the addition of parties defendant and for further relief, it has been brought to his attention that the School Board, on advice of their counsel, has now decided to do nothing else to comply with this Court's order on the basis of the most recent restraining order entered by the Superior Court of Mecklenburg County on Sunday night, February 22, 1970 in the case entitled *Moore, et al.* v. *Charlotte-Mecklenburg Board of Education,* 70 CVS 2045.

That plaintiffs have taken further discovery with respect to steps previously taken by the School Board following this Court's order of February 5, 1970.

That the evidence now of record will establish that the Board has not complied and does not intend to comply with the mandate of the Court to desegregate.

That in order to insure the full implementation of the directives of this Court, it is imperative that the Court take action to insure compliance with its orders by immediately enjoining all proceedings in the State Court, temporarily and permanently enjoining the additional parties and the original parties defendants from in any way attempting to prevent or obstruct the carrying out of this Court's orders.

This 27 day of February, 1970.

J. LeVonne Chambers

(Sworn to February 27, 1970)

Request for Admission

(Filed February 27, 1970)

To: William J. Waggoner, Esq.
Weinstein, Waggoner, Sturges & Odom
1100 Barringer Office Tower
Charlotte, North Carolina

Benjamin S. Horack, Esq.
806 East Trade Street
Charlotte, North Carolina

Plaintiffs request that the defendants admit the following facts pursuant to Rule 36 of the Federal Rules of Civil Procedure:

1. That at least since 1930 until 1961 Mecklenburg County Board of Education, which has merged with the former Charlotte City Board of Education, operated public school buses to transport students to and from school.

2. That said Board operated and routed these buses on a racially segregated basis, transporting Negro students to Negro schools and white students to white schools.

3. That because of the segregated schools, bus routes overlapped and Negro students who may have resided near white schools were transported by such schools to all-Negro schools and white students who may have lived near Negro schools were transported by such schools to all-white schools.

4. That at least since 1930 until 1961 the Charlotte City Board of Education which has now merged with the former Mecklenburg County Board of Education, operated public school buses to transport students to and from school.

Request for Admission

5. That said Board operated and routed these buses on a racially segregated basis, transporting Negro students to Negro schools and white students to white schools.

6. That because of the segregated schools, bus routes overlapped and Negro students who may have resided near white schools were transported by such schools to all-Negro schools and white students who may have lived near Negro schools were transported by such schools to all-white schools.

7. Since 1961, following the merger of the County and City Boards, the school board continued to provide transportation for students in the sytem who resided in the county or within the areas of the city annexed subsequent to 1957 who resided more than 1½ miles from the schools to which they were assigned.

8. That since 1961 until the closing of the ten all-Negro schools in the county in 1966, the merged board continued to provide separate bus service for Negro and white students.

9. That pursuant to the plan approved by the Court in August, 1969, the school board has provided transportation for approximately 767 inner-city black students to be transported to white residential areas of the city and county.

10. That the inner-city black students above referred to in many instances passed other schools serving their grade level on the way to the schools to which they had been assigned.

Request for Admission

PLEASE TAKE NOTICE that answers to the foregoing Request for Admission must be served upon the undersigned within ten (10) days.

Respectfully submitted,

CONRAD O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina

CHAMBERS, STEIN, FERGUSON AND LANNING
216 West Tenth Street
Charlotte, North Carolina

JACK GREENBERG
JAMES M. NABRIT, III
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

Amendment, Correction or Clarification of Order of February 5, 1970 dated March 3, 1970

Paragraph 7 of the February 5, 1970, order read in part as follows:

> "7. That transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance. Estimates of the number of children who may have to be transported have run as high as 10,000 or more."

Since February 5, estimates have been made by defendants that paragraph 7 would require transporting more than 23,000 pupils rather than 10,000 to 14,000, as estimated at the hearing. Upon reviewing the evidence introduced since that hearing, it appears that these higher estimates may be based on construing the above language of paragraph 7 so as to require an offer of transportation to all children who live more than 1½ miles from their school, including city children who are not now entitled to transportation. These, according to the testimony, may number as many as 13,000.

The court regrets any lack of clarity in the order which may have given rise to this interpretation. Paragraph 7 was never intended to require transportation beyond that now provided by law for city children who are not reassigned, nor for those whose reassignments are not required by the desegregation program.

Accordingly, paragraph 7 of the February 5, 1970 order is amended by deleting the words "attendance in any school" and inserting the words "reassignment to any school," in the first sentence.

This the 3rd day of March, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Court of Appeals Order Granting Stay Order of March 5, 1970

Order

An application for a stay pending appeal of the order of the District Court dated February 5, 1970 made to Judge Craven was by him referred to the entire Court pursuant to Rule 8 of the Federal Rules of Appellate Procedure.

Upon consideration by the full Court, it appears that disposition of this appeal will depend in part upon a resolution of factual questions as yet undetermined in the District Court. Specifically, the parties are in wide disagreement as to the impact of the order upon the School Board's transportation system, the number of pupils for whom transportation will be required under the order, the number of school buses needed to provide such transportation, their availability, and the cost of their acquisition and operation. The resolution of such factual issues is necessary to an orderly consideration of the issues on appeal insofar as they are directed to the order's requirement that transportation be provided for pupils reassigned under the order.

To facilitate the hearing and the disposition of this appeal, the District Court is requested, after such evidentiary hearings as may be necessary, to make supplemental findings of fact respecting the general issue of busing and the effect of its order with respect to the number of pupils transported, the number of buses required, their availability, and the additional capital and operating costs of transportation.

The District Court is requested, if possible, to file a supplemental order or memorandum, including such findings of fact, by March 20, 1970.

Court of Appeals Order Granting Stay Order of March 5, 1970

This appeal is accelerated. The hearing of the appeal will be scheduled in the Court of Appeals in Richmond, Virginia, on April 9, 1970 and the attorneys for all parties are directed to file their briefs in the office of the Clerk of the Court of Appeals for the Fourth Circuit not later than Tuesday, April 7, 1970.

Since it appears that the appeal cannot be heard and determined prior to April 1, 1970, the date for implementation of the first phase of the order of the District Court, and since the Court of Appeals is presently unable to appraise, in the absence of the requested additional findings of fact, the impact of the busing requirements,

It Is Now Ordered that the order of the District Court dated February 5, 1970 be, and it hereby is, stayed insofar as it requires the reassignment of pupils for whom transportation would be required under the order but who are now not transported or who are now being transported at substantially less distance and at substantially less expense, such reassignments being those arising out of the pairing and clustering of schools with resulting cross-busing.

To the extent that the stay granted by this order requires other modifications in the District Court's order, such modifications as may appear appropriate to the District Court to achieve a cohesive and efficient system of public education are authorized.

Except with respect to the busing requirements of the order which are hereby stayed and the resulting necessary modifications hereby authorized, the application for a stay is denied, and implementation of the order of the District Court is directed at the times and in the manner specified

therein, subject to the further orders of this Court and the ultimate disposition of the appeal. This is in conformity with the general direction of the Supreme Court that orders of the District Court shall be implemented pending the hearing and determination of appeals from such orders. Alexander v. Holmes County Board of Education, 396 U.S. 19; Carter v. West Feliciana Parish School Board, —— U.S. — —(January 14, 1970).

By direction of the Court.

/s/ Clement L. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Order Suspending Superior Court Order

(Filed March 6, 1970)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION No. 2631

JAMES E. SWANN, *et al.*,

Plaintiffs,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate, *et al.*,

Defendants.

and

CIVIL ACTION No. 1974

MRS. ROBERT LEE MOORE, *et al.*,

Plaintiffs,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Defendants.

On Sunday, February 22, 1970, Judge Frank W. Snepp, in *Moore, et al.* v. *Charlotte-Mecklenburg Board of Education, et al.*, a suit filed in the Superior Court of Mecklenburg County, North Carolina, signed a restraining order against the defendants. The order is of record. It appears

to have been filed at 10:16 P.M. on Sunday night, February 22, 1970.

On Friday, February 27, 1970, the defendant Board of Education had a meeting. Without any inquiry of this court, the Board staff were instructed to comply with the state court order and to stop work on compliance with the order previously entered by this court.

On February 28, 1970, counsel for all interested parties were notified that a hearing would be conducted on March 2, 1970, on motions to set aside or to restrain the effect of the Snepp order. Counsel for plaintiffs in the Moore case did not appear, but sent word through secretaries by telephone that they were occupied elsewhere.

The School Board attorneys have also filed on March 2, 1970, in the Swann case, Civil Action No. 1974, a motion which, although it does not clearly say so, amounts to a request by the Board to this court to relieve the Board of the burden of Judge Snepp's order so that it will not interfere with the preparation and implementation of a desegregation plan.

The Fourth Circuit Court of Appeals has now, on March 5, 1970, issued an order which postpones pending appeal the implementation of the clustering, pairing and cross-bussing provisions of the February 5, 1970 order, but which directs the implementation of the rest of the February 5 order according to its terms. It would appear that the Board should without question follow the order of the Court of Appeals, rather than consider itself hampered by the Snepp order. Nevertheless, in order that there may be no possible question about the effect of the Snepp order henceforward, it is now, in the discretion of the court and in the furtherance and protection of the jurisdiction and orderly processes of this court, and pursuant to ap-

plicable statutes, ORDERED, ADJUDGED AND DECREED, that the order heretofore signed by Judge Snepp in Civil Action No. 2631 in the Superior Court of Mecklenburgh County be, and it is hereby suspended and held in abeyance and of no force and effect pending the final determination by a three-judge court or by the Supreme Court of the issues which will be presented to the three-judge court on March 24, 1970.

IT IS FURTHER ORDERED, that the *Moore Case*, No. 2631, be referred to the three-judge court of March 24, 1970, for such hearing and determination as that court may find proper.

This the 6th day of March, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Order

(Filed March 6, 1970)

On March 5, 1970, the Fourth Circuit Court of Appeals entered an order which included the following:

> "Upon consideration by the full court, it appears that disposition of this appeal will depend in part upon a resolution of factual questions, as yet undetermined in the District Court. Specifically, the parties are in wide disagreement as to the impact of the order upon the school board's transportation system, the number of pupils for whom transportation will be required under the order, the number of school buses needed to provide such transportation, their availability, and the cost of their acquisition and operation.
>
> "The resolution of such factual issues is necessary to an orderly consideration of the issues on appeal insofar as they are directed to the order's requirement that transportation be provided for pupils reassigned under the order.
>
> "To facilitate the hearing and disposition of this appeal, the District Court is requested, after such evidentiary hearings as may be necessary, to make supplemental findings of fact respecting the general issues of busing and the effect of its order with respect to the number of pupils transported, the number of buses required, their availability and the additional capital and operating costs of transportation.
>
> "The District Court is requested, if possible, to file a supplemental order or memorandum, including such findings of fact, by March 20, 1970."

The court directs the parties to prepare and file with the Clerk of this court not later than Friday, March 13, 1970, all evidence (evidence should not be interpreted to include

argument of counsel or others nor any extended opinions) which they would like for the court to consider bearing upon the factual questions referred to in the March 5, 1970 order of the Court of Appeals.

Counsel for all parties are directed to produce upon written request of opposing counsel all documents, records, exhibits, reports, evidence or data of any and every kind which may be requested by opposing counsel. If there are objections upon any basis the evidence shall nevertheless be produced and the court will pass upon the objections after examining the evidence and hearing from counsel.

Counsel are directed to appear before the court at 2:00 P.M. on Monday, March 16, 1970, for the purpose of examining such evidence as may then be available, and determining what matters can then be stipulated and whether any further testimony will then be necessary.

The objections filed by the defendants on March 6, 1970, to the plaintiffs' list of additional exhibits in evidence, and any other objections that any party makes to any demand for evidence or addressed to the production of evidence will be heard at the conference among court and counsel on March 16, 1970, and counsel will be given adequate opportunity to record their then objections and exceptions.

All counsel will provide opposing counsel with copies of all exhibits or other evidence sought to be introduced or which the court is requested to consider.

If a further hearing is necessary after the conference among court and counsel scheduled for March 16, 1970, it will be conducted on Tuesday, March 17, 1970, at 10:00 A.M.

This the 6th day of March, 1970.

JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Order

(Filed March 6, 1970)

Among other questions on which findings of fact for the court's report to the Court of Appeals may be necessary are the following:

1. Total numbers of children who live (1) in the pre-1957 city boundaries, (2) in the "perimeter" area, and (3) in the rural areas:

   (a) Elementary, black and white;

   (b) Junior High, black and white; and

   (c) Senior High, black and white.

2. Numbers of children in each school in the entire system who live in a different zone from that of the school they attended in January, 1970:

   (a) Those who are supplied transportation; and

   (b) Those who are not supplied transportation.

3. Average daily number of pupils riding school busses in each school for the months of October, November and December, 1969, and January and February, 1970.

4. With respect to the schools whose students are to be desegregated under the court ordered plan by rezoning:

   (a) How many pupils, school by school, live within a radius of one and one-half miles of each school?

   (b) How many pupils, school by school, live within a radius of two miles of each school?

5. Statistics from the National Safety Council or any other responsible source showing the accident rate among school children and the relative safety of:

(a) Walking;

(b) Riding in private vehicles; and

(c) Riding in school busses.

6. Three maps howing in clear coloring or markings with respect to elementary, junior high and senior high schools the following data:

(a) The school zone for all schools in which desegregation by zoning is to be accomplished under the court ordered plan; and

(b) Those schools in which desegregation is to be accomplished under the court ordered plan by pairing or grouping or clustering with other schools and providing transportation.

7. A map showing (1) the pre-1957 city limits, (2) the perimeter area, and (3) the rural area, with all elementary schools clearly located on it.

8. A map showing (1) the pre-1957 city limits, (2) the perimeter area, and (3) the rural area, with all junior high schools clearly located on it.

The parties are directed to procure and supply the court by March 13, 1970, with information as above described.

This the 6th day of March, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Deposition of John A. Finger
March 11, 1970

[1] By consent this deposition was taken on March 11, 1970, at 12:15 P.M., in the offices of Chambers, Stein, Ferguson & Lanning, Attorneys at Law, 216 W. 10th Street, Charlotte, North Carolina.

By consent all objections except as to the form of the question are waived and objections will be made and ruled on at the time of trial. With the consent of all counsel, signature is waived.

APPEARANCES:

Plaintiffs—Julius L. Chambers, Esq.
Attorney at Law
Charlotte, North Carolina
Adam Stein, Esq.
Attorney at Law
Charlotte, North Carolina

Defendants—William J. Waggoner, Esq.
Attorney at Law
Charlotte, North Carolina

DR. JOHN A. FINGER, having first been duly sworn, was examined and testified as follows:

By Mr. Chambers:

Q. Your name is Dr. John A. Finger? A. Yes.

Q. What is your address? A. 35 Larch Street, Providence, Rhode Island.

Q. What is your occupation? [2] A. I am a college professor.

Deposition of John A. Finger March 11, 1970

Q. Were you requested by the Court to assist the Court in preparing a plan for desegregation of the Charlotte-Mecklenburg schools? A. Yes, I was.

Q. When were you so requested? A. On December 2, 1969.

Q. What instructions did you receive at that time, Dr. Finger? A. I was told to read the order of the Court and to prepare a desegregation plan for Charlotte-Mecklenburg that met the Court order.

Q. Would you state generally for the record what the objectives of the Court order were in terms of the kind of plan you were to prepare? A. As I understood it, I was to draw up a plan that resulted in the elimination of all of the all black schools.

Q. What kind of assistance were you to receive in the preparation of the plan? A. The Court ordered the School Department to provide me with whatever assistance was needed to draw up a desegregation plan.

Q. Were you given an office? A. Yes, I was given an office.

Q. Where was the office? A. In the School Department headquarters.

Q. Was the staff of the School Board directed to provide you with [3] all the information that you needed to prepare a plan for desegregation? A. Well, the Court order required the School Department to provide me with whatever information was needed and when I wanted information or when I wanted to meet with someone, I wrote to the School Superintendent and asked for the information or asked for a meeting with the school staff members.

Q. Did you receive information from the school staff? A. I received everything I asked for.

Deposition of John A. Finger March 11, 1970

Q. Would you explain for the record some of the things that you did receive? A. I received the School Board minutes for the past year, I received demographic maps that showed the location of pupils by grade and race, I received enrollments in the various schools in Charlotte-Mecklenburg, I received school department maps showing the School Board desegregation plan.

Q. Did you get information relative to the teachers in the schools, the school capacities? A. Yes. I have information concerning the number of teachers in each school by race and I have met with the Superintendent, Asst. Superintendent Anderson, who is in charge of teacher assignments, to discuss the plans that he had for desegregating the faculties of the schools.

Q. Do you feel, Dr. Finger, that you received sufficient information in order to prepare a plan for desegregation of the [4] schools? A. Yes, I do.

Q. In the demographic map did that show the residences of the children, too? A. No. It simply showed the number of children residing in each half-mile grided area. The demographic maps are a grid that coincides with the larger school department maps and the number of children residing in each half-mile square block was shown.

Q. Did you receive information about the transportation presently provided by the school system for students? A. No, I did not. I didn't ask for it.

Q. Now, have you had occasion to study the transportation that is provided by the school system? A. I have not studied the present transportation system in detail.

Q. Would you tell us when you began work on the plan? A. That must have been about . . . it was a Thursday, must have been about December 5, I think it was, but it was a Thursday, whatever that date is.

Deposition of John A. Finger March 11, 1970

Q. And when did you submit your plan to the Court?

Mr. Waggoner: We will stipulate February 2. That's the date we had that first hearing.

A. February 2. I submitted a portion of the report the previous Thursday. The final portion of the report was submitted on [5] the day of the hearing.

Q. Would you tell us what you did in terms of a plan for the desegregation of this school system? How did you go about preparing the plan? A. When I accepted this appointment by Judge McMillan and he called a meeting on, I guess it was December 5, wasn't it, Mr. Waggoner?

Mr. Waggoner: Yes.

A. In his chambers where Mr. Waggoner and Supt. Self and I met, we agreed on the procedure that I would follow in working with members of the school department. It was agreed that whatever I wanted from Supt. Self would be requested in writing and I followed that procedure. I also stipulated that I did not feel that I should be a witness in this lawsuit after I accepted the position as consultant to the Court and I'd like to state for the record I am here under protest, that it was my understanding that I would be subpoenaed if I didn't appear. I do feel it is not appropriate to probe into the procedures that I followed in preparing the desegregation plan. I have reported the plan to the Court and that constitutes my official document.

Q. Would you tell us how you proceeded to desegregate the high schools in the system? A. The general procedure I followed in preparing the plan that I submitted to the Court was to meet with various members of [6] the school

department staff to talk to them about how, to ask them about how, to ask them to react to various plans and procedures that I developed and to evaluate them in terms of their feasibility and in the process I obtained as many documents as were available to help me understand what would be the most effective way to proceed. The plan that I submitted to the Court for senior high schools is very similar to the plan that the school department prepared under the direction of the School Board and the only change that I made was to make it conform with the Court order that I was operating under so that it provided for desegregation of all the schools. I also made the plan so that it would provide very nearly equal ratios of black and white students in all the senior high schools.

Q. Now, how did your proposal differ from the proposal of the School Board with respect to the senior high schools? A. Both plans have been presented as evidence in the court. I would think that that question was answered by the documents that were submitted to the Court.

Q. Could you just explain for the record what you propose to desegregate the high schools that added to or modified what the Board proposed? A. Yes. I made the ratio of black and white students approximately equal to the ratio of all the students at that grade level.

Q. How did you accomplish that? A. By assigning grids to the various high schools. I used the [7] demographic map and just counted the number of students residing in each grid until I achieved a ratio that was approximately equal. In the plan that I submitted to the Court all of the schools have a ratio between 22% and 26 with the exception of Olympic, which was intentionally left low because of an anticipated housing development, and for North Mecklenburg which I felt ought not to be included in the desegregation plan.

Deposition of John A. Finger March 11, 1970

Q. Is North Mecklenburg the only senior high school that had no changes in terms of the boundaries? A. There might have been a slight change in North Mecklenburg, I'm not positive, but otherwise all the senior high schools had changes in the boundaries. I'd have to check the maps to make sure because occasionally boundaries were altered slightly.

Q. The plan designed by the Board made use of computer matching of grids from the map and enlarging or altering school boundaries, is that correct? A. Yes, that's correct.

Q. Does it also create a satellite district for one of the schools? A. Yes, it creates a satellite district for Independence High [8] School.

Q. Would you explain for the record what a satellite district is? A. Well, it's a district that is—in effect it's two districts that are not connected to each other. One district includes the geographic area in which the school is located and the other satellite district is a district not attached to the first one.

Q. Did your plan follow basically the plan submitted by the School Board with respect to the junior high schools? A. There is a good deal of similarity between the plan I submitted and the plan submitted by the School Board. The major difference is that their plan did not desegregate all of the junior high schools and it required that the attendance zones all be connected. I established some satellite attendance zones.

Q. Do you recall the satellite attendance zones you established for the junior high schools? A. They are shown on the map that I submitted to the Court. There is a satellite zone for Cochran, for Eastway, for Albermarle Road, for Alexander Graham, for McClintock, for Wilson, for

Project 600 Carmel Road, for Smith, for Wilson and for Quail Hollow.

Q. Are these satellite zones that you have proposed for the junior high schools basically Negro residential areas? A. Yes, they are basically Negro residential areas.

[9] Q. And these students are to be assigned to the outlying white junior high schools? A. Yes, they are to be assigned to the outlying white junior high schools.

Q. Now, did your plan follow basically the plan of the School Board with respect to the elementary schools? A. Well, yes, and then again, no. The School Board plan for elementary schools used grid assignments but it did not desegregate all of the elementary schools that my plan called for, pairing of schools in the center of the city with those in the outlying areas.

Q. Now, the pairing, are those schools shown on the last page of the exhibit you attached to your proposal? A. Yes, that's correct. I don't know that is a page but it's a document labeled Elementary Schools Paired. Is that the one you're referring to?

Q. That's the one. Did your consideration in desegregating the schools take account of the transportation of students? A. Well, I don't know just what you mean by take account of. I considered the problems of transportation in developing various desegregation plans and came to understand what kind of control one had over the amount of transportation involved.

Q. Now, do you know the number of students who would be involved in desegregation of the high schools as you have proposed? A. Repeat that question, please.

[10] Q. Do you know the number of students who would be involved in the reassignment under the proposal you submitted to the Court for desegregation of the high schools?

Mr. Waggoner: Would you read the question back, please?

(The Court Reporter reads the question on Line 1 above.)

A. Well, according to my count there are approximately 17,000 high school students. I guess they'd all be more or less involved.

Q. You indicated that the boundary for North Mecklenburg might have been altered some. Could you just estimate for us how many students would be reassigned under the high school provision of the plan? A. There have been some alterations in the students assigned to North Mecklenburg. Some students who were not assigned there last year will be going there and some students who were assigned there will not be. These are students who live close to the present city limits of Charlotte. My earlier statement should have simply noted that the children who live well north of the city limits were not included in the desegregation plan.

Q. Well, in your opinion would approximately 17,000 students be reassigned under the plan or less than 17,000 in the senior high schools. A. I never tried to estimate the number of children who would be [11] reassigned. It's a considerable number. It varies with the color of the student. There are more black students being reassigned proportionately than white students. Just a rough estimate I think there are probably 4000 students being reassigned.

Q. 4000? A. That would be a rough estimate. I need to sit down and do a more careful . . .

Mr. Waggoner: Move to strike the rest of it.

Q. Could you give us an estimate of the number that would be reassigned under your proposal of the junior high schools?

Deposition of John A. Finger March 11, 1970

Mr. Waggoner: Objection.

A. Well, Mr. Chambers, I could sit down with a map and make those estimates but I have not prepared those estimates and I really don't know the numbers that are involved. It's something that is easy enough to obtain. The school department could obtain that number if I were to ask for it. I didn't ask for it.

Q. Did you determine how many students would be provided transportation in the high schools? A. I asked the school department to prepare a report for me on the additional number of students that would be required to be transported under the State regulations and they have prepared such a report for me.

Q. How many senior high school students would be provided [12] transportation under the State regulations? A. Under the court consultant plan the additional number of students to be transported is 1,815.

Q. What about the junior high school students? A. I asked the school department to prepare an estimate of that and their estimate of the additional number of students to be transported according to State regulations is 2,286.

Q. What about the elementary schools? A. They prepared an estimate for me for the elementary schools and that estimate is 10,614.

Q. Dr. Finger, did you consider a different method for desegregating the elementary schools besides that you submitted to the Court?

Mr. Waggoner: Read that to me.

(The Court Reporter reads the question on Line 11 above.)

A. Yes, I did.

Do you have a copy of the affidavit there, Bill?

Mr. Waggoner: No. I have a copy of your report to . . .

A. All right, I have that.

Mr. Chambers: You have a copy of the report to whom?

Mr. Waggoner: Whatever the one was that the Court received there. Have you not seen this?

Mr. Chambers: No.

[13] (Off the record at this point by consent.)

Q. The proposal you initially considered was altered in what respect from that finally submitted to the Court? A. I believe I prepared some . . . I prepared three, four desegregation plans in considerable detail. I prepared more than that in partial detail. I have already stated that in an affidavit to the School Board attorney and I have already testified to the fact that I prepared several plans.

Q. Do you know why the plan that was finally submitted to the Court differed from the one that you had initially considered? A. I submitted to the Court the one that I thought was the best plan.

Q. Did you have any consultation with the staff to determine the one submitted was more feasible than the others you considered? A. I have always felt that the school department was the best judge of what would be the most effective plan.

Q. Did you have consultations with the staff as to the feasibility of the plan you submitted to the Court? A. You see, Mr. Chambers, I am not sure that I can answer

your question because I have been in a unique position and the school department was ordered by the Court to cooperate with me and I think that all I can say is that they did cooperate with me. I consulted them extensively about the development of desegregation plans; they provided me with the information [14] I needed. I asked the Superintendent to provide me with staff members who would examine my plans and make judgments about them. I asked the Superintendent to make these judgments himself and when I finally submitted a plan it was the one I thought was the most feasible.

Q. Since the Court order have you had occasion to study approximately how many children would be provided transportation under your plan? A. Well, we read off the numbers that were prepared for me by the school department and these seem to me to be reasonable estimates of the amount of transportation that would be required. I have checked the transportation estimates for all of the elementary schools and I came up with approximately the same number as the original estimates made by the Board of Education . . . by the school department, excuse me. They show 10,614 and my estimates are approximately that same number, approximately 10,000.

(Off the record by consent at this time.)

Q. How many students did you estimate would be provided transportation for the junior high schools? A. Well, the School Board estimate was 2,286, but that estimate did not include any students to be transported to Alexander Graham Junior High School and the students who reside in the satellite district live approximately about four miles from the Alexander Graham Junior High School and it seems to me [15] to be unreasonable not to provide transportation for them. I would have increased my transporta-

tion estimate for Alexander Graham by about 360 students.

Q. So your estimate would be approximately. . . .? A. I'm not finished yet. There is a satellite district for McClintock Junior High School and I estimate that there are approximately 325 students who would need transportation to McClintock. There are a small number of students, I estimate 100, who would need transportation to Sedgefield. And I estimate that there are about 500 students who would need transportation to Williams. According to my estimates, the school department report overestimated the number of children needing transportation in Smith Junior High School. They reported 432 and I think that 300 is a more accurate estimate. That would make 3,439 students.

Q. You estimate 3,439 for the junior high schools? A. Yes.

Q. What is your estimate for the senior high schools? A. I think the estimate that the school department prepared for me is essentially the same as my estimate.

Q. 1,815? A. That's correct.

Q. Did you consider the number of buses that might be necessary to provide transportation? A. Excuse me a minute. I need to have Mr. Morgan's affidavit.

[16] (Paper writing is handed to the witness.)

Q. Did you estimate the number of buses? A. Give me a few minutes to check my last statement.

RECESS FOR LUNCH

Q. Did you estimate the number of buses that would be required for implementation of the plan? A. I have made a number of estimates of the number of buses required. I based my estimates on 45-passenger buses. I also made estimates on 60-passenger buses. If there were no round

trips at all, my estimates for busing are the elementary school level 217 45-passenger buses; 51 45-passenger buses at the junior high school; and 40 at the senior high school.

Q. Let me get those figures again. For the elementary? A. 45-passenger buses, 217.

Q. And for the junior high? A. 51, and for the senior high 40.

Q. And you say you also made an estimate with 60-passenger buses? A. Yes. That would take 163 buses at the elementary level; 38 at the junior high school level; and 30 at the senior high school.

Mr. Waggoner: What size bus is that?

A. 60.

Q. Your estimates are made on the basis of one trip? A. Yes, that's correct. It seems to me there are two ways that [17] one could utilize a bus for two trips. One way would be to have the elementary school buses used to transport the junior high and senior high school students. There are 217 elementary buses required. Half of these, approximately a hundred, would be coming into the city and a hundred would be going out from the city. Those hundred coming into the city could be utilized to provide the transportation for the junior high school students since most of those are bused out and also a large number of senior high school students are bused out and those buses could be used in that way. That would require staggering the starting hours of the elementary schools and junior and senior high schools. If one were to follow that pattern, it would require approximately the number of elementary school buses needed which would be 217. There is another alternate way of providing the transportation. One could

provide staggered hours for the elementary schools. One could start a bus in the center of the city leaving for the, shall we call it the suburbs, and would be going against the traffic. Traffic would be coming into the city at that time of day, and it might leave at whatever time is desirable, let's say 8:00. It would arrive at its destination at approximately 8:30—take an average run time of half an hour. I haven't driven one of these routes and I don't know what the actual run time would be. Of course, the bus would be going non-stop, it would not be stopping to pick up any children, [18] it will not be stopping to leave off children. It will have a full bus that it's running on a straight run to its destination. In any event, when it arrives at that destination, it picks up children at the school. If it's a school in an area where children are transported in, those children have already been transported into the school under existing transportation and they are at that school. They board this bus which turns around and presumably not is behind the rush hour traffic and goes back into the center of the city. That bus, in following this plan, would then have to return to its starting point because the busing pattern would be the opposite way when school is closed. That is just one posible plan that one might use if the objective was to minimize the number of buses required. Under that plan instead of needing 217 45-passenger buses for elementary, I estimate one would need 109.

Q. Dr. Finger, let's look at the plan that the Court has directed itself and see how it operates. You have some maps here and these maps have been introduced as exhibits in court. The map for the senior high school has established boundaries. A. This is the Board plan map and that is the Finger plan map.

Q. I see. Now, on the Finger plan map, so-called, the one that has been directed by the Court, you have a satellite

district in the midst of the city for Independence High School. [19] A. Yes, that's correct.

Q. You provide for approximately 300 high school students being assigned out of that satellite district? A. The School Board estimate of number of students to be transported to Independence was 300 and so I presume that that's the number of students residing in the Independence satellite zone. We could check that by getting the demographic map.

Q. Now, other than that satellite district, your plan is basically the same as that of the School Board? A. If one looks, for example, at the attendance zone for West Charlotte, one finds that the zones are almost identical. There is a difference way over here on the northeast section where the zone for the Board's plan follows this old attendance line here and on the Finger plan it goes just straight across, going across on the top of grids number 236, 237, 238, etc. Not very many children reside in that area and for practical purposes it's almost identical zones. You can see there is a little difference down in here where that zone is straight out.

Q. Now, the School Board proposed under its plan to provide transportation only for students who live outside the city limits or are assigned to schools outside the city limits as it existed in 1957. There is an affidavit by Mr. Morgan about the number of students who would be provided transportation under the Board plan for the senior high schools. [20] A. Yes, that's correct.

Q. How many students does the Board estimate it would be providing transportation for under its plan for the senior high schools? A. According to the Morgan affidavit, 53.

Q. 53 additional students? A. 53 additional students.

Q. In looking at this map would there be several students living more than two miles from the school who would not be provided transportation under the Board plan? A. Well, I believe that all of these children who live out in the Hidden Valley area who would reside about four and a half, five miles from the school would not be provided transportation. That's pre-'57? I don't know how many children are going to be transported. The Board says under their plan that 53 students would be transported and then they say under the Finger plan 810 students would be transported.

Q. You're talking about for West Charlotte? A. For West Charlotte. Those essentially are the same attendance zones so that it's obvious that the number of students transported is not a function of the attendance zone nor a function of the size of the zone. If the same rules were to be followed under the Finger plan as followed under the Board plan, the Finger plan, I suppose, would require transporting about 53 students.

[21] Q. For West Charlotte High School? A. For West Charlotte High School.

Q. Looking at the junior high schools, what does the Finger plan propose? Students would be assigned there to junior high schools according to geographic zones? A. Students are assigned to junior high schools by geographic zones and there are satellite zones for ten of the junior high schools.

Mr. Waggoner: Could I interrupt? I have to make a phone call—I picked up the wrong file.

SHORT RECESS

Q. Going back to the senior high school, did you recompute the number of students who would be provided trans-

portation? A. In the Morgan affidavit it shows that the number of students to be transported under the Board at the high school level would be 1,202. The major difference between the Board plan and the court consultant plan is in the satellite zone for Independence High School which has approximately 300 students in it. Thus one would expect the estimate of the number of students to be transported for senior high schools under the court consultant plan to be approximately 1,500, 1,200 plus 300. When the school department prepared their estimate they estimated 1,800 and I presume that the difference between those two figures has to do with the slight differences in racial balance in the attendance zones and that the minor [22] differences in these attendance zones result in 300 more pupils being transported under the court consultant plan than under the Board plan and I can't make any more accurate estimate than that 1500 to 1800 students would seem to me to be the appropriate estimate for senior high school students to be transported if one were to follow the Board rules for transporting students. The Morgan affidavit shows the court consultant plan to be transporting 4,106 senior high school students and that's at least 2300 more than my estimate. They are counting students in different ways in the Morgan affidavit.

Q. Now, for the junior high schools did you compute the approximate numbers of students that would be transported under the Court ordered plan? A. Well, the school department prepared estimates for me and they estimated 2,286. That's the estimate that I would make if I were counting students in the same way that the students are counted under the Board plan in the Morgan affidavit.

Q. How many does Mr. Morgan indicate would be transported in his affidavit? A. He shows that under the Board

plan a total of 1388 students would be transported. My estimates of the number transported under the court consultant plan would be somewhat more than that. I already gave you the estimate that the school department prepared for me. In the Morgan affidavit he reports that [23] the court consultant plan would require 6,129 junior high school students to be transported. That is nearly 4,000 more than my estimate.

Q. Would you state the criteria that you're using for your estimates? A. Well, the criterion I am using for my estimates are the number of students to be transported according to State regulations. That's the rule that was followed when the school department prepared this transportation estimate for me. When one compares the attendance zones for the court consultant plan and the Board plan, one will find there are many instances where the attendance zones are identical or nearly identical. For example, we might look at the Williams Junior High School attendance zones and observe that those attendance zones are nearly identical and according to the Morgan estimate for transportation under the Finger plan there would be 630 students transported, but under the Board plan there would be no students transported. Now, obviously if one follows the same rules one transports the same number of students in the same attendance zone. We could go through many of these attendance zones and discover that the court consultant plan, in fact, requires less transportation.

Q. Than the proposal of the school . . . ? A. Than the proposal of the School Board, or it puts more students in close proximity of the school.

[24] Q. Looking at the Court ordered plan for elementary schools, would you explain basically what this plan does? A. What the Board plan does?

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Q. No, what the Court plan does. A. The Court plan has some schools that have redrawn attendance zones which are essentially walk-in schools. These schools with redrawn attendance zones are the schools that are largely on the perimeter of the center of the city or in the area where the Barringer and Marie Davis schools are. There are then some remaining schools that are all black in the center of the city and one all black school, the Marie Davis School near the center of the city, and a large number of white or predominantly white schools in the outlying area of the city. The attendance zones for the center city schools and for these outlying schools are essentially the same attendance zones as now exist and these schools are paired or grouped with schools in the center of the city so that black students from the center of the city at grades 1 through 4 leave their schools and are transported to a school that has been all white and the white students in turn in grades 5 and 6 go into the center of the city school.

Q. The number of paired schools is 34, 10 black and 24 white schools? A. It's a matter of record here. Is that the correct number? Yes.

[25] Q. The Court ordered plan differs in that respect from the plan submitted by the School Board? A. Yes, that's right.

Q. With respect to elementary schools? A. Yes, that's right.

Q. Have you made an estimate of the number of students who would be provided transportation under the Court ordered plan? A. Yes, I have. The court ordered plan requires transporting the students from the center of the city out to the white schools and the transporting of white students into the center of the city and there are approx-

imately 10,000 students to be transported, 5,000 white students and 5,000 black students.

Q. Now, could you tell us whether the methods that are followed in desegregating the elementary schools are independent? You have some schools that have zones and some schools that are paired. Could the Board implement the plan for the paired schools immediately? A. Yes, they could.

Q. Could they implement the plan for the zoned schools immediately? A. Well, interestingly enough, it's harder to do that than it is the pairing because there is a lot more schools with change involved and they all have to change at the same time. But I believe the answer to that question is yes, they could.

Q. First of all, let's establish whether some schools in the [26] county have retained their previous geographic attendance zones. A. Yes, that's correct.

Q. The schools that are affected by the plan principally are those that are in the inner city and adjacent to the inner city, is that correct? A. The inner city schools have the same attendance zones under the court consultant plan as they had before. Those have not been changed.

Q. And is the same true of those schools that are paired with the inner city schools? A. Those schools that are paired with the inner city schools have, for the most part, not been changed. We could look at some specific illustrations if you wanted to.

Q. Would you do that? A. We could note the Bruns Avenue School that is located at grid 317B and it has, I believe, the same attendance zone under this plan that it has had previously and under the court consultant plan it is to be paired with Huntingtown Farms, which is lo-

cated at grid 534B, and with Sharon at 570B, and with Starmount at 508C. All three of those schools have the same attendance zones under the court consultant plan that they have at the present time. Thus it would be possible to just carry out the pairing or clustering since there are four schools involved here for those four schools and it wouldn't [27] involve any other schools or any other dislocation of pupils at all.

Q. The pairing or clustering, then, could be done independently of each other, you could do one set of pairing without doing the others? A. Yes, you could. It was the major reason that this plan was proposed to the Court. It can be done step by step.

Q. Would you explain that? A. Well, if there are questions as to the exact amount of transportation required, one way to find out the exact amount of transportation required is to carry out or begin to carry out the desegregation plan and you could pair group by group as long as you've got school buses to do it with. When you run out of school buses, you may have to stop implementing the plan at that point.

Q. What makes it easier to carry out the clustering of schools than to make the assignments under the new attendance zones? A. Well, the attendance zones for the paired schools have not been changed and, therefore, the children already going to that school can get to the school using the present transportation routes that are already established. When they arrive at that school, there is a bus to take them to their new school assignment and so that the only change that takes place is the cross city bus run, a straight run.

Q. And with the rezoning, if it becomes necessary for the Board [28] to determine who the students are in the new

zone? A. The school department can do that because they know the names of the students that live in each one of the grids but you have to do it all at the same time. Many of the children, a large proportion of the children will be going to the same school they were going to in the past. When you change one school, some children who have been in that school have to leave in order to make room for the new children coming in. So you have to schedule a day in which a large number of children change schools. Since most of these children are going to be able to walk in, it will be feasible to do this. I suppose the Superintendent can write a letter. The computer system has the names of all the children in those grids and it's a matter of preparing a letter and addressing it by computer advising the parents what school to go to.

Q. We talked earlier this morning about the other plans that you had considered. Would you tell us now the reason why the plan that was submitted to the Court was substituted in lieu of the plan that you had initially worked up? A. I developed one plan that had some features that were improvements on the one that the Court has ordered. It used hand-drawn attendance zones, zones that followed natural boundaries for the schools that were contiguous to the center city. By doing it that way you can reduce the number of children to be transported, but not a great deal. It also changed a large [29] number of attendance zones and it was apparent when the plan was thoroughly studied by the school staff that it was extremely difficult to implement that plan and I became aware of the fact that while the plan had some features that were improvement, it was very hard to carry out.

Q. Was the difficulty of implementing the plan that you initially prepared a matter of time, that it would take more

time to implement the one that you had than the one you submitted? A. Well, there were other features that were different and it seems obvious when one studies this plan that was submitted to the Court that one of its major features is that it's a feasible plan one can carry out and I think that it was in consultation with the school staff that I became aware of the fact that this was a plan that could be carried out.

Q. You have a statement in your report to the Court which reads as follows: . . . the last page of the report . . . "I have prepared several different desegregation plans. No matter which is pursued the end result is that approximately 5,000 children must be bused out from the center of the city and 5,000 bused in. The problem becomes one of deciding which children should be bused and how far. Should the distance traveled be given priority? Should a child residing five miles from a school be exempt but not a child who would be bused four miles?" And skipping the next two paragraphs, you then say: "It is my understanding that the School Board had considered and [30] rejected a plan that would bus children to provide for complete desegregation. That plan is attached to this report. You will find that there are various tables showing projected enrollment and a map detailing the schools to be paired." What plan was that that was rejected by the Board? A. The court consultant plan.

Q. The one that was submitted to the Court? A. That's my understanding, yes.

Q. Dr. Finger, had the staff considered the plan you have submitted to the Court and that has been directed to be implemented by the Court and found that plan to be feasible?

Mr. Waggoner: Objection unless he knows.

A. I wouldn't have submitted the plan to the Court if I didn't think it was a feasible plan and if it was not my impression the school department felt it could be carried out.

Mr. Waggoner: Motion to strike his answer.

Q. Have you studied Mr. Morgan's affidavit? A. I only received it this morning but I have studied it and I have a page missing on the elementary schools. I read it through and, yes, I have studied it briefly.

Q. Mr. Morgan has stated in his affidavit that he estimates that he needs approximately 526 buses to implement the court ordered plan. Did you have a chance to consider that estimate? A. Yes, I did.

Q. Did you find that estimate to be accurate? [31] A. I found it to be utilizing different rules for counting students under the court consultant plan than under the Board plan and I don't know how Mr. Morgan arrived at these numbers that he lists under his transportation estimates for the court consultant plan. We've already testified to the effect that at the junior high school and high school levels he makes estimates that are grossly different from my estimates and it's quite clear that when he says that the Board plan is requiring one number of buses and the court consultant plan is requiring a different number of buses he is using different methods of estimating the number. As far as I can tell, the number of junior high school students and the number of high school students . . . strike that, please, I want to start over again. I've already testified to the number of high school and junior high school students that would be transported under the court consultant plan. Un-

der the elementary school plan I estimate that the number of children to be bused would be approximately 10,000, the 5,000 children bused into the center of the city and the 5,000 bused out in addition to those already bused.

Q. Did you find any other discrepancies in the estimates of Mr. Morgan? A. Well, yes. We could detail all of the discrepancies at the junior high school level if you wanted to do that.

Q. Let's do that. [32] A. I can also note some discrepancies at the elementary school level but because I am missing a page of his affidavit, I can only note discrepancies in a few of the elementary schools.

Mr. Waggoner: What page is missing?

A. It's the first page that begins Albemarle School, and so on, for elementary schools. I note that he shows under the court consultant plan for elementary schools for Huntingtown Farms he shows 220 students; for Sharon he shows 230; for Starmount he shows 256. Those add up to 706 students. Those schools are all clustered with Bruns Avenue. But the number of white students to be transported are only 540. Therefore, there's a difference of 166 students. I don't know how he got those estimates. I would think that the number of additional students to be transported from those three schools, Huntingtown Farms, Sharon and Starmount, would be 540 since that is the number of 5th and 6th grade white students shown in Bruns Avenue.

Q. Would you give us some other examples of the elementary schools? A. Yes. His Park Road and Pinewood add to 691 but only 532 white students are to go to Marie Davis, the school paired with those two schools. He shows 342 from Hidden Valley. That school is paired with Druid

Hills but 303 white students are assigned to Druid Hills. His estimates for Montclaire, Rama Road are 529. Those schools are grouped with University Park [33] and the number of white students there is 461. For Selwyn, Windsor Park and Winterfield the total number of students is 1053 but their satellite school is Villa Heights which has 668 white students in it. I might add that all of those schools have the same attendance zones under the court ordered plan as they do now.

Q. No additional students would be involved? A. No additional students would be involved. The only addition would be the transportation for pairing or clustering.

Q. Would you look at the junior high school estimates and tell us whether you have noted any discrepancies there in Mr. Morgan's affidavit? A. I believe we have already mentioned the Williams discrepancy. Those attendance zones are essentially the same zones but under the court consultant plan there are 630 students to be transported and none under the Board plan. For Alexander Graham Bell there are 732 to be transported under the court consultant plan and none under the Board plan. If one compares those two districts one finds that the distances involved in getting to school are approximately the same even though the court consultant plan has a satellite zone. Those same children residing in that satellite zone are assigned to the Alexander Graham School under the Board plan so that the same students are involved. The difference is that a group of students in an interim area are assigned to a different [34] school. They are assigned to Piedmont under the court consultant plan and they are assigned to the Alexander Graham School under the Court ordered plan.

Q. Court ordered or Board plan? A. Under the Board plan, whichever it should be. I'm mixed up. Eastway shows

603 students to be transported under the court consultant plan and none under the Board plan but again if one compares the attendance zones for Eastway, one finds that this grid #296A, C and D constitute the satellite zone for Eastway and under the Board plan two of those same grids, 296C and D are assigned to that school. The difference is that the Board plan has this long, strung-out attendance zone but the attendance zone for the court consultant plan is essentially a more compact one. Therefore, it ought not to require more transportation but less, if one were to count the transportation in the same way. The court consultant plan, according to the Morgan affidavit, York Road transports 365 students and the Board plan none; Hawthorne 468 under the court consultant plan and under the Board plan none; Spaugh under the court consultant plan 290 and under the Board plan none; Randolph under the court consultant plan 90 and under the Board plan 59; Piedmont under the court consultant plan 424 and under the Board plan none. If one examines those attendance zones one would find they are for the most part very similar in geographic area except for Piedmont. Piedmont has [35] a different configuration under the court consultant plan because it is a desegregated school and under the Board plan it was an all black school or predominantly black school. If one examines the compactness of the two districts under the two plans, one finds one is as compact as the other. The other two schools to be mentioned are Sedgefield, 252 under the court consultant plan and in the Morgan affidavit none; and Coulwood 126 and the Board plan has more, 220.

Q. Again, as I understood your testimony with respect to the number of buses, you estimate is that if the method of staggering school terms is used that the Court ordered

plan could be implemented with 109 buses. A. At the elementary school level.

Q. Would additional buses be needed for the junior high and senior high schools? A. Yes. The 109 for elementary schools assumes staggered hours, with each bus making a run in and a run out, or a run out and a run in.

Q. One of the questions directed by the Court of Appeals was how many buses would be needed to implement the plan. Now, would you give us a figure of what you would consider the minimum number that would be needed to implement the plan as directed by the Court? A. If one were to start with, let's say the Marie Davis, Park Road, Pinewood cluster, and use staggered hours, it would take [36] 11 buses to do that one clustering, 11 45-passenger buses. As I have already testified, one can begin to implement the plan because one can do it cluster by cluster. You asked me the total number of buses required to implement the plan and I'll try to make an estimate of that. I have already testified that one estimate would be the number of elementary school buses making a single run because these buses could be used for junior and senior high schools transportation. That estimate would result in 217 being required. Another procedure would be to use elementary buses on staggered hours and one way bus runs for junior and senior high school students. That would give me an estimate of 200 45-passenger buses.

Q. Would that 200 be for the elementary, junior and senior high schools? A. That would be for all levels, that's correct. I believe that it would be possible to use less transportation than this because I believe that it would be possible to utilize public transportation for some of these junior and senior high school students and that might be by far the more feasible procedure to follow. I am unable

to work out the complete details or the details on what such a plan would be but I have made a rough estimate that the number of buses required might be under 150 if public transportation were used to supplement the senior and junior high school transportation. This would not [37] mean using their buses for just school purposes but providing funds for junior and senior high school students to ride on the buses on their existing routes.

Q. The estimates you have just given us were based on a 45-passenger bus? A. That's correct.

Q. Would the estimate be less if you were talking about a 60-passenger bus? A. Yes. If you're talking about a 60-passenger bus the elementary might require only 83 buses and the junior and senior high schools 20 buses. I want to make it clear that I have made these estimates without a very detailed analysis of exactly where these bus runs are but in contrast to the affidavit here that shows some 500-odd buses are required, I think that my estimates are far more accurate than those.

Q. There is an affidavit submitted by the Board to the effect that by adding buses on the streets that it would, Mr. Hoose says. . . .

Mr. Waggoner: You're starting to bedraggle this thing. Can you hit the nails and get going because I've got a lot of questions I have to ask and I'm going to stay here as long as I have to and I'm not going to burden Mrs. Berger with a deposition that she can't complete by Friday.

Mr. Chambers: The thing I want to do here is to [38] check. You filed some affidavits in here.

Mr. Waggoner: I have no objection, I'm just making a statement.

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Q. It's talking about stop and go traffic of the buses on the streets. Would you state the method that is proposed? Are these buses going to be stopping on the streets? A. Not to load and unload passengers. The pickups in the center of the city would be, I suppose, at the schools and I would suppose the pickup would be at the white schools that are paired because many of those children would be bused into their schools on existing bus routes and so there would be no pickups at all. The paired school transportation would be from school to school with no stops.

Q. In picking the pairs for the schools did you take into account the roads and streets over which the students would be transported? A. I believe that the staff that prepared those plans for me took two things into consideration. One was the capacity of the school and the other was the available transportation.

Q. Did you have some pairs that you considered that were eliminated because the ones that were finally adopted were more feasible? A. Well, by the time we came to the drawing up of this final plan, the staff and I had worked together on a great many different arrangements of clustering and pairing and we had [39] come to know what schools would pair with what and some of the earlier plans, we had corridor-like clustering, and some of the members of the school department staff were well familiar with where the clustering would effectively take place, given where the roads existed where clustering would be most effective.

Q. I might have asked you this but I'll ask you again. In your opinion can the plan as directed by the Court feasibly be implemented by the School Board within the time directed by the Court? A. I have already testified to the effect and I believe it is in the report that I submitted to the Court that it was possible to make a step by step im-

plementation of this plan. I've said a number of times this afternoon that the plan for elementary schools could be started at once. When the School Board will find that it does not have sufficient school buses to continue implementing the plan, I'm not positive, I presume at that point . . . I presumed originally that at that point they would come to the Court and say we've carried out half of the clustering that you ordered and now we are out of buses. It's my understanding that there are enough buses available to begin the implementation of the plan. It's not my opinion they could do it all tomorrow.

Q. Is your answer to my question whether they could implement the plan within the time directed by the Court yes or not?

[40] Mr. Waggoner: I object. I don't think this witness could possibly know the answer.

A. It seems to me I already testified to that on several occasions. I have said the redrawn attendance zones in the area contiguous to the center of the city could be implemented, children could be reassigned in that area, and I have already testified to the effect that some of the pairings could be done at once. I'm not positive that the school department has sufficient buses to do all of it. However, they say that there are 75 buses available from the State. I don't know what availability those are. My estimates would indicate that would come close to fulfilling the requirements.

Mr. Chambers: I have nothing further.

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By Mr. Waggoner:

Q. Dr. Finger, your first participation in this case was as witness for the plaintiff, was it not? A. Yes, that's right.

Q. And you came in at that time with a plan for desegregation. A. Yes, that's right.

Q. And you had two of your colleagues from Rhode Island College who also testified on behalf of the plaintiffs. A. Yes, that's right.

Q. You later came back with a plan for desegregation which involved substantial pairing of schools, did it not? A. Yes.

[41] Q. This pairing arrangement left a large number of black and white schools, did it not? Do you recall that you left some all black and all white schools as a result of that pairing arrangement? A. I believe that's correct.

Q. And the only possibility you saw for breaking up the all black and all white schools was fairly long-distance busing, is this correct? A. I believe that's correct.

Q. You were appointed by the Court and first came to Charlotte around December 5, is this correct? A. Yes.

Q. How much time did you actually spend in Charlotte during the period that you actually worked on devising the court consultant plan? A. Didn't bring my vouchers with me but I would estimate that I was in Charlotte approximately fifteen to twenty days.

Q. And most of your time was in reviewing statistics and reviewing maps and records of the school sytem, is this correct? A. No, that is not correct. I spent a great deal of time meeting with the members of the school administrative staff, consulting with them as to what would be the best strategy to follow in developing a desegregation plan

and in providing them with procedures to follow to draw up a desegregation plan. When I first arrived in the school department, the school department [42] was unable to work on a desegregation plan because they had no authorization from the Board of Education and so when I arrived they were under Court order at that point to work with me and so we began together to explore the various ways in which the Court order could be met.

Q. All right. Now, with reference to your understanding of what was required of you, what criteria did you impose in seeking to achieve a desegregated school system in Charlotte? A. I believe I have defined that in my report to the Court. I have given a definition and it's my understanding that that definition is more or less implied by the Court order.

Q. Would you state the definition, please, sir? A. A desegregated school will be defined herein as one whose minority group enrollment does not exceed by more than 5% the proportions in all of the schools at that school level.

Q. So what this would mean is that at the elementary level a school should not have more than 35% black. A. That's correct.

Q. And on the junior high approximately 33% black. A. That's correct.

Q. And 31% on the senior high. A. That's correct.

Q. It makes no difference to you if it's 1% or 2% as long as you do not exceed the 5% ratio, is this correct? A. I'm not quite sure what you mean by it makes no difference.

[43] Q. Would you regard a school as desegregated if it had 1% black provided no other elementary school had more than 35% black? A. As I understand the order of the Court, it did not require the elimination of all of the all white schools. It only required the elimination of the

all black schools and this definition provided a working procedure to follow in arriving at a desegregation plan. It was a working procedure that I felt would prevent resegregation from taking place and I assume that that's what the Court had ordered me to do.

Q. And this is what your statistics show, is this correct? A. There are one or two schools that are slightly off.

Q. I mean generally. A. Yes.

Q. I believe you also assume that the neighborhood school was no longer a predominant pattern that would be followed in the desegregated system, is this correct? A. Yes. I believe the Court had something to say about that in their original Court order. It might be appropriate to quote from it.

Mr. Chambers: Is that the April 23 order you're referring to?

Mr. Waggoner: I have a package you sent me in the mail, let me get it. Which order are you reading from?

Mr. Chambers: April 23.

[44] A. The Court said in its April 23 order: "If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships. The neighborhood school concept may well be invalid for school administrative purposes even without regard for racial problems." He had many other things to say on the neighborhood school but I was following the Court order and so I assumed I was not required to follow the neighborhood school concept.

Q. All right. So you have abandoned this concept to the extent that it doesn't produce desegregation, is that basi-

cally what you have done? A. I have carried out the Court order.

Q. You also make a recommendation that the school authorities stay on top of this and revise and constantly look over the boundaries and ratios of students in schools so as to, in effect, police it, is this correct? A. So as to maintain desegregated schools, yes, sir. I suppose that if an all black school is unconstitutional, it is required that the school board take corrective action and I so recommend to the Court.

Q. This is a question that hasn't been fully answered by the courts yet, has it, to your knowledge? A. I'm an educator, not a lawyer.

[45] Q. Now, with reference to transportation you made certain recommendations, one of which was staggering the opening and closing of schools. Are you familiar with the method of employment of the drivers of the school buses? A. Yes, I am.

Q. Would you describe it for me? A. Well, it's put out in one of these affidavits here. It's not my intent to have recommended that student drivers be assigned to this transportation for cross busing. I would use adult drivers.

Q. You would use adult drivers. A. As I testified earlier, those buses will have to return to their starting point for their return trip.

Q. What utilization would you make of these employees as an educator while they are not driving the buses?

Mr. Chambers: Well....

Mr. Waggoner: I'm asking. This is part of the overall expense.

Mr. Chambers: What use do you make of the adult bus drivers now?

Mr. Waggoner: I'm asking him.

A. You ask me as an educator and I don't see why that's relevant to an educational problem. I didn't intend to make any use but there might be some use for them in the schools where they. . . .

[46] Q. Would it be fair to say that you haven't considered that? A. Yes, indeed, it would be fair.

Q. I believe you also recommended that students residing more than one and one-half miles from their school should not be penalized by having to walk, nor be penalized by having to pay for public transportation. A. I so recommended that to the Court. It's a matter of record.

Q. Do you still adhere to this recommendation? A. Well, I think it's important that we differentiate between that transportation that makes the walking distance one and a half miles and that transportation that is involved in simply carrying out the desegregation plan. Those are two separate and distinct problems. If the School Board proposes to have these children in grid #296C walk over to Eastway, a distance of four miles, they'd go that distance under either plan. It would seem to me that since the children who are doing most of the walking would be black children that it wasn't fair to them.

Q. I ask you to addres yourself to Northwest Junior High. A. Yes, sir.

Q. What students would be walking to that school? A. Well, it would be a lot of black children walking to that school. Some children live outside the district line that I assume will be riding to the school.

Q. There are many of those students who are white who will be [47] walking, are there not? A. There will be some students—and I don't know just where this line is—that will be walking in because the earliest city district line is not shown on these maps. On can't look at this map and

see. I understand the Court has asked for the documentation so that one can determine the numbers of students. I couldn't answer that question.

Q. I ask you to address yourself to the J. T. Williams line and ask you what race of students will be walking there. A. I said that I though the Hidden Valley students would be walking into the Williams School and I said that I thought that was too far for them to walk. Someone corrected me and said that they lived outside the old city limit and so they would be entitled to transportation. The only thing that it seems clear to me is that the students who will be attending the Williams Junior High School are the same students under either plan, or essentially the same students, so that the question is whether or not students are to be required to walk long distances or not.

Q. The walking will involve both black and white, will it not? A. I believe I testified earlier that it looked to me as if there would be far more black students who would be doing the walking but I haven't actually made a count of the number of black and white students.

Q. This is at best a guess on your part? [48] A. I wouldn't exactly call it a guess. I have studied these maps carefully over a long period of time.

(At this point in the proceedings Mr. Horack and Mr. Morgan arrived in the hearing room.)

Q. Dr. Finger, with reference to your recommendations on implementation of a desegregation plan, you recommended to the Court as an educator that the assignment of high school students be made as soon as possible and also junior high, but by reason of curriculum and faculty changes and things of this nature it would be unwise to do it prior to the end of the year, is this correct, from an educational

standpoint? A. I believe I differentiated between the senior high schools and junior high schools in that the requirements at the senior high school level, the programs were much more tailored to individual students. Therefore, in my opinion these students should be allowed to continue their education in their present schools and I suggested to the Court that if the schools were planning the programs and were assigning the courses to the students during this spring semester that might constitute a phasing in of the desegregation plan.

Q. But the actual attendance of the students at the schools would be deferred until next year according to your recommendation. A. Do you have the page?

Q. Not numbered. [49] A. I numbered mine.

Q. It looks like about page 10 or 11. A. My recommendation was that the assignment of high school students be made as soon as possible so that detailed plans for curriculum and faculty changes can be completed. The students in the present 10th and 11th grades should be required to report to their new school assignments during the spring semester. And I left that intentionally vague.

Q. Was there any reason why you were more specific with reference to junior high schools wherein you stated: "The school department should be required at least to have the junior high school students report to their new school assignments during the last week of school."? Is there any reason for differentiating between junior and senior highs? A. It was my understanding that the Court was uncertain as to what the law required it to do.

Q. I'm asking you as an educator. A. Repeat the question.

Q. As an educator do you feel it desirable to uproot junior and senior high school students on May 4 and physically put them in another school?

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Mr. Chambers: We object to the question.

A. I would say that the question was . . . strike that, that was off the record.

Q. We don't have off the record. You can't answer the question? [50] A. Of course, I can answer the question. My recommendations are stated in the document and as an educator I would feel that the junior and senior high school students should be allowed to stay in their present school assignments during the current year but that they should report to their new school assignments during the last few weeks of school so that the school programs can be adequately planned for the fall semester.

Q. And this is primarily by reason of curriculum and faculty and things of this nature, is that correct? A. And it's also so that the whole implementation of the plan can be restructured during the summer, the transportation reexamined and approved, and so on.

Q. You're firmly satisfied that there is no way to desegregate the inner city schools other than the long-distance busing of the nature that has been employed in your plan, is this correct? A. Long-distance is a relative term.

Mr. Chambers: I object to the form of the question, too. Mr. Waggoner is inserting a lot of adjectives that are opinionated by Mr. Waggoner and not justified by the facts in the case.

Q. Would you read the question back, please?

(The Court Reporter reads the question on Line 14 above.)

[51] A. I prepared some plans that had shorter distances in them and I believe I say in my report that one can con-

trol the distance that a child is to be bused and which children are to be bused when there is little control over the number to be bused.

Q. All right. You have a statement in your recommendation: Should a child residing five miles from a school be exempt but not a child who would be bused four miles. Is this in the area that you think is a reasonable distance to be bused for desegregation, between four and five miles? A. Most of the transportation in the proposed plan, the court consultant plan, exceeds that distance. It was simply a manner of speaking.

Q. Then there is no significance you would attach to the use of four miles or five miles in your report to the Court? A. The importance of distance depends upon the roads and the traffic conditions. Five miles isn't long on an expressway, ten miles isn't long on an expressway; ten miles isn't long on a main highway where the bus can move.

Q. Do you know the maximum speed a school bus can travel in the State? A. I believe it's in one of the affidavits. Is it 35 miles an hour?

Q. That's correct. Do you know the minimum speed limits on the interstate highways? Is it 45 miles? [52] A. I just mentioned interstate highways. I don't think anyone was proposing transporting these children on interstate highways.

Q. You would object to it yourself, wouldn't you? A. I think it might be done but it was my understanding that the school department felt it was unwise to do that.

Q. Is there a great difference of opinion among educators as to whether or not an elementary child should be bused to achieve desegregation? A. There's an awful lot of difference of opinion these days on busing. It seems to be a major issue, doesn't it? Professor Coleman who

wrote the Coleman Report spoke to that matter recently. There was a story in the New York Times about it. He was the one that wrote the Coleman Report that produced a lot of evidence as to the desirability of desegregating schools. He certainly felt busing was worth it.

Q. As far as elementary children were concerned? A. Yes, sir.

Q. Are there any educators who feel busing of elementary children is unwise? A. I suppose there are some. One can find people on most sides of most things.

Q. You conducted a major survey of this system with Dr. Passey, did you not? A. That isn't the language I'd use to describe my work with [53] Professor Passey. He was involved originally in the Charlotte case and he drew up a desegregation plan and he testified to the Court. I really wasn't very much involved with Professor Passey.

Q. He is a colleague at Rhode Island College, is he not? A. Yes, he is on the faculty of Rhode Island College.

Q. You were present in the courtroom when he testified he did not favor busing elementary children, particularly grades 1 through 4, out of their neighborhoods for safety and other reasons that are attributed to the neighborhood benefits. Were you present then? A. I don't think I was.

Q. Is this an unsound educational position? A. I believe that some 18 to 23,000 children in the Charlotte-Mecklenburg County get transported now and a large portion of those are elementary school children.

Q. Would you answer the question? A. What's your question, which way did you put it? Is it unsound to bus children? No, it's not unsound to bus them.

Q. Is it unsound to unnecessarily bus them?

Mr. Chambers: Objection to the form of the ques-

tion. Will you define what you mean by unnecessarily?

Mr. Waggoner: I'll let the question stand.

A. I don't know what you mean by unnecessarily. If the only way [54] to desegregate schools is to bus elementary school children, I don't think that's unnecessary, for educational reasons.

Q. Let me ask you this question. I asked you this earlier and haven't had an answer yet. Is there wide dispute among educators as to the relative benefits of busing elementary children to achieve desegregation substantial distances from their homes? A. I don't know what you mean by substantial distances.

Q. All right, ten miles. A. I don't believe all educators feel that one ought to bus children. Apparently a great many educators do because they have abandoned the one-room school house in favor of central consolidated schools. So I guess they think there are educational advantages to busing children.

Q. Are there a substantial number of educators who feel there are disadvantages to the type busing we are discussing of elementary children? A. I don't think this type of busing is any different from any other type of busing. The question is whether the child will benefit educationally.

Q. Would you answer the question, please, Dr. Finger? A. Give me the question.

Q. Would you read it back to him, please.

(The Court Reporter reads the question on Line 15 above.)

A. I don't know what you mean by a substantial number, whether [55] you mean 10 or 30%.

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Q. Tell me how many or percentage, either one. A. I never made a survey, I don't know. I don't know of any survey that's been made as to the number.

Q. You're saying you don't know how many are in favor of it or how many are against it, the only thing you know is your own opinion, is this correct? A. I didn't say it was my opinion, Mr. Waggoner. I just quoted one of the nation's most outstanding authorities on this matter.

Q. Is he the only one that you know of, then? A. Of course not.

Q. Who are the other ones? A. (No answer given.)

Q. Since there has been no answer, I'll go on to something else. A. I was wondering how to respond to that. I think there are a large number of educators who are. It's obvious that many cities are carrying out desegregation plans because they think it's sound educationally. It's clear that a number of people have done analyses of the Coleman Report and have reported on the adequacy of that study and of the expectancies that one can have from desegregated schools. I think there is a substantial body of knowledge concerning the expected outcomes from desegregation.

Q. All right. You have told me of those who support your [56] position. Are there any that don't support your position? A. I don't know of any research studies that show that children do not benefit from attending desegregated schools.

Q. That's not the question I asked you. A. I know that there are some high school principals and school principals here in Charlotte who oppose it. Is that what you want me to say?

Q. I'm asking you to say whatever you have knowledge of.

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Mr. Chambers: What's the question about?

Mr. Waggoner: We spent 15 minutes asking Dr. Finger if he knows the degree of dispute among educators as to the relative advantages and disadvantages of transporting elementary children ten miles to achieve a desegregated education. The question relates to whether or not the advantages of transportation outweigh the advantages of desegregation, the type of transportation we have in the Charlotte system.

Mr. Chambers: Your question is whether the advantages of transportation outweigh the advantages of desegregation?

Mr. Waggoner: Whether the disadvantages of transportation outweigh the advantages of desegregation.

A. I don't think that's an equation. I think that it's demonstrated that there are educational advantages to be obtained [57] from desegregation and there is a body of research that supports that.

Q. Well, I won't pursue that line of questioning any more. Now, you have had great quarrel with Mr. Morgan's transportation figures. Let me see if I can ask this question to bring some light on the matter. The Board plan, utilizing the requirements of State law, will bus approximately 4900 students. Is this reasonably correct, additional students? A. That's reasonably correct, yes. This is according to the Morgan affidavit.

Q. And your plan proposed adding to that the cross busing of approximately 10,000 black and white students, is that correct? A. Yes, that's correct.

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Q. So you're somewhere in the neighborhood of 14,000 students, is that correct? A. That's correct.

Q. In addition your plan would furnish transportation to all students who reside within a mile and a half, whether or not they are eligible for transportation, is this correct? . . . under State law. A. No, that's not correct.

Q. Well, let's take a look at your report. A. I have already testified that one should differentiate between the recommendation to the Court about walking and the equal [58] treatment of children. That recommendation would apply under either plan, whether it was the Board plan or the court consultant plan.

Q. But the Board didn't choose to adopt that, did it? A. The Board doesn't choose to . . . the Board didn't choose to adopt that.

Q. So the Board figures 4900 to the best of your knowledge. A. If we count children in the same way, the Board plan calls for the transportation of approximately 4500 children and the court consultant plan calls for that same number plus 10,000 children to be bused under pairing. Under either plan, if transportation is provided to children who must walk more than a mile and a half, there will be additional transportation and in my opinion that additional amount will be about the same under either plan.

Q. That's correct. Now, you're familiar with the fact that Judge McMillan's order of February 5th provided that the School Board would determine a walking distance and furnish transportation to every student whose attendance at school is required for desegregation, is that correct? I direct you to Page 3, Paragraph 7. A. The Court ordered: "That transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and

who live farther from the school to which they [59] are assigned than the Board determines to be walking distance."

Q. Now, under your balancing arrangement the attendance of any child at a school affects the degree of desegregation that school has, does it not? I'm sorry, I'll pick it up again. You have imposed and so has the Court imposed a balancing of races within the schools, is this correct? A. I don't know.

Q. I mean, this was your goal, to achieve as much balance as reasonably possible, is this correct? A. In my report to the Court I defined a desegregated school and then I attempted to have all schools meet that definition.

Q. This definition was an attempt to meet as much of a racial balance as possible, is this correct? A. I already answered that question.

Q. Will you answer it again? A. Yes. I defined a desegregated school in my report to the Court and I tried to have all the schools fall within that definition of a desegregated school.

Q. And this involves racial balance, does it not? A. Those are your words, not mine.

Q. I'm asking you. A. I'll answer that question the same way I answered it before. I defined a desegregated school and I attempted to have all the schools fall within that definition.

Q. We don't have the privilege of a Court present. Will you [60] answer my question?

Mr. Chambers: I object to that. I think the witness has already answered the question.

Mr. Waggoner: He can answer it yes or no and he can explain it.

Mr. Chambers: He's given you an answer, he's told you what he did. You just want him to say something he hasn't said.

Mr. Waggoner: He can say it's a racial balance or it's not a racial balance.

A. I don't know what a racial balance is. That's why I used the language I used here.

Q. You don't know what a racial balance is. All right.

Mr. Chambers: How are you defining racial balance?

Mr. Waggoner: Racial balance is similar to what the judge indicated in his prior order, it should be approximately the same number of students of each race in each school.

Mr. Chambers: I want to call the Court's attention at this time to the Court decision of February 5th. The language of that opinion appears on Page 2, bottom of the page, and continuing on Page 3.

(The Court Reporter at this point in the proceedings reminded [61] counsel it was 5:00 and that it had been ordered that the deposition of Mr. Morgan begin precisely at 5:00 o'clock.)

Mr. Waggoner: I'd like to continue.

Are you talking about the statement of the Judge?

Mr. Chambers: Yes.

Mr. Waggoner: I'm asking this gentleman what his definition is.

Mr. Chambers: Definition of a racial balance?

Mr. Waggoner: Yes.

Mr. Chambers: Are you asking him a racial balance and asking him to define what you mean by racial balance?

Mr. Waggoner: If he can define the term racial balance.

Q. Can you do this? A. Mr. Waggoner, I already testified to the fact that I was required to carry out an order of the Court which required me to draw up a plan which ended up with no all black schools. In order for me to carry out that order, I needed to have some kind of definition to follow as to what constituted a desegregated school. So I defined it and I made it very clear that my definition was so that I could refer to the words desegregated schools in order to explain what procedures I was following. Now, if you wish to say that my definition of a desegregated school is racial balance, that is for you [62] to say. The Court has said that that was not his order and it is not the language that I used in my report to the Court.

Q. I'm asking you, then, did the results of your plan following the Court's instructions achieve a racial balance in the schools. A. I sometimes indicated that I thought it was unwise to allow the proportion of black students to be too disparent with those in all the rest of the schools in the county but I might have been following a rule similar to the one the Board of Education followed in drawing up its computer assigned attendance zones in which it set a limit of some kind of the proportion of black students in a school, I believe 40%.

Mr. Chambers: Can we go off the record one minute? Judge Warlick ordered us to depose Mr. Morgan at 5:00 o'clock. Dr. Finger has a 6:59 plane.

Mr. Waggoner: Julius, I'm extremely sorry but you have gone into a great deal of detail on transportation.

Mr. Chambers: The only thing I mean is would you go ahead with Dr. Finger and then let us pick up Mr. Morgan?

Mr. Waggoner: We will waive Mr. Morgan until we get through here.

(The Court Reporter informed counsel that the above would [63] appear in the record in view of Judge Warlick's order to the Court Reporter to proceed with the examination of Mr. Morgan at 5:00 o'clock.)

Q. Do you interpret the language that students of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have the same proportion of black and white students, would you interpret that as being an attempt to reach a racial balance?

Mr. Chambers: Where are you reading from?

Mr. Waggoner: I'm reading from the December 1 order.

Mr. Chambers: You're asking the witness to interpret the Court order?

Mr. Waggoner: No, this is the February 5th order, third page. I'm asking him if that is the balance he tried to achieve. I'm asking whatever my question was.

A. Where are you reading from?

Q. Page 3, February 5 order, paragraph 6. A. Well, the Court makes that statement on Page 3 and on the bottom of Page 2 he says that the order which follows is not based upon any requirement of racial balance.

Q. I understand that, but did you achieve racial balance in your results? A. May we take a . . . .

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[64] Q. Let's talk, let's stay on the record. I want to get out of here. A. I find that language of the Court a little puzzling. The Court did not use the language racial balance and neither did I. For some reason the Court avoided it and so do I.

Q. You're avoiding it because the Court did? A. Apparently there is some reason that you don't want to avoid it.

Q. That's correct. A. I can only answer the question as I did before. I defined desegregated schools and I tried to carry out, in effect, the statement here that pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students, and that plan that I submitted to the Court in effect does that.

Q. Now, with reference to transportation, you're familiar with the fact that the Court originally ordered the furnishing of transportation to all students who live more than a walking distance whose presence at a school was necessary for desegregation, is this correct? A. Where do we find that again?

Q. Page 3.

Mr. Chambers: Objection to the question unless you're also going to read . . . .

[65] Mr. Waggoner: I will, give me time.

Mr. Chambers: You asked him what the Court directed. Why don't you put down what the Court said it directed?

Mr. Waggoner: Let me handle my examination.

Mr. Chambers: I don't think you ought to mislead the witness.

Mr. Waggoner: I'm not misleading the witness. I'm just asking this.

A. You just read that statement a minute ago. You want to read it again?

Q. If you like, paragraph 7. A. "That transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance." Now, I would have thought if the Board determined walking distance for one plan, they would determine it for another plan in the same way.

Q. All right. Now, with reference to this the Board established one and a half miles as a walking distance and it was on this basis that computations were made reflecting that 23,000 students would be transported under your plan. Do you dispute these figures? A. I have no way of judging.

[66] Q. Now, on March 3 the Court entered a supplemental order—and continue to refer to that paragraph—and he indicates there has been some misunderstanding concerning what he meant and he therefore amends the order by deleting the words "attendance in any school" and inserting the words "reassignment to any school" Do you understand this to mean that any student who lives in his old attendance district and is in a school and resides more than a mile and a half will not be furnished transportation?

Mr. Chambers: Are you asking him to interpret the Court's decision?

Mr. Waggoner: I'm asking him to interpret this to see that he understands my next question.

A. As I read the entire Court order it seems to me that the Court is saying that his new revision is such that approximately 4500 plus the 10,000 we have been talking about would be the number of children he is ordering the Board to transport.

Q. Do you understand that the Board plan would not transport students in the AG district and your plan would and the Court ordered plan would? A. Will you explain to me why? . . . I'm the one to testify. What's your question, Mr. Waggoner? Do I understand . . . . no, I don't understand it that way. No, I don't.

Q. The Board plan will not furnish transportation to any student [67] who resides in the city limits and attends the city school. Do you understand that, the city limits of '57? A. Yes.

Q. Your plan would and so would the Judge's for those who have been reassigned. A. Yes, that's correct, Mr. Waggoner.

Q. Now, the computations you made didn't take into consideration the original Court order requirement for transportation of all students within a walking distance.

Mr. Chambers: Objection to that because that is not the original Court order.

Mr. Waggoner: There was enough misunderstanding about it for the Judge to write another order.

Mr. Chambers: The interpretation given the order by the School Board and nobody else. I think the question is unfair and misleading to this witness and I object to the form of the question.

A. What's the question?

Q. Would you read it back?

(The Court Reporter reads the question on Line 7 above.)

Q. Whose presence is required for desegregation. A. I didn't calculate students the same way Mr. Morgan did.

Q. Would you answer the question and then explain if you wish? A. I thought I did answer the question, didn't I? Apparently Mr. Morgan was certainly counting a different kind of student [68] than I was.

Q. Tell me what students you counted, Dr. Finger. A. Well, let's see if we can reach some agreement what we're talking about so we have some clarity on this matter. It seems to me that when we talk about the students who are in schools that are involved in pairing that the amount of transportation required that I'm talking about is the same transportation that is now provided by the School Board because those are the same attendance zones that are now currently being used and that will be used in the future and that in addition to those students, for those students there is an additional amount of transportation required of 10,000 elementary students. Now, when I read Mr. Morgan's figures I find that his estimates for elementary transportation exceed that amount and I would think for clarity what I've been talking about for those schools that are to be paired that there is the present amount of transportation now provided by the Board of Education, plus the 10,000 students who would be bused to accomplish the pairing.

Q. Do I understand that you're saying that you would furnish transportation to those students who are entitled

to transportation under State law plus the 10,000 students who are involved in cross busing? A. I don't see how I could make my statement more precise than I made it before and would prefer not to reword it.

[69] Q. I didn't understand it. It doesn't agree with what I said. A. Well, we can go to any school district you want to at the elementary level like Huntingtown Farms and under the court consultant plan the school attendance zone for Huntingtown Farms is identical to the current attendance zone for Huntingtown Farms and all those students currently transported in that attendance zone would continue to be transported and that in addition some of those students would be transported to accomplish the pairing. Therefore, the amount of transportation under the elementary pairing plan would be the amount now being provided plus 10,000.

Q. In those 34 schools? A. Yes, sir, that's what we've been talking about.

Q. What other transportation would you provide? What other transportation did you provide in the figures that you gave me? A. None.

Q. You would only provide the 10,000 elementary students with transportation? A. We were talking just about elementary schools.

Q. All right. You would provide none for any other elementary students. A. OK.

Q. What other transportation would you provide for junior high schools? [70] A. Let's make sure that question is clear because there are some students who are currently being transported who would continue to be transported. They might be assigned to a different school and I do not know whether the amount of transportation would increase

or not. For example, I look at the Amay James District and I see that there are some children that are going to be transported, I presume they are going to be transported to Amay James School. They're entitled to it. Those students are being transported to some school now. So that it's my opinion that the total amount of transportation involved in this system would be that amount currently being provided plus that amount which is involved in the pairing arrangement, the 10,000. Now, I talked about the 34 schools only to be very precise and point out that those attendance zones are identical to the attendance zones now being used. There are some other attendance zones that have been changed and as a result there might be some children transported to a different school, but presumably those children who are entitled to transportation would still be entitled to transportation. There might be some small changes and there might be some small increases but I assume that the number is approximately the same.

Q. All right. Let me ask you if this is a fair statement; that in the elementary schools that to get the students to Barringer School you would transport an additional 197 to the [70A] school so they could be picked up . . . wait a minute, that's not a cross busing school. Would you transport 197 students to Barringer School? A. I don't know what the question is, would I. What do you mean by that?

Q. Under your plan or under your computations. A. The consultant plan and the Board plan for Barringer are identical, are they not?

Q. That's correct. You said you wouldn't furnish any additional transportation on the elementary level to any other school. A. All those youngsters reside within a mile and a half of the school.

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Q. Is that the linear distance or is that the road distance? A. Well, do you want to come look at the boundary? None of those boundaries are more than, I don't believe by any way you want to figure it, more than a mile and a half for those children.

Q. I ask you to closely look at the boundary and not mistake the old boundary. A. Is that the boundary there?

Q. It sure is. A. That's just about a mile and a half. There may be a few children residing in there that exceed that distance.

Q. Would 197 be approximately correct? A. Might be.

[71] Q. Would you like to look at the Berryhill School while you're up and see if 274 would be transported? You understand that State law provides transportation by the nearest route and not a radius. A. I understand that. There are some children residing here, in this district here, which I presume are well beyond a mile and a half. Is that 190?

Q. 274. What about Billingsville? Would you transport 259 students to that school under your plan? A. Under the Board plan?

Q. Either plan. A. OK. If you say that's the number that live more than a mile and a half from the school.

Q. Then you would have transportation furnished to additional elementary students. A. I testified there might be some additional students that would be transported but that's a small number of students.

Q. This is without regard to whether or not they are reassigned to that school or not, is that correct?

Mr. Chambers: Objection to the form of the question.

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A. I don't understand your question, Mr. Waggoner. These are elementary school children who, under the Board developed plan utilizing these computer assignment system, end up residing more than a mile and a half and are therefore [72] entitled to transportation as elementary school students. Is that correct?

Q. That's correct. And they are eligible under State law for transportation. When did you make your computations with respect to transportation? . . . the requirements as far as numbers of buses and numbers of students. A. Within the last few days.

Q. Within the last few days. When did you first see Mr. Morgan's affidavit? A. This morning.

Q. At what time? A. 10:12.

Q. Did you spend the entire time prior to 12:00 o'clock studying that affidavit? A. Yes, I did.

Q. You made comparisons during that time? A. Yes, sir.

Q. So in an hour and forty minutes you're in a position to question the extensive transportation contained in Mr. Morgan's affidavit? A. It's quite clear, as I have testified over and over again, that Mr. Morgan is following a different set of rules and that we're talking about the same school attendance zones and under one set of rules you transport a lot of children and under a different set of rules you transport a different [73] number of children. I think it's important to understand that the attendance zones are the same or nearly the same.

Q. The point I'm trying to get across, Dr. Finger, is that the Board, as you say, uses one set of rules in which they will furnish transportation to students who are eligible under State law for transportation and in your report to the Court you indicated that transportation should be fur-

nished to all students residing more than a mile and a half from the school irrespective of State law.

Mr. Chambers: Are we talking about Dr. Finger's recommendations or what the Court directed?

Mr. Waggoner: I'm talking about his recommendation just now.

A. What page is that on?

Q. 10 or 12. A. Right of student to be transported. Students residing more than one and a half miles from the school should not be penalized by having to walk to school, or penalized financially by having to pay for public transportation. Students residing more than one and one-half miles from the school to which they are assigned should receive free transportation. The School Board should either provide for free public transportation or provide school buses. I recommended that to the Court.

Q. Have you made any computation with reference to the number of [74] students who would be transported under that definition? A. No, I have not.

Q. You cannot, then, dispute the 23,00 figure that Mr. Morgan has developed, is that correct?

Mr. Chambers: Are you suggesting that Mr Morgan used the recommendations of the Court order?

Mr. Waggoner: I'm talking with reference to the recommendation.

A. I would have thought Mr. Morgan followed the Court order.

Q. Will you answer my question? A. What is the question?

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Q. You have no reason to dispute Mr. Morgan's figure of 23,000 students. A. I answered that question once. I said the answer to that was no, I have no reason to dispute it. I have no basis for judging it.

Q. When did you first see the amendment to the Judge's order with reference to his order of February 5? A. It was on my mantel at home special delivery, airmail, at 7:00 o'clock last night when I got home from school.

Q. Have you made a computation with reference to the number of students who would have to be transported under the Judge's amended order? A. I believe that we have completed talking about the number of children to be transported under the Judge's amended order [75] for elementary schools, that we have completed that. I believe the numbers we have been talking about for elementary schools are essentially those that complied with the Judge's amended order.

Q. On the elementary level? A. On the elementary level.

Q. And what total did you come up with? A. I thought we had said that a half-dozen times.

Q. You haven't told me. A. We just pointed out a few instances, did we not, that involved several hundred children that I did not count. So that we have talked about, in addition to the 10,000, apparently there are a small number of additional children who must be transported to their elementary schools. I do not know the exact number of these but I assume that we have substantially covered most of these in the recent testimony.

Q. Well, would it surprise you if I told you that the figures I was reading related to the transportation requirements under the Board plan? I will withdraw the question. Dr. Finger, you haven't made a careful study of the transportation requirements as required by the amended Court

order of February 5th and March 3, have you? A. I made some estimates.

Q. All right, will you give them to me? A. I need a little advice. I don't know which attorney to turn [76] to for advice, you know. I'm off the record there.

Q. Leave it on the record. A. May I have a five minute recess?

Mr. Chambers: Yes.

Mr. Waggoner: I would prefer to go ahead and finish. If you want to take time and think, that's all right. I don't want to interrupt now.

Mr. Chambers: Do you have a question, Dr. Finger?

A. I just need to be sure I understand the Court order so that I understand this question so that I know exactly what I'm testifying to. Let me see now. I think those are all the estimates I have been talking about. Excuse me, where is this revised order?

Mr. Chambers: We can take a recess if Dr. Finger has a question he wants to ask.

Mr. Waggoner: Let him ask it in the presence of everyone.

Mr. Chambers: If you don't understand the question posed by counsel, tell him you don't understand the question, unless he wants to take a break to find out exactly what his question is about.

Mr. Waggoner: He can ask and we can put it on the record, there's no objection to that. He can ask me and I'll respond as best I can.

A. As I understand the language of the Court order, the

Court has [77] said that whether the Court consultant plan is adopted or whether the Board plan is adopted that certain children are entitled to transportation under that plan and that children residing in these satellite zones here would be required to be provided with transportation. Is that your interpretation?

Q. That's a part of it. Let me direct your attention to Randolph Junior High School. Randolph Junior High is located here. There is a neck that goes on past the Billingsville area to pick up black students. These students in this neck do not reside in this district. They have been reassigned to the school and would be furnished transportation, as I understand the Court order. Have you made a computation as to the number of students who would be required to be furnished transportation at Randolph Junior High School? A. I think I have and I want to be sure that I have and that the testimony that I give is correct and accurate. Yes, I have made such an examination. I counted as follows: For Alexander Graham Junior High School 360 students.

Q. That's a result of your satellite zone? A. Yes, sir.

Q. That is all it includes, is that correct? A. Yes, that's correct. I have based the estimates of the number of buses that would be required to transport junior high school students on the number of students reported by the school department according to State regulations and in [78] addition I have made an analysis of the number of students in the satellite zones; for Alexander Graham 360; for McClintock 325; for Quail Hollow 274; for Carmel Road 142.

Q. Let me interrupt you for a minute, Dr. Finger. You have not taken into consideration any other students who may have been reassigned to that school who are not in

the satellite zone, is that correct? A. Unless they were included in the original report that the school department submitted to me.

Q. You're familiar with the fact that the report submitted to you by the school department was purely for students eligible under State law for transportation? A. I have testified to that a number of times, yes, sir.

Q. All right, and that the school department's report doesn't include reassigned students in the Alexander Graham district and you've made no allowance for that, have you? A. Mr. Waggoner, I looked at the plan proposed by the Board, I examined the transportation estimates prepared by Mr. Morgan and listed under the Board plan, and I observed that there were some cihldren who lived a long distance from the school. In estimating the number of children who might be entitled to transportation, I counted the children who were in the satellite zones.

Q. Then you have not taken into account any other students who may have been reassigned to that school other than those [79] living in the satellite zones. A. Well, that's not wholly true. I noted this Sedgefield neck up here and I made an estimate of the number of students that resided there and counted them.

Q. Did you take into account any students who would attend Alexander Graham who reside in grids 402B and 403A? A. No, I did not.

Q. A similar situation would exist for any other students who have been reassigned and are not within satellite zones other than Sedgefield or a few other isolated areas. A. Well, as I read the Court order, the Court order talked about a walking distance and I would have assumed that the walking distance that the Board assigned under one plan would be the same as the walking distance that

the Board assigned under some other plan and so I looked at the Board plan and the estimates of transportation under the Board plan and thought that that must be what the Board assigns as walking distance. So I don't see why the Board assigns two different walking distances under two different plans. So the reason I didn't count those students was because I assumed that they were within walking distance.

Q. Well, it's readily apparent that the students residing in the Alexander Graham attendance district as restructured under the court ordered plan, or your plan, in 402B and 403A reside more than a mile and a half from the school, isn't it? [80] About two miles, uh huh.

Q. Wouldn't it be closer to three by road? A. Two and a half to three miles. It's a good walk.

Q. You have overlooked similar students in the other districts, too, have you not? A. If we have, we better detail them so there is no misunderstanding as to what the transportation problem is and what the Court order is.

Q. I ask you address yourself to Smith Junior High School and tell me how many students there. A. When I look at the Board plan I go 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 grids. That's five miles as the crow flies. When I look at the Court ordered plan I see a much more compact attendance zone with a satellite and I have counted the satellite.

Q. You're familiar with the fact that the kids under the Board plan in Smith would be entitled to transportation under State law, are you not? A. No, I wasn't aware of that. They would be?

Q. They would be. A. How come?

Q. It's located in the perimeter area. A. It would be helpful if we had a map with the perimeter area around it.

Q. The Judge requested this. A. Let's not confuse the record, then, on these matters.

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[81] Q. The point I'm trying to make is that you haven't considered all the students who would be furnished transportation under the Court ordered plan in the figures you have given Mr. Chambers, is that correct? A. I certainly have made fair estimates of the amount of transportation required and when the School Board is claiming that 23,000 students are to be transported, they are making claims made on or based on a set of rules which now appear to be not in the language of the Court.

SHORT RECESS

Q. Dr. Finger, I don't believe you answered my last question. You gave an answer but I don't think it was in direct response to it. Would you read the question back?

(The Court Reporter reads the question in Line 1 above and the answer in Line 5 above.)

Q. That's wholly unresponsive.

Mr. Chambers: That's not good enough?

Mr. Waggoner: No.

Mr. Chambers: What do you want him to say?

Mr. Waggoner: I want him to tell me whether or not these figures are accurate and whether he's considered every student that would be furnished transportation under the court ordered plan. He already indicated that he has not.

Mr. Chambers: That's your interpretation, Mr. [82] Waggoner.

A. I have made estimates at the junior high school level that includes students not reported by the school depart-

ment in their report that was prepared for the Court. As a matter of fact, I have made a range of estimates as to the number of students who might be transported at the junior high school level and I estimate this number to be between 3500 and 4000. Now, I believe to the best of my knowledge and belief that I have counted all of the students and when I reported on the number of buses that would be required, I believe I counted all of those children. To avoid any possibility of misunderstanding, let's just check and make sure. If there are 3500 additional junior high school students to be transported, that would require 78 45-passenger school buses.

Q. Does this assume full capacity use of the buses?
A. I was counting 45 students in a bus, yes, sir. One might assign more students to the bus than the bus would hold.

Q. In making that computation did you consider students who are not in the satellite zones who are reassigned to those junior high schools?

Mr. Chambers: Haven't we gone over that, Mr. Waggoner?

Mr. Waggoner: He comes back with a positive statement this is all that would be required and I'm not going to leave it to conjecture that he has [83] recomputed the thing and added these students back in.

Mr. Chambers: I think the witness testified on two or three different occasions to the same question you have just posed.

Mr. Waggoner: Well, I want to make certain that the record is very clear that this 500 that he has estimated does not include those students who were reassigned and do not reside in the satellite zones.

Mr. Chambers: He just testified to the contrary.

Mr. Waggoner: He did not. Let him answer the question.

Mr. Chambers: You mentioned harassing. I think the questions that you continually are asking now are purely harassment.

Mr. Waggoner: If I could get straightforward answer from the witness, we could go on.

Mr. Chambers: I think the witness has given straightforward answers.

Mr. Waggoner: We'll let the record speak for itself.

A. Perhaps, Mr. Waggoner, we should go through these junior high schools district by district and count the amount of transportation that would be required so that there is absolutely no misunderstading as to what transportation is [84] or is not needed. It is not easy to estimate the amount of transportation since some of the children who will be attending a junior high school under the court ordered plan were riding the school bus to a different junior high school and so there is always the question of when you are talking about a new student going to a junior high school and one who is currently riding a school bus.

Q. It's quite satisfactory with me if we go through the junior high schools school by school. I hope we don't have to do it. A. If we have to clarify the testimony, then I think we should.

Q. I think we should, too. With reference to Albemarle Road, I would like for you to estimate the number of students who will be furnished transportation or additional students who will be furnished transportation under the

court ordered plan. Do you have your demographic chart with you? A. No.

Q. On what basis can you make such an estimate, then? A. With regard to the Albemarle Road School the original report of the school department on transportation required under State law was 297. Mr. Morgan estimates in his affidavit that there are 267 students to be transported. Now, I believe that when Mr. Morgan is counting these 297 students, he is talking about transporting these students to a school that is outside the city limits and that that's the number of students that [85] he reported being transferred to that school. Another way. . . .

Q. Let me direct your attention to. . . .

Mr. Chambers: Let the witness finish.

A. Another way that I could get that figure would be to read the number of black students assigned to Albemarle Road School. There are 292 black students in Albemarle Road School. Well, I can get my . . . . it's right here. At the present time there are 63 black students in Albemarle Road School and I don't have the demographic maps with me. I assume those 63 black students live in that attendance zone. So if I were to make an accurate count of the number of students required to be transported to the Albemarle Road School, it would be essentially those students currently attending Albemarle Road School or some other students eligible for transportation to that school, plus the number of black students residing in that attendance zone. Now, my estimate of the number was 297 but I see that my estimate is on the high side because indeed, 63 black students already go there, so that the correct number of students to be transported might be somewhere more near 239.

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Q. Now, the estimate that you have of 297 and 267 were furnished to you by Mr. Morgan, were they not? A. Yes, sir, that's right.

Q. And you accept them as reliable. A. I don't know that Mr. Morgan submitted the 297. The school [86] department was requested to supply those to me. I pressume that Mr. Morgan did those. I never questioned Mr. Morgan's reliability.

Q. You do not question him? A. I never have, no, sir. I question the rules under which he was conducting the counting, not his reliability.

Q. Isn't this the basic difference in the counts we're coming up with, Mr. Morgan was using one set of rules, that the Board adopted a policy that they would furnish transportation where permitted by State law so the State would share part of the expense, is this not correct? A. Repeat the question.

(The Court Reporter reads the question on Line 7 above.)

A. It's correct that we were operating under a different set of rules. What else do you want me to say?

Q. Well, I'd like to define these rules so the Court can understand what rules you were operating under and what ones he was operating under, and as I understand your junior high attendance areas you were operating under the rule that you would furnish transportation from the satellite districts only except in a few isolated cases where students seemed to be located long distances from the school you would furnish transportation under your figures. Is that a fair statement? A. Yes.

Q. And that would likewise hold true on the elementary

and senior [87] high schools, too, would it not? A. I was trying to make estimates of the actual amount of transportation that would be required to carry out what I conceived of the desegregation plan.

Q. You made your computations several days ago, is that correct? A. I believe I testified it was even more recently than that.

Q. And you received the Court order last night is that correct? A. That's correct.

Q. And you have just begun to understand the Court order this afternoon.

Mr. Chambers: Can we define which court order you're talking about?

Mr. Waggoner: March 3, amending the February 5 order.

A. I would say it's correct, Mr. Waggoner, that I did not understand why there were the reports on the transportation of 23,000 students that I read in the newspapers.

Q. Read the question back, please.

(The Court Reporter reads the question on Line 9 above.)

A. I just saw it last night for the first time.

Q. And you gained an understanding of it this afternoon, is that correct?

Mr. Chambers: May I inquire what you mean by gaining an understanding of it? From whom?

Mr. Waggoner: Knew what it meant.

[88] Mr. Chambers: As defined by whom?

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Mr. Waggoner: By its own language, satisfactory to himself.

A. Well, it seems to me that the estimates that I have given for transportation are pretty much consistent with the amended court order.

Q. And you're saying the estimates you made before receiving the Court order are still accurate to your satisfaction—as complying with estimates you would make under the Court order. A. I just testified a few moments ago that if we want to improve upon the accuracy of the testimony that I have given that we had better go through the junior high schools one by one and get an accurate estimate of the exact amount of transportation that is required. It's my understanding that the Court has ordered the school department to prepare such plans and that when these plans are prepared we will have a much more accurate estimate of the actual transportation under the Court order than we can get here.

Q. Would you submit that the estimates developed by Mr. Morgan and his staff would be much more accurate than those you have testified to today with respect to defining transportation requirements under the Court order of February 5 and March 3?

Mr. Chambers: How can this witness say that?

Mr. Waggoner: Well, I'm just asking him.

Mr. Chambers: Are you asking him if Mr. Morgan [89] had available the detailed demographic maps to make an estimate or are you asking him to testify that Mr. Morgan is going to tell the truth? I don't think you want to put this witness in that position. It isn't fair to even ask that question.

Mr. Waggoner: I would like an answer.

Mr. Chambers: I object to the form of the question.

A. I have consistently said from the very outset that the school department is the one most capable of drawing the accurate estimates, the ones most capable of drawing a desegregation plan. The plan that was submitted to the Court was submitted because it was a plan that the school department felt was a feasible one. So my answer to that question would, of course, be yes.

Q. Have you at any time defined for the Court the students whom you would recommend that transportation be furnished by grid numbers of grid code? A. No, I have not.

Q. By any other method? A. No, I have not. The total amount of information submitted to the Court on transportation is this prepared by the school department.

Q. Was this prepared by the school department at your request? A. Yes, it was.

[90] Q. Was it submitted in this form to the Court? A. It was submitted in this form to the Court with the notation that it should not be part of my report since I could not attest to it.

Q. And did you instruct the Court to remove the transportation information contained on this exhibit that is attached to his court order of February 5? A. I reported to the Court that I had no knowledge about that, that it had been prepared by the school department and that, therefore, I could only provide the Court with whatever it said there and the Court decided that, therefore, it should not be incorporated as part of my report.

Q. Did you have any similar reservations with reference

to the numbers of students who would be attending the various schools which were also prepared by the school department? A. No, because we counted those together.

Q. You counted those together. A. We counted them so many times you get to be pretty sure of what things are.

Q. Do you have any information as to the total number of students who have been reassigned as a result of the Court order of February 5 as amended? A. Well, we can quickly count the number of students reassigned in the paired schools since those students are in the same attendance zones they were in before. I have not counted [91] the actual number of children who will change schools because of the redrawing of attendance zones at any of the grade levels.

Q. It's a fairly detailed job. A. It's a fairly detailed job. We could obtain that information. In some cases it's a sizeable number. For example, most of the children attending West Charlotte are reassigned. That's the school that has the most reassignment. Independence High School has very few children reassigned.

Q. On what basis did you come to the conclusion that the school department had overestimated the number of students who would need transportation at Smith? I think you testified that 300 would be a more accurate figure than the 413. On what basis did you reach this conclusion? A. Well, I reached this conclusion based on the fact that there are 350 black students assigned to Smith and presumably this is the group count of this satellite here and that these children in the geographic area surrounding Smith would all walk in. I thought that that might be an overestimate I also noted that . . . .

Q. Let me ask you on that, did you have a demographic chart before you at the time you made this estimate? A.

No, I did not. I also noted that Mr. Morgan, in his second report, noted 360 students in there, so I just questioned that. I didn't make a big thing about it.

[92] Q. Mr. Chambers asked you about showing residences of the students and that you were only furnished with grids showing the populations within racially. This is not unusual in a system this size to not get information that is broken down by actual location of residences within a school district, is it? A. Well, nothing is really very usual these days in school demographics. I have suggested to the school department that they could probably improve their attendance zoning if they would be able to split those grids into quarters. I'm sure they'll do it if they can find time to do it.

Q. Dr. Finger, in connection with describing the difference in the two plans, I made a note that you testified that you made the ratios of the races equal in all grade levels to the extent you could. Do you recall testifying to that? A. I believe that that falls within my definition of a desegregated school in which I explicitly say by more than 5% of the proportions in all of the schools at that school level.

Q. But you did try to establish a racial ratio, though, you didn't try to establish a racial balance. Would that be a fair statement? A. I tried to define desegregated school and have all schools fall within my definition.

Q. It's obvious I'm not going to get an answer to that one. Dr. Finger, in establishing these ratios or a desegregated [93] system, the attendance of any student of either race would be necessary to maintain the level of desegregation in that school, would it not? A. That sounds like a yes question but I'll ask for it to be repeated.

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(The Court Reporter reads the question on Line 25, Page 92.)

A. I guess that would fall under my requirement that the school department should be required to assign and reassign students to maintain desegregated schools.

Q. Dr. Finger, with reference to priorities from an educator's standpoint, would you furnish transportation to the students in districts who need transportation or would you furnish transportation on a long-distance basis—strike that long-distance—on a distant pairing arrangement—I got lost in my question. A. That's good, so did I.

Q. With reference to priorities of furnishing transportation, as an educator would you prefer to furnish in-district transportation to students or furnish transportation in cross busing?

Mr. Chambers: Objection to the form of the question.

A. I don't think I have any druthers on that matter.

Q. If in-district transportation would permit two bus runs per day for shift change, would you prefer in-district busing [94] against cross busing where you could only utilize a bus one way, one trip each school opening or closing? A. I've already testified to the fact that these buses could be used in two different ways on cross busing and there would not be a single run. I have testified to the fact that the buses could either be run a double run at the elementary school level or that there could be sufficient buses for one run on each way with the elementary school children but that the time schedule for junior and senior high schools be such that junior and senior high school students could be transported on the same bus that was used for elementary schools.

Deposition of John A. Finger March 11, 1970

Q. All right. I'll repeat my question and assume that you do not go to staggering of opening of school hours. A. Well, your question is very ambiguous because I don't know what is meant by in-district busing.

Q. That's the transportation of students to a school in the district in which they live. A. The district in which a student lives is an arbitrary affair. It's anything the School Board makes it.

Q. With reference to the School Board plan or your plan or the Court plan. A. Didn't I already say I didn't have any druthers about that matter?

Q. You didn't say with reference to where a bus could operate two trips per school opening. The other related to one. [95] A. I not only don't understand the question, I don't understand the relevance of the question. I just don't see what you want me to say.

Q. I think it's very obvious that if you can get two children to school instead of one child to school with the same bus is the relevance of the question. A. I was ordered by the Court to prepare a plan that met the Court order.

Q. You were employed as an educational consultant and you testified as an expert in this case and I think I'm entitled to your opinion. A. I have no opinion on that matter.

Q. No opinion. Have your school duties ever involved the procuring of transportation equipment? A. No.

Q. Are you familiar with the delays that are involved in acquiring transportation equipment?

Mr. Chambers: Objection.

A. I read Mr. Morgan's testimony.

Q. Is that the first time you were aware of it?

Mr. Chambers: I object to that.

A. No. It would be hard to spend twenty-five years in education and not be aware of problems like that.

Q. So they do exist. Now, one point. You started out with 308 buses. How many students would you propose transporting? [96] A. I already testified I was making my calculations based on 45 students per bus. I can multiply this 45 by 308 and I would get 13,800.

Q. This is the number of students that you have calculated would be transported under your figures, is that correct? A. Yes, that's correct. That's the number of additional buses.

Q. Have you driven the nearest routes between the paired schools at the time that buses would ordinarily be transporting students? A. I don't know what time the buses would ordinarily be transporting students.

Q. You suggested 8:00 o'clock. A. I used that only as an illustration.

Q. You also gave us a figure of thirty minutes one way. Do you know if this is accurate? A. No, I don't know. I note that there are some estimates that are made as to the length of time that is required and they run to several hours and I think somebody ought to go out and find out. I think it's true and I think it's important to emphasize one of the things in the testimony and that is some busing transportation include the pickup time. The cross busing does not involve any pickup time, it involves no stops. It does not tie up traffic because they are not stopping to let children on and off the bus.

Q. Well, that depends on whether you pick the students up at the [97] school or whether you pick them up on the route. A. If you pick them up on the route, you're picking

them up on the route the buses are already picking them up.

Q. Does your thirty-minute estimate cover that time? A. No, it does not.

Q. So it could possibly be another thirty-minute pickup time. A. I have already testified that my estimate was based on the fact that the children would arrive at the school on the pickup bus because in some instances all of the children in an area would be being picked up, 1st, 2nd, 3rd, 4th, 5th, 6th graders. They would arrive at the school together. The 1st, 2nd, 3rd and 4th graders would stay at that school and the 5th and 6th graders would be transported.

Q. Do you find the 5th and 6th graders would be waiting for other buses to come so they could fill the express bus? A. Well, I'm sure Mr. Morgan can work it out so that waiting time would be minimized.

Q. Your experience at schools indicates that school buses arrive sometimes as much as a half an hour apart, does it not? A. Well, in many instances there are going to be more than one bus on the express run, all instances.

Q. I'm speaking with reference to getting the students to the schools. A. They'll arrive at different times.

Q. Are you still of the opinion that the desegregation plan [98] ordered by the Court can be implemented with 109 buses? A. I have testified a number of times that this plan can be initiated section by section and that the accurate estimate of the exact amount of transportation that will be required will best be found out as the plan is implemented and we noted that any one of the pairs could be operated with only a small number of buses. That's another way of saying I do not know the exact number of buses that would be required. We have gone through the various strategies

that might be followed to reduce the number required and the plan is one that can be implemented on a phased-in basis.

Q. What written communications have you had with the Court in connection with your services as a Court consultant? A. I have written him a couple of personal letters and he has written some to me. I submitted the Court plan. I wrote him a letter after I received the attachments to the Court plan which gave some additional detail on my recommendations relative to that attachment.

Q. Did you make additional recommendations? A. As I read over those recommendations, they seem to be the same as the recommendations submitted in my original report to the Court, but there is another letter that I submitted to him.

Q. That was submitted prior to February 5, is that correct? A. Yes, that's correct. He might not have gotten it by February [99] 5. I read it to him over the telephone. I also submitted a preliminary report which I labeled as a preliminary report for your personal perusal which indicated to him some of the thoughts that I had about the desegregation plans so that he would have some ideas as to what he might expect from me.

Q. Dr. Finger, do you regard the after-school activity of children as being important in their total educational growth? A. Yes.

Q. Do you feel that staggered school hours would interfere with their participation in the after-school activities? A. It wouldn't necessarily. One might be able to devise both curricular and extracurricular activity that took advantage of the staggered hours.

Q. In other words, it would involve more than just dis-

rupting the school system, it would disrupt a lot of private activities. A. Those are your words, Mr. Waggoner, they are not my words at all.

Q. I'm asking you. A. I did not say that at all, I did not say that at all, Mr. Waggoner. I said that the staggered school hours could be utilized to develop plans that would make use of the staggered school hours.

Q. But it would require changes in other activities, would it not? [100] A. It might require some different activities and some different plans.

Mr. Waggoner: I have no further questions.

CERTIFICATE

I, Evelyn S. Berger, Notary Public/Reporter, do hereby certify that Dr. John A. Finger was duly sworn by me prior to the taking of the foregoing deposition; that said deposition was taken and transcribed by me; and that the foregoing 100 pages constitute a true, complete and accurate transcript of the testimony of the said witness. I further certify that the persons were present as stated in the caption.

I further certify that I am not of counsel for, or in the employment of any of the parties to this action, nor am I interested in the results of this action.

In witness whereof, I have hereunto subscribed my name this 14th day of March, 1970.

/s/ EVELYN S. BERGER
Notary Public in and for
County of Mecklenburg
State of North Carolina

Defendants' Response to Plaintiffs' Request for Admissions

(Filed March 13, 1970)

The Defendants Charlotte-Mecklenburg Board of Education et al., acting through William C. Self, Superintendent of the Charlotte-Mecklenburg Public Schools, respond to the Plaintiffs' Request for Admissions as follows, in each instance the paragraph numbers in this Response corresponding to the paragraph numbers in the Plaintiffs' Request:

1. Charlotte City Board of Education and Mecklenburg County Board of Education operated separate school systems until 1961 when they consolidated as the Charlotte-Mecklenburg Board of Education. For a number of years prior to 1961 the County (but not the City) Board of Education operated public school buses to transport students to and from school. In conformity with State law as it existed prior to 1961 and prior to consolidation of the two systems, the Mecklenburg County Board of Education operated and routed school buses in a fashion that some transported only negro students to negro schools and some transported only white students to white schools. By reason thereof, the bus routes of the Mecklenburg County system overlapped and some negro students who may have resided near white schools were transported by such schools to all negro schools and some white students who may have lived near negro schools were transported by such schools to all white schools.

2. See Paragraph 1 hereof for response to Plaintiffs' Paragraph 2.

3. See Paragraph 1 hereof for response to Plaintiffs' Paragraph 3.

Defendants' Response to Plaintiffs' Request for Admissions

4. Prior to 1961 the Charlotte City Board of Education did not operate a public school bus system and, therefore, did not operate public school buses to transport students to and from school, did not transport negro students to negro schools and white children to white schools and did not have bus routes overlapping or otherwise.

5. See Paragraph 4 hereof for response to Plaintiffs' Paragraph 5.

6. See Paragraph 4 hereof for response to Plaintiffs' Paragraph 6.

7. Following the merger of the County and City School Boards in 1961 the consolidated Board provided transportation for students who resided in the portion of Mecklenburg County located outside the city limits as they existed immediately prior to the 1967 annexation who resided more than 1½ miles from the schools to which they were assigned, such transportation being in conformity with that prescribed by State law.

8. That since 1961 and until the closing or reorganization of the 10 all negro schools in the County in 1966, the consolidated Board provided separate bus service for some negro and white students.

9. Pursuant to the Plan approved by the Court in August, 1969, the School Board has provided transportation for approximately 767 inner city black students to be transported to white residential areas of the City and County. These 767 inner city black students are a portion of a much larger number of such students who were granted

by the Board a freedom of choice arrangement pursuant to which they could elect to remain in schools near their homes or to attend schools in the predominately white residential areas. The approximately 767 inner city black students represent those who elected to attend the schools in the predominately white residential areas. The transportation referred to above was made available to such students in order to encourage their attendance at these schools. The approximately 767 inner city black students referred to above in many instances passed other schools serving their grade levels on the way to the schools to which they were assigned pursuant to the above-mentioned freedom of choice arrangement.

/s/ WILLIAM C. SELF
William C. Self

SWORN to and SUBSCRIBED before me this
13th day of March, 1970.

/s/ LILY R. MCMAHON
Notary Public
My commission expires:
August 1, 1970

Submissions to Court in Response to March 6, 1970, Order and Motion for Extension of Time

(Filed March 13, 1970)

In compliance with the March 6, 1970 Order of this Court, the information and materials referred to therein (with the exception of Item 2) are attached, in each instance the respective items bearing an identifying number which corresponds to those set forth in that Order.

In addition the following items are submitted: (1) A map showing the pre-1957 city limits, the perimeter areas and rural areas with all senior high schools clearly located on it; and (2) Affidavit of Herman J. Hoose, Director of Traffic Engineering for the City of Charlotte, setting forth the number of vehicles in Mecklenburg County and other related data as requested by this Court on March 2, 1970.

Defendants respectfully move the Court that they be granted an extension of time until Monday, March 16, 1970, for the submission of Item 2 referred to in the March 6, 1970 Order of the Court and the other information requested by the Court of Appeals for the Fourth Circuit in the March 5, 1970 Order.

Respectfully submitted,

/s/ William J. Waggoner
William J. Waggoner

/s/ Benj. S. Horack
Benj. S. Horack

Attorneys for Defendants

ITEM 1

Summary of total number of children who live in the Pre-57 city limits, Perimeter Area, and Rural Area.

	Pre-57	Perimeter	Rural	Total
Senior High Schools	6073	4429	6080	16,582
Junior High Schools	7411	6365	7499	21,275
Elementary Schools	17,228	11,986	15,790	45,004
GRAND TOTAL	30,712	22,780	29,369	82,861

CHARLOTTE-MECKLENBURG SENIOR HIGH SCHOOLS

Total Number Children who live

	(1) Pre-57		(2) Perimeter		(3) Rural		TOTAL	
	Black	White	Black	White	Black	White	Black	White
East Mecklenburg	159	401	9	836	39	642	207	1879
Garinger	381	951	41	908	9	109	431	2049
Harding	583	457	10	203			593	660
Independence	45	18	2	13	73	1049	120	1080
Myers Park	203	1355		358		17	203	1730
North Mecklenburg			27	6	413	1139	440	1145
Olympic	80	23	105	30	180	447	365	500
South Mecklenburg	4	76	19	1197	72	701	95	1974
West Charlotte	1337		233				1570	
West Mecklenburg			78	354	58	1052	136	1406
TOTALS	2792	3281	524	3905	844	5236	4160	12,422

CHARLOTTE-MECKLENBURG JUNIOR HIGH SCHOOLS

Total Number Children who live

	(1) Pre-57		(2) Perimeter		(3) Rural		TOTAL	
	Black	White	Black	White	Black	White	Black	White
Albemarle Road				5	63	998	63	1003
Alexander					365	768	365	768
Cochrane		110	43	456	36	984	79	1550
Coulwood			2	31	104	722	106	753
Eastway	57	781	4	560			61	1341
Alexander Graham	101	674	12	334		19	113	1027
Hawthorne	591	365	5	71			555	436
Kennedy	552		291	6	5		848	6
McClintock	50	38	1	607	42	650	93	1295
Northwest	916		145				1061	
Piedmont	445	51					445	51
Quail Hollow				361	155	1064	155	1425
Randolph	263	98	26	609			289	707
Ranson			83	10	177	538	260	548
Sedgefield	167	577		224			167	801
Smith	48	2	3	1011	4	421	55	1434
Spaugh	127	530	153	300			280	830
Williams	868		195	1			1063	1
Wilson			7	809	64	320	71	1129
E-600 (Carmel)								
E-601 (Quail)								
TOTALS	4195	3225	970	5395	1015	5484	6170	15,104

CHARLOTTE-MECKLENBURG ELEMENTARY SCHOOLS

Total Number Children who live

	(1) Pre-57		(2) Perimeter		(3) Rural		TOTAL	
	Black	White	Black	White	Black	White	Black	White
Albemarle Rd.	1	4	2	30	1	486	4	520
Allenbrook				191	61	244	61	435
Ashley Park	1	545	26	4			27	549
Bain					33	739	33	739
Barringer	698		194	16			892	16
Berryhill			8	10	106	653	114	663
Beverly Woods	66			102	2	589	68	691
Billingsville	563		44				607	
Briarwood			6		676	12	682	12
Bruns Ave.	789	10					789	10
Chantilly	5	478					5	478
Clear Creek					51	252	51	252
Collinswood		72	111	374		12	111	458
Cornelius					195	245	195	245
Cotswold	16	4	7	538			23	542
Davidson					104	183	104	183
Dorie Davis	663		18				681	
Dorita					163	684	163	684
Dogerahire		400		478		24		902
Dilworth	119	346					119	346
Double Oaks	805						805	
Druid Hills	400		55	3			456	3
Eastover	42	497		55			42	552
Elizabeth	367	151					367	151
Enderly Park	3	209		90			3	379

	(1) Pre-57		(2) Perimeter		(3) Rural		TOTAL	
	Black	White	Black	White	Black	White	Black	White
First Ward	805	0					805	
Hickory Grove					70	534	70	534
Hidden Valley				1059		32		1091
Highland	80	305					80	305
Hoskins			17	228			17	228
Huntersville					154	534	154	534
Hunt. Farms				419	7	168	7	587
Idlewild	53			92	2	501	55	593
Irwin Ave.	304	0					304	
Amey James			253		235	3	488	3
Lakeview	270	72	100	30			370	102
Lansdowne	72	754	3	1			75	795
Lincoln Hghts.	308		395				703	
Long Creek					270	468	270	468
Matthews					86	814	86	814
Merry Oaks		414		47				461
Midwood	21	487					21	467
Montclaire				712				712
Myers Park Elem.	27	471					27	471
Nations Ford					47	686	47	686
Newell					74	447	74	447
Oakdale					69	504	69	504
Oakhurst	4	3	1	598			5	601
Oaklawn	620						620	
Olde Providence	76				4	489	80	489

	(1) Pre-57		(2) Perimeter		(3) Rural		TOTAL	
	Black	White	Black	White	Black	White	Black	White
Park Road	44	259		294			44	553
Pine Creek					27	595	27	595
Pine Creek Annex					30	266	30	266
Pinesville					146	377	146	377
Pinewood				663				663
Plaza Road	6	258	83	104			89	362
Reno Road			1	393		410	1	803
Sedgefield Elem.	3	557					3	557
Selwyn	31	37		566		22	31	625
Shamrock Gdns.		365		145				511
Sharon	86			92	3	245	89	337
Starmount				687	25	21	25	708
Statesville Rd.			113	49	220	463	333	512
Steele Creek					5	533	5	533
Thomasboro				658				658
Tryon Hills	311		11	152		12	322	164
Tuckaseegee					58	579	58	579
University Pk.	716		116	1			832	1
Villa Heights	968	88					968	88
Westerly Hills			46	492		40	46	532
Wilmore	260	232					260	232
Windsor Park		318	1	429			1	747
Winterfield	48	120		572			48	692
TOTALS	9551	7577	1612	10,374	292½	12,866	14,187	30,817

ITEM 3

AVERAGE DAILY NUMBER PUPILS RIDING SCHOOL BUSES

	Oct. 2 Oct. 29	Oct. 30 Nov. 26	Dec. 1 Jan. 7	Jan. 8 Feb. 11
HIGH SCHOOLS	4574	4293	4269	4193
JUNIOR HIGH SCHOOLS	8841	8847	8805	8729
ELEMENTARY SCHOOLS	10237	10150	10130	10204
TOTALS	23652	23290	23205	23126

ITEM 3

AVERAGE DAILY [illegible] TOTALS RIDING SCHOOL BUSES

CHARLOTTE-MECKLENBURG SENIOR HIGH SCHOOLS

	Oct. 2 Oct. 29	Oct. 30 Nov. 26	Dec. 1 Jan. 7	Jan. 8 Feb. 11		
East Mecklenburg	621	587	584	585		
Garinger	306	305	290	339		
Harding	182	176	176	158		
Independence	482	455	455	445		
Myers Park	142	151	145	136		
North Mecklenburg	827	693	683	747		
Olympic	424	423	423	404		
South Mecklenburg	960	505	505	825		
West Charlotte	17	17	17	26		
West Mecklenburg	633	550	550	506		
Revins				22		
TOTALS	4574	4293	4269	4193		

TABLE 3

AVERAGE DAILY MEMBERSHIP IN JUNIOR HIGH SCHOOLS

CHARLOTTE-MECKLENBURG JUNIOR HIGH SCHOOLS

	Oct. 2 Oct. 29	Oct. 30 Nov. 26	Nov. 27 Jan. 7	Jan. 8 Feb. 2		
Alexander Road	714	693	669	720		
Alexander	1037	1053	1058	1069		
Eastover	838	832	857	872		
Southeast	516	518	503	511		
Desires	69	67	65	64		
Alexander Street	99	102	102	103		
Westboro	12	12	12	12		
Kennedy	135	135	135	129		
Piedmont	834	855	855	835		
Westover						
Piedmont				15		
Druid Hills	1305	1283	1283	1214		
Randolph	401	354	403	353		
Carson	562	569	555	580		
Smithfield	70	80	80	75		
Smith	873	873	873	879		
Spruce	215	326	336	274		
Williams	77	76	76	69		
Wilson	914	879	879	917		
[illegible] (Female)						
[illegible] (Male)						
TOTALS	8041	8017	8006	8029		

1934-35 1024a

AVERAGE DAILY MEMBER FIFTH MONTH SCHOOL WEEK

CHARLOTTE-MECKLENBURG ELEMENTARY SCHOOLS

	Oct. 2 Oct. 29	Oct. 30 Nov. 26	Dec. 1 Jan. 7	Jan. 8 Feb. 1			
Thomasville Rd.	325	276	276	249			
Allenbrook	56	68	68	50			
Ashley Park	26	27	27	25			
Avon	621	607	607	609			
Barringer							
Berryhill	477	474	474	510			
Beverly Woods	303	305	305	298			
Billingsville							
Briarwood	145	145	145	137			
Cows Ave.							
Cornelius				12			
Clear Creek	221	215	215	105			
Collingwood	82	81	95	55			
Dunbar	208	207	207	206			
Eastwood	40	39	39	38			
Elmwood	65	61	61	61			
Annie Davis							
Berna	353	353	353	372			
Davidson	93	93	59	95			
Dilworth							
Double Oaks							
Hills							
Myers	20	20	20	20			
Plaxth	21	24	24	25			
Park							

	Oct. 2 Oct.29	Oct. 3 Nov.26	Dec. 1 Jan. 7	Jan. 8 Feb. 11			
First Ward							
Hickory Grove	385	385	385	400			
Hidden Valley	61	61	61	61			
Highland							
Hoskins							
Huntersville	402	399	399	404			
Hunt. Farms	83	85	86	90			
Idlewild	214	211	213	213			
Irwin Ave.							
Amay Jones	185	178	178	187			
Lakeview							
Lansdowne	234	227	227	221			
Lincoln Hghts.							
Long Creek	555	553	558	553			
Matthews	603	558	558	562			
Berry Oaks							
Midwood				1			
Montclaire							
Myers Park Elem.				16			
Nations Ford	567	554	554	552			
Newell	304	499	499	503			
Oakdale	301	283	283	280			
Oakhurst	37	37	37	35			
Oaklawn							
Olde Providence	183	183	183	187			

	Oct. 2 Oct. 28	Oct. 30 Nov. 25	Nov. 27 Jan. 7	Jan. 8 Feb. 13			
Fork Road	101	100	100	94			
Fox Creek	482	449	455	445			
Fox Creek Annex	111	128	128	134			
Pineville	149	149	150	134			
Pinewood							
Plaza Road	28	28	28	28			
Rock Road	142	144	144	136			
Sadlefield Plaza	6	6	6	5			
Selwyn	102	105	105	99			
Shorecrest Drive							
Sharon	155	155	155	143			
Stanmore	33	33	33	23			
Starmount Pk	658	659	659	770			
Steele Creek	452	452	452	495			
Thrift Road							
Town Hills	71	71	71	71			
Tuckaseigee	293	254	267	276			
University Pk							
Ville Heights							
Westerly Hills	62	62	62	67			
Wilcare				8			
Windsor Park							
Winterfield	42	40	40	40			
TOTALS	10237	10259	10310	10204			

ITEM 4

With respect to the schools whose students are to be desegregated under the court ordered plan by rezoning:

	1-1/2 Miles Radius of School	2 Miles Radius of School
High Schools	2,067	3,589
Junior High Schools	5,921	9,074
Elementary Schools	9,671	11,559
TOTALS	17,659	24,222

ITEM 4

CHARLOTTE-MECKLENBURG SENIOR HIGH SCHOOLS

		1st Miles		2 Miles			
	East Mecklenburg	25		271			
	Garinger	538		907			
	Harding	304		562			
	Independence	15		110			
	Myers Park	392		759			
	North Mecklenburg	5		21			
	Olympic	10		31			
	South Mecklenburg	5		134			
	West Charlotte	693		754			
	West Mecklenburg	20		40			
	TOTALS	2067		3589			

ITEM 4

CHARLOTTE-MECKLENBURG JUNIOR HIGH SCHOOLS

	1½ Miles		2 Miles			
Albemarle Road	104		184			
Alexander	10		48			
Cochrane	556		771			
Coulwood	214		275			
Eastway	432		697			
Alexander Graham	384		553			
Hawthorne	409		611			
Kennedy	225		329			
McClintock	250		369			
Northwest	235		345			
Piedmont	310		530			
Quail Hollow	6		103			
Randolph	448		825			
Renson	86		157			
Sedgefield	449		697			
Smith	646		775			
Spaugh	467		730			
Williams	334		367			
Wilson	132		221			
E-CO (Carmel)	115		183			
E-CL (Cuno)	109		159			
TOTALS	5921		8075			

ITEM 4

CHARLOTTE-MECKLENBURG ELEMENTARY SCHOOLS

		1½ Miles		2 Miles				
	Albemarle Rd.							
	Allenbrook							
	Ashley Park	379		521				
	Bain							
	Barringer	231		498				
	Berryhill	137		231				
	Beverly Woods							
	Billingsville	179		238				
	Briarwood							
	Bruns Ave.							
	Chantilly	475		475				
	Clear Creek							
	Collinswood	504		616				
	Cornelius							
	Cotswold	382		462				
	Davidson							
	Dorie Davis							
	Dorita							
	Devonshire							
	Dilworth	592		617				
	Double Oaks							
	Druid Hills							
	Eastover	338		471				
	Elizabeth	311		406				
	Enderly Park	386		420				

	1½ Miles		2 Miles				
First Ward							
Hickory Grove							
Hidden Valley							
Highland	313		313				
Hoskins	383		383				
Huntersville							
Hunt. Farms							
Idlewild							
Irwin Ave.							
Amy James	127		128				
Lakeview	419		419				
Lansdowne							
Lincoln Hghts.							
Long Creek							
Matthews							
Merry Oaks							
Midwood	513		517				
Montclaire							
Myers Park Elem.	281		468				
Nations Ford	25		28				
Newell							
Oakdale	266		378				
Oakhurst	731		731				
Oaklawn							
Olde Providence							

	1/4 Miles		2 Miles				
Park Road							
Pine Crest							
Pine Crest Annex							
Pinecrest							
Pinehurst							
Plaza Court	531		531				
Rosemont							
Sanford Field	380		587				
Selvyn							
Seminole Gdns	367		467				
Sharon							
Shenandoah							
Statesville Ct							
Steele Creek	11		58				
Thomasboro	654		725				
Town Hills							
Tremont							
University Pk							
Villa Heights							
Westerly Hills	339		476				
Wilmore	348		403				
Windsor Park							
Winterfield							
TOTALS	4071		11559				

1033a

State of North Carolina

Department of Motor Vehicles

Raleigh 27602

March 10, 1970

Mr. Floyd Bass
Citizens Safety Asso.
301 St. Bernard St.
Charlotte, N.C.

Dear Mr. Bass:

During 1969 there were some 1806 traffic deaths in North Carolina. There were 58610 reported personal injuries during that year.

School age children are defined by me as those from 7 to 14 years old, inclusive.

There were some 136 of these children killed; 56 were pedestrians, 17 were bike riders, 4 were operating motor vehicles and the remaining 59 were vehicle passengers.

Approximately 4400 of the injured were in the defined age bracket; 580 were pedestrians, 475 were bike riders, 83 were operating a motor vehicle and the remainder were passengers.

During the 1968-1969 school year there were 330 school bus pupil passengers of all ages reported injured. One school bus pupil passenger was killed; six additional students were struck and killed by school buses; 21 were injured in a like manner.

Very truly yours,

Joe K. Register
Statistical Analyst
Driver Education and
Accident Records Division

JKR:aj

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The detailed analysis of accidents in this booklet was made possible by the cooperation of the following organizations and of many employers and individuals who supplied statistics or traffic authorities or other sources who made compensation authorities: U. S. Bureau of the Census; National Center for Health Statistics; Bureau of National Safety Council; Bureau of Public Roads; Federal Aviation Agency; National Transportation Safety Board; Bureau of Mines; Bureau of Labor Statistics; Canadian Bureau of Statistics; World Health Organization; insurance companies; trade associations; schools and community safety councils.

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FACTS

1969 EDITION

SCHOOL-AGE DEATHS, 1968

Accidental deaths and death rates of children 5-14 years

(See page 37 for effect of H.D. English Revision on death totals.)



	1965	
	Deaths	Rate*
TOTAL	8,100	20.3
Motor-vehicle	4,200	10.2
Pedestrian	*1,900*	*4.6*
Home	1,100	3.1
Public non-motor-vehicle	2,600	6.3
Work	200	0.5

*Deaths per 100,000 population.

Totals by class of accident as shown above are not available for other age groups, but total deaths are shown below (1967 latest available). See also pages 8, 9 and 51.

Deaths and Death Rates by Age, 1967

Age Group	1967		Changes in Rates	
	Deaths	Rate*	1966-1967	1958-1967
1 to 4 years	8,074	32.1	− 4%	−37%
5 to 9 years	4,019	19.0	− 6%	−37%
10 to 14 years	3,761	19.6	+ 1%	−41%
15 to 19 years	11,975	61.2	− 3%	+24%
20 to 24 years	10,022	76.8	+ 7%	+42%

*Deaths per 100,000 population in each age group.

High school driver education

Participation in driver education has been increasing steadily since 1960, as shown in the table below. Eligible students are those enrolled in the grade level in which the most students are enrolled in driver education; eligible schools are the number of high schools that house these grade levels. The participation figures cover courses which consist of at least 30 clock hours of classroom instruction and 6 clock hours of laboratory instruction—in car or simulator.

Participation in Driver Education, 1960-1968

Year	Student Participation			School Participation		
	Eligible (000)	Enrolled (000)	% of Elig.	Eligible	Offering Course	% of Elig.
1960-61	3,891	814	21%	18,340	4,256	23%
1961-62	3,966	1,011	25%	18,767	4,756	25%
1962-63	4,042	1,092	27%	19,193	5,256	27%
1963-64	3,967	1,194	30%	19,620	5,756	29%
1964-65	3,971	1,372	35%	17,373	6,256	36%
1965-66	3,993	1,548	39%	19,147	7,256	38%
1966-67	4,093	1,725	42%	19,921	8,256	41%
1967-68	4,079	1,903	47%	19,919	9,256	46%

Source: Insurance Institute for Highway Safety

PEDESTRIAN AND BICYCLE ACCIDENTS SUMMARY

PRE-SCHOOL AND SCHOOL AGE CHILDREN

1969

Pre-School Children (Ages 0 through 5)

Time	Total	Fatalities	Bicycle	Pedestri
8:00 a.m. - 4:00 p.m.	12	0	1	11
4:01 p.m. -12:00 a.m.	20	0	1	19
12:01 a.m. - 7:59 a.m.	0	0	0	0
TOTAL	32	0	2	30

School Age Children (Ages 6 through 19)

Time	Total	Fatalities	Bicycle	Pedestri
8:00 a.m. - 4:00 p.m.	70	4	23	43
4:01 p.m. -12:00 a.m.	99	3	30	66
12:01 a.m. - 7:59 a.m.	4	0	0	4
TOTAL	173	7	53	113

The records showed City school enrollment increased 1.6% in 1969. Only one child was injured within the scope of our Safety Patrol and Crossing Guard program and only 19 other children were injured while in the process of going to or coming from school. This was 9.5% of the total amount of children injured in the City of Charlotte.

Education and supervision in bicycle and pedestrian safety rules has certainly been the key element for the decrease in this year's report. This yearly report shows that 123 accidents occurred after school hours. We realize, in order to eliminate the majority of these accidents, action must come from parents or supervisory personnel.

PLEASE BE A DEFENSIVE DRIVER WHERE YOU SEE CHILDREN; SLOW DOWN AND LET THEM LIVE

COMPARISON

	1968	1969
Enrollment	51,599	52,067
Parochial Enrollment	2.024	2,462

COMPARISON (contd.)

	1968	1969
Injured	220	205
Fatalities	8	7
Summer Accidents	58	49

PERCENTAGE OF CHANGES OVER PREVIOUS YEAR

Pre-school	-	decrease	30.2%
School ages	-	decrease	.05%
Bicycle	-	decrease	8.6%
Fatalities	-	decrease	12.6%

Affidavit of Herman J. Hoose, Director of Traffic Engineering for the City of Charlotte, North Carolina

(Referred to in Foregoing Submission)

HERMAN J. HOOSE, being duly sworn, deposes and says that:

1. I am now, and have been for the past 22 years, Director of Traffic Engineering for the City of Charlotte. I am charged with primary responsibility for all matters relating to traffic on city streets and thoroughfares. By reason of my position, I also thoroughly familiar with matters relating to traffic in the portions of Mecklenburg County located outside the city limits. Various studies have been made under my direction and control regarding the vehicular traffic and related matters in both Charlotte and the balance of Mecklenburg County, North Carolina.

2. As of April, 1969, the total number of registered motor vehicles in Mecklenburg County, North Carolina, was 183,362, of which 160,862 were passenger vehicles and 22,500 were trucks. Based upon past experience, it is estimated that there has been a 5% increase during the one year interval since the foregoing figures were tabulated. Based upon this increase the total of such registered vehicles is now approximately 192,530, of which 168,905 are passenger vehicles and 23,625 are trucks.

3. In the summer of 1967, a survey was prepared (with the assistance of my Department) by the Planning and Research Department, North Carolina State Highway Department, Raleigh, North Carolina, entitled "External Origin & Destination Survey for Charlotte, N. C." The boundaries of the survey area covered by this study and

report are roughly (but not quite) the same as those of Mecklenburg County. It was the purpose of this survey to identify the total number of vehicles that daily enter and pass through the survey area (these trips being denominated as Class A trips) and the total number of vehicles that daily come from outside the survey area to a termination destination point within the survey area (these trips being denominated as Class B trips). The results of this survey (in the summer of 1967) are as follows:

Class A Trips (i.e., through traffic)	13,285
Class B Trips (i.e., to and from points of origin outside the survey area)	55,580

Based on past experience, each of these trip categories increases about 5% per year—resulting in about a 10% increase since the 1967 survey was made. With this increase, the current Class A Trips are about 14,613 and Class B Trips about 61,138. The Class B trips are predominately those by persons who live outside Mecklenburg County and have jobs in Charlotte and Mecklenburg County. Most of these Class B trips are during the morning (7:30 to 9:30 a.m.) and evening (4:30 to 6:30 p.m.) rush hours when local traffic is at its peak. The Class A trips are primarily those of the traveling public passing through Charlotte and Mecklenburg County. A major portion of these Class A trips are also made in the morning and evening rush hours, resulting primarily from the fact that travelers make a local stopover at local hotels and motels in the evening and continue on their way the next morning.

Affidavit of Herman J. Hoose, Director of Traffic Engineering for the City of Charlotte, North Carolina

4. With reference to strictly internal traffic (i.e., making trips to and from points entirely within Mecklenburg County) studies made by my Department show that as of November 1969 there were approximately 102,000 occupied dwelling units in Mecklenburg County, that each dwelling units owns 1.55 passenger automobiles and makes 7.4 trips per day or 4.7 trips per vehicle per day. This means that the locally registered passenger cars (currently estimated to be 168,905) makes about 793,853 internal trips per day (i.e. 168,905 cars x 4.7 trips per car).

5. A summary of the currently estimated number of trips per day in Charlotte and Mecklenburg County is as follows:

Class A Trips (see Para. 2 above)	14,613
Class B Trips (see Para. 2 above)	61,138
Internal Trips by Autos (see Para. 4 above)	793,853
Total (exclusive of internal truck trips)	869,604

HERMAN J. HOOSE

Submissions to Court in Response to March 6, 1970 Order

(Filed March 6, 1970)

In compliance with the March 6, 1970 Order of this Court the Defendant Charlotte-Mecklenburg Board of Education submitted all of the information and maps required by that Order with the exception of the data and information identified in Paragraph 2 thereof. The data and information specified in that Paragraph 2 (and related matters), as interpreted by the Defendants, is now submitted herewith together with an affidavit of William C. Self, Superintendent of Charlotte-Mecklenburg Public Schools.

Respectfully submitted this 17 day of March, 1970.

/s/ WILLIAM J. WAGGONER
William J. Waggoner

/s/ BENJ. S. HORACK
Benj. S. Horack

Attorneys for Defendants

Affidavit of William C. Self, Superintendent of Charlotte-Mecklenburg Public Schools

(Referred to in Foregoing Submission)

WILLIAM C. SELF, being duly sworn, deposes and says that:

1. I am the Superintendent of the Charlotte-Mecklenburg Public Schools.

2. On Monday a. m., March 9, 1970, I received a copy of the Order of the District Court dated March 6, 1970, in which the School Board was directed to furnish the data, information and maps described in the 8 paragraphs of that Order. Immedately upon receipt of that Order I, together with members of my administrative staff and other school personnel, began to assemble the requested information and data and to prepare the maps. In an effort to meet the prescribed March 13, 1970 deadline, the administrative staff and other personnel worked both day and night.

3. On March 13, 1970, all of the information, data and maps requested by the March 6, 1970, Order were filed with the District Court with the exception of the information designated as Item 2 in that Order. When the submission of the other items were made the Court was advised that additional time was necessary to assemble the facts and figures required by that Paragraph 2.

4. The staff was advised by the School Board attorneys that the information requested by that Paragraph 2 related to the numbers of children in each school in the entire system who under the Court approved Plan will live in a different zone from that of the school they attended in

Affidavit of William C. Self, Superintendent of Charlotte-Mecklenburg Public Schools

January 1970. After many hours of preparing the data on that phase and checking and double checking its accuracy in conformity with what the staff understood Paragraph 2 to require, the information has now been completed and is being submitted to the District Court.

5. During the morning of March 17, 1970, I was advised through our attorneys that the Court had stated that Paragraph 2 of his March 6, 1970, Order has been misinterpreted and that the Court now advises that Paragraph 2 was not intended to relate to the zones under the Court approved Plan, but on the contrary made inquiry of the numbers of children in each school who now live in a different zone from that of the school they attended in January 1970—with a designation of those who are supplied transportation and those who are not supplied transportation.

6. Immediately upon receipt of this advice, I made inquiry to ascertain whether this information was available, from whom it would need to be acquired and what would be involved in preparing a tabulation. I am advised that this information and data can be supplied only by utilizing computer print outs and a manual analysis of them and by the principals of the different schools who will first have to make an analysis of their school records and a head count of those who are and are not afforded transportation.

7. Both the administrative staff and the school principals have been and are now involved in the laborious task of conforming grid lines to suitable natural monuments as one of the major undertakings required in order to be in readiness to implement the Court Plan at the elementary level by the prescribed April 1, 1970 deadline.

Affidavit of William C. Self, Superintendent of Charlotte-Mecklenburg Public Schools

8. Because of the heavy involvement of the staff, the principals and other school personnel in the efforts to implement the Court Plan, superimposed upon the time consuming task of assembling the other information requested by the March 6, 1970, Order, I respectfully state that it is not humanly or physically possible to assemble and furnish the Paragraph 2 information in time to meet the Court prescribed deadline. In view of the foregoing, we respectfully request the Court's guidance as to what it wants us to do in view of this dilemma.

WILLIAM C. SELF

Affidavits of J. D. Morgan, Ralph Neill and J. W. Harrison

(Referred to in Foregoing Submission)

Each of the undersigned being duly sworn deposes and says that:

1. His position with the Charlotte-Mecklenburg School System is as indicated below.

2. From March 9, 1970 to March 17, 1970 a total of not less than 650 man hours were expended by school personnel in obtaining and tabulating the information and preparing the maps requested in the March 6, 1970 order of the District Court. These persons include the following:

J. D. Morgan—Assistant Superintendent—Business Services;

Ralph Neill—Adm. Assistant—Auxiliary Services;

John Hansil—Adm. Assistant Physical Plant;

J. W. Harrison—Director of Transportation;

Carroll York—Director of Planning and Sites Development;

H. L. Puckett—Director of School Construction;

Julian Carter—Site Engineer;

Ron Reavis—Draftsman;

Wayne Church—Director of Research;

Don Baucom—Assistant Director of Transportation;

Bill Harrison—Transport Spec.

Affidavits of J. D. Morgan, Ralph Neill and J. W. Harrison

3. He is thoroughly familiar with those information and maps which have been submitted to the court pursuant to the order including item arabic 2 and its attachments and states that they correctly portray information which they purport to convey. Any estimates and projections being based on the actual past experience of the Charlotte-Mecklenburg School System.

North Carolina
Mecklenburg County

This 17th day of March, 1970 came before me the following and who being duly sworn acknowledged the afore as true statements:

/s/ J. D. Morgan
J. D. Morgan

/s/ Ralph E. Neill
Ralph E. Neill

/s/ J. W. Harrision
J. W. Harrison

Witness my hand and Notarial Seal.

/s/ Ruth Von Canon
Notary Public

My commission expires: April 24, 1970

ITEM 2

Summary of total number of children in each school in the entire system who will live in a different zone under the court approved plan from that they attended in January of 1970.

	Live in Rezoned Area	Now Trans-ported	Add'l to Trans-port (1)	Not to be Trans-ported
Senior High Schools	5,292	3,008	2,197	87
Junior High Schools	6,696	4,522	1,599	575
Elementary Schools	6,472	1,486	2,223	2,763
GRAND TOTAL	18,460	9,016 (2)	6,019	3,425

NOTE: (1) Additional transportation provided under Court Plan for each child who lives more than 1-1/2 miles from his school and who is being required (rezoned) to a different school than the one previously attended.

(2) A substantial number of these children will be transported a greater distance under the Court Plan than is presently the case.

Item 2

NUMBER OF CHILDREN WHO WILL LIVE IN A DIFFERENT ZONE FROM THAT THEY ATTENDED IN JAN. 1970

THE CHARLOTTE-MECKLENBURG SENIOR HIGH SCHOOLS

1969 - 1970

	Live in Rezoned Area		Now Trans-ported		Additional to Trans-port		Not to be Trans-ported
East Mecklenburg	469		4		465		0
Garinger	836		365		471		0
Harding	258		188		45		25
Independence	211		211		0		0
Myers Park	411		96		308		7
North Mecklen'burg	47		47		0		0
Olympic	659		643		16		0
South Mecklenburg	561		149		412		0
West Charlotte	1409		1135		219		55
West Mecklenburg	431		170		261		0
	5292		3008		2197		87

Item 2

NUMBER OF CHILDREN WHO WILL LIVE IN A DIFFERENT ZONE FROM THAT THEY ATTENDED ON [illegible], 1970

CHARLOTTE-MECKLENBURG SCHOOL DISTRICT

	Live in Rezoned Area	Bus Transported	Additional to Bus	Not to be Transported
[illegible]	220	155	0	24
[illegible]	49	49	0	0
[illegible]	159	68	91	0
[illegible]	212	75	137	0
[illegible]	158	140	0	18
[illegible]	50	16	30	4
[illegible]	205	39	135	31
[illegible]	476	467	58	51
[illegible]	76	50	26	0
[illegible]	703	699	97	6
[illegible]	516	0	473	43
[illegible]	201	201	0	0
[illegible]	275	243	12	20
[illegible]	396	396	0	0
[illegible]	317	79	245	43
[illegible]	183	141	42	0
[illegible]	391	138	253	0
[illegible]	879	867	0	12
Wilson	148	148	0	0
[illegible]	369	135	0	233
[illegible]	529	434	0	95

Item 2

NUMBER OF CHILDREN WHO WILL LIVE IN A DIFFERENT ZONE FROM THAT THEY ATTENDED IN JAN. 1970

CHARLOTTE-MECKLENBURG ELEMENTARY SCHOOLS

	Live in Rezoned Area	Now Transported	Additional to Transport	Not to be Transported
Albemarle Rd.	0	0	0	0
Allenbrook	63	0	33	30
Ashley Park	274	0	221	53
Bain	0	0	0	0
Barringer	288	35	205	48
Berryhill	467	193	274	0
Beverly Woods	0	0	0	0
Billingsville	272	112	128	32
Briarwood	0	0	0	0
Bruns Ave.	0	0	0	0
Chantilly	0	0	0	0
Clear Creek	0	0	0	0
Collingwood	253	0	224	29
Cornelius	0	0	0	0
Cotswold	269	63	0	206
Davidson	0	0	0	0
Dilworth	8	0	0	8
Dutch	0	0	0	0
Eastover	0	0	0	0
Dilworth	52	0	0	52
Double Oaks	0	0	0	0
Druid Hills	0	0	0	0
Eastover	351	7	42	302

	Live in Rezoned Area		Bus Transportation		Additional to Transportation		Not to Transportation
First Ward	0		0		0		0
Hickory Grove	0		0		0		0
Hidden Valley	0		0		0		0
Highland	7		0		0		7
Hoskins	293		0		0		293
Huntersville	0		0		0		0
Hunt. Farms	0		0		0		0
Idlewild	0		0		0		0
Irwin Ave.	0		0		0		0
Jmay James	105		105		0		0
Lakeview	231		0		0		231
Lansdowne	0		0		0		0
Lincoln Hghts.	0		0		0		0
Long Creek	0		0		0		0
Matthews	0		0		0		0
Merry Oaks	0		0		0		0
Midwood	83		0		0		83
Montclaire	0		0		0		0
Myers Park Elem.	236		4		163		75
Nations Ford	279		78		201		0
Newell	22		22		0		0
Oakdale	105		105		0		0
Oakhurst	118		0		0		118
Oaklawn	0		0		0		0
Olde Providence	0		0		0		0

	Live in Rezoned Area	Now transported*	Additional to transport	Not to be transported
Park Road	0	0	0	0
Pew Creek	0	0	0	0
Pew Creek Annex	0	0	0	0
Pineville	0	0	0	0
Pinewood	375	375	0	0
Plaza Road	249	0	0	249
Reno Road	0	0	0	0
Sedgefield Elem.	259	0	164	95
Selwyn	0	0	0	0
Shamrock Gdns.	302	39	45	218
Sharon	0	0	0	0
Starmount	0	0	0	0
Statesville Rd.	0	0	0	0
Steele Creek	295	176	119	0
Thorntorp	213	0	94	119
Tryon Hills	0	0	0	0
Tuckaseege	0	0	0	0
University Pk.	0	0	0	0
Villa Heights	0	0	0	0
Westerly Hills	200	0	140	60
Wilmore	149	0	71	78
Windsor Park	0	0	0	0
Winterfield	0	0	0	0
	6472	1485	2223	2763

* Does not include pupils now transported from inner-city closed schools 7-1-69.

TOTAL NUMBER OF STUDENTS FOR WHOM DESEGREGATION
TRANSPORTATION IS REQUIRED BY THE COURT'S ORDER

CHARLOTTE - MECKLENBURG SCHOOLS

SCHOOLS	NO. STUDENTS PAIRED SCHOOLS	NO. STUDENTS SATELLITE SCHOOLS	NO. STUDENTS REMAINING [illegible]	TOTAL NO. STUDENTS [illegible]
enior		300	2,197	2,497
unior		2,760	1,599	4,359
lementary	10,206		2,223	12,429
TOTAL	10,206	3,060	6,019	19,285

1054a

TOTAL NUMBER OF STUDENTS FOR WHICH ADDITIONAL TRANSPORTATION IS REQUIRED BY THE COURT ORDERED PLAN

CHARLOTTE-MECKLENBURG SENIOR HIGH SCHOOLS

	Satellite	Ironside	Total			
East Mecklenburg		465	465			
Garinger		471	471			
Harding		45	45			
2,640 Zoo-Cbo Independence 318 A	300	0	300			
Myers Park		306	306			
North Mecklenburg		0	0			
Olympic		16	16			
South Mecklenburg		412	412			
West Charlotte		219	219			
West Mecklenburg		201	201			
TOTAL	300	2,147	2,447			

[illegible]

	Satel-lite	Reserve	Total			
Alexander Jr.	237		237			
Alexander						
Cochrane	303	91	394			
Coolwood		137	137			
Gastonia	354		354			
Alexander Carbon	374	30	404			
Hawthorne		135	135			
Kennedy		58	58			
Reflectory	355	26	381			
Northwest		97	97			
Piedmont		473	473			
Quail Hollow	274		274			
Randolph		12	12			
Rapson						
Sedgefield		245	245			
Smith	402	42	444			
Strauch		253	253			
Williams						
Wilson	163		163			
Tel00 (Forest)	218		218			
Tel01 (Guam)						
	2,730	1,500	4,350			

TRANSPORTATION IS RELATED TO THE CHARLOTTE REGION

CHARLOTTE-MECKLENBURG ELEMENTARY SCHOOLS

1056a

	RATED	MOBILE	TOTAL				
Alexander Co.	175		175				
Allenbrook	155	33	188				
Ashley Park		221	221				
Bain							
Berringer		205	205				
Berryhill		274	274				
Bradley Woods	250		250				
Billingsville		128	128				
Briarwood	222		222				
Briar Creek	526		526				
Chantilly							
Clear Creek							
Collinswood		224	224				
Corrells							
Cotswold							
Davidson							
Dixie Davis	430		490				
Dodie							
Evanshire	276		276				
Dilworth							
Double Oaks	567		587				
Druid Hills	312		312				
Dorlover		42	42				
Elizabeth		30	30				
Enderly Park		79	79				

	First Ward	573		573				
	Hickory Grove	224		224				
	Hidden Valley	302		302				
	Highland							
	Hoskins							
	Huntersville							
	Hunt. Farms	195		195				
	Idlewild	163		163				
	Irwin Ave.							
	Amay James							
	Lakeview							
	Lansdowne	297		297				
	Lincoln Hants.	456		456				
	Long Creek							
	Matthews							
	Merry Oaks	113		113				
	Midwood							
	Montclaire	217		217				
	Myers Park Elem.		153	153				
	Nations Ford		301	301				
	Newell							
	Oakdale							
	Orchurst	105		105				
	Oaklawn	405		405				
	Olde Providence	147		147				

		[illegible]	[illegible]	[illegible]			
	Fern Road	100		100			
	Pea Creek	225		225			
	Pea Creek Annex	56		56			
	Pierceville						
	Pierpont	346		346			
	Plank Road						
	Rose Road	244		244			
	Sedgefield Plan.		164	164			
	Selwyn	188		188			
	Shamrock Gdns.	90	45	135			
	Sharon	117		117			
	Stanmount	234		234			
	Stonesville Rd.						
	Steele Creek		119	119			
	Thornborn	95	94	189			
	Tryon Hills	326		326			
	Turquoise	130		130			
	University Pk.	550		550			
	Villa Heights	737		737			
	Westerly Hills		140	140			
	Wilson		71	71			
	Windsor Park	234		234			
	Winterfield	193		193			
		10,705	2,223	12,92[illegible]			

COURT ORDERED PLAN

CHARLOTTE-MECKLENBURG SCHOOLS

1. Cost Buses *	$ 2,369,064.08
2. Cost of Parking Areas *	264,600.00
3. Cost Operation **	586,613.76
4. Personnel **	166,190.00
5. Total Cost First Year	$ 3,806,667.84

NOTES:

* These Capital Outlay items do not reflect annual depreciation.

** These items are costs which recur each year. These figures do not take into account anticipated annual cost increases.

COURT ORDERED PLAN

COSTS FOR REMAINDER 1969-70 YEAR

	COST OPERATION	PERSONNEL	TOTAL
Elementary Schools - 49 days	$101,230.08	$ 28,347.48	$129,577
Junior and Senior High Schools 26 Days	30,551.04	8,800.00	39,351
TOTALS	$131,781.12	$ 37,147.48	$168,928

[illegible]

[illegible]

[illegible]

1. Capital Outlay

A. 69 Units @ $5,387.69 Ea.	$ 371,747.16
B. Equipment	1,750.00
C. Service Vehicles	
Service Trucks - 3	7,500.00
Gasoline Delivery Truck - 1	5,000.00

2. Cost Operation

	Daily	Annual
Drivers' Salaries	$353.97	$ 89,050.57
Gasoline, oil, grease, anti-freeze	69.17	11,639.77
Mechanics' Salaries	89.01	16,110.81
Repair Parts	16.55	2,997.35
Tires and Tubes	-	-
TOTALS	$529.92	$ 95,915.52

3. Personnel

A. Supervisory - 1	$ 8,190.00
B. Clerical - 1	6,120.00

COURT ORDER PLAN

CHARLOTTE-MECKLENBURG SCHOOLS

JUNIOR HIGH SCHOOLS

1. Capital Outlay

A. 84 Buses @ $5,307.64 ea.	$452,551.
B. Equipment	2,250.
C. Service Vehicles	
Service Trucks - 4	10,000.
Gasoline Trucks - 2	10,000.

2. Cost Operation

	Daily	Annual
Drivers' Salaries	$430.92	$ 77,565.
Gasoline, oil, grease, anti-freeze	78.12	14,139.
Mechanics Salaries	109.36	19,683.
Repair Parts	20.16	3,628.
Tires and Tubes	-	-
TOTALS	$605.12	$116,765.

3. Personnel

A. Supervisory - 3	$ 24,570.
B. Clerical - 1	6,120.
C. Bus Dispatcher - 1	7,800.

[redacted]

1. Capital Outlay

A. 269 Buses @ $5,387.64 ea.	$1,449,275.16
B. Equipment	6,500.00
C. Service Vehicles	
Service Trucks - 11	27,500.00
Gasoline Delivery Trucks - 5	25,000.00

2. Cost Operation

	Daily	Annual
Drivers' Salaries	$1,379.97	$249,774.57
Gasoline, oil, grease, anti-freeze	250.17	45,280.77
Mechanics' Salaries	387.01	62,800.81
Repair Parts	69.56	11,605.36
Tires and Tubes	-	-
TOTALS	$2,085.92	$373,931.52

3. Personnel

A. Supervisory - 5	$ 40,950.00
B. Clerical - 3	18,360.00
C. Bus Dispatcher - 1	7,800.00
Assistant Bus Dispatcher - 1	5,200.00
D. Mechanical Supervisory - 2	16,640.00
E. Personnel Manager - 1	8,320.00
F. Driver Training Supervisor - 1	7,800.00
G. Bus Route Specialist - 1	8,320.00

1064a

COURT ORDER PLAN

ADDITIONAL TRANSPORTATION REQUIRED

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

SENIOR HIGH SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING AREA	BUS ARC
East Mecklenburg	465	11	S	..
Garinger	471	11	N	7,(
Harding	45	1	S	..
Independence	300	7	S	..
Myers Park	308	7	N	5,(
North Mecklenburg			S	..
Olympic	16	1	S	..
Second Ward				
South Mecklenburg	412	10	U	6,(
West Charlotte	219	5	U	4,(
WestMecklenburg	261	6	U	5,(
Changes in Attend.Areas		10		
	2,497	69		28,(

COURT ORDER PLAN

ADDITIONAL BUSES REQUIRED

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

JUNIOR HIGH SCHOOLS

School	No. Students to be Transported	No. Buses Required	Bus Parking Area	Bus Parking Area Cost
Beverly Woods	297	6	S	-
Brandon	0		S	
Carmel	394	7	U	5,400
Coltewood				
Crestwood	137	3	S	
Eastway	354	7	U	5,400
Alexander Graham	404	7	N	5,400
Hutchens	135	3	N	3,800
Ivey Avenue				
McClintock	381	7	U	5,400
Northwest	97	2	N	3,400
Piedmont	473	9	N	6,200
Quail Hollow	274	5	U	4,600
Ranson	0	0		
Sedgefield	245	5	N	4,600
Smith	444	8	S	-
Spaugh	253	5	N	4,600
Spriggs	0	0		-
Stinson	183	4	U	4,200
Kennedy	58	1	N	3,000
Randolph	32	1	S	
P-600 (Carmel)	218	4	S	
P-601 (Comm.)	0			
	4,350	84		56,000

ADDITIONAL TRANSPORTATION NEEDED

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

ELEMENTARY SCHOOLS

SCHOOL	NO. PUPILS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING AREA	[illegible] AREA
Albemarle Road	126	4	E	420
Allenbrook	189	4	S	
Ashley Park	221	4	N	420
Bain				
Barringer	205	4	N	420
Berryhill	274	5	S	-
Beverly Woods	250	5	S	-
Billingsville	128	3	N	300
Briarwood	222	5	U	400
Bruns Avenue	526	12	N	720
Chantilly				
Clear Creek				
Collingwood	224	4	S	-
Commodore Marie Davis	490	9	N	620
Cotswold				
Davidson				
Derita				
Devonshire	276	6	S	
Dilworth				
Double Oaks	587	12	N	720
Druid Hills	312	6	N	500
Eastover	42	1	N	300
Elizabeth	30	1	N	300
Enderly Park	79	2	N	340
First Ward	533	12	N	740
Hickory Grove	224	4		42

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

ELEMENTARY SCHOOLS

	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING AREA	BUS PARKING AREA COST
...ley	302	6	N	5000
...lle				
	395	4	N	4200
	163	3	U	3800
	292	6	N	5000
...ights	456	9	N	6200
	119	2	N	3400
	217	4	N	4200
...Elem.	153	3	N	3800
	201	4	S	
	105	2	N	3400
	405	9	N	6200
	147	3	U	3800
	160	3	N	3800
	225	4	U	4200
...Creek Annex	56	1	S	

ADDITIONAL TRANSPORTATION REQUIRED

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION
ELEMENTARY SCHOOLS

SCHOOL	NO. STUDENTS TO BE TRANSPORTED	NO. BUSES REQUIRED	BUS PARKING AREA	BUS P AREA
Rama Road	244	5	N	46
Sedgefield Elem.	164	3	N	38
Selwyn	188	4	N	42
Shamrock Gard	135	3	N	30
Sharon	117	2	N	34
Starcount	234	5	N	46
Statesville Road				
Steele Creek	119	2	S	
Thomasboro	18	4	N	42
Tryon Hills	328	6	N	50
Tuckaseegee	190	4	N	42
University Park	550	12	N	74
Villa Heights	797	15	N	80
Westerly Hills	140	3	N	38
Wilmore	71	2	N	34
Windsor Park	234	5	N	46
Winterfield	199	4	N	42
Pinewood				
Change in Attendance Area		17		
	12,429	269		200,

Deposition of J. D. Morgan March 19, 1970

[1] This deposition was taken on March 19, 1970, at 10:15 A.M., in the Map Room of the Charlotte-Mecklenburg Education Building, Charlotte, North Carolina.

By consent all objections except as to the form of the question are waived and objections will be made and ruled on at the time of trial. With the consent of counsel, signature is waived.

APPEARANCES:

Plaintiffs—Julius L. Chambers, Esq.
Attorney at Law
Charlotte, North Carolina

Adam Stein, Esq.
Attorney at Law
Charlotte, North Carolina

Defendants—Benjamin S. Horack, Esq.
Attorney at Law
Charlotte, North Carolina

J. D. MORGAN, having first been duly sworn, was examined and testified as follows:

By Mr. Chambers:

Q. Mr. Morgan, we have an affidavit that you submitted to the Court on yesterday or the day before, listing your estimates of the number of students who live in the areas affected by the February 5th order and who would be provided transportation. We'd like to examine these figures. Do you have a copy of the figures?

Deposition of J. D. Morgan March 19, 1970

[2] Mr. Horack: That's which pages?
Mr. Chambers: Beginning with item 2.

A. This is it right here, item 2, summary of total number of children in school in the entire system who live in different zones under the Court approved plan.

Q. Yes. A. Yes.

Q. I think according to your figures you have estimated you'd have 18,460 who would live in the rezoned area and of that 9,016 are now being transported and you estimate an additional 6,019 would have to be transported. A. That's correct.

Q. And you say that 3,425 would not need to be transported. A. That's correct.

Q. We'd like to see how you arrive at these figures. Do you have a map that you used in preparing these figures? A. Yes, and I believe, Mr. Chambers, the only way I am going to be able to do that will be to take the maps and go through it as we have listed here in item #2 school by school, grid by grid for all of them to show you.

Q. All right, would you do that for us? A. It will take us probably, I'd say, a couple hundred hours to do it. It took me over three hundred but now that I am this familiar with it we might be able to do it.

Q. Do you have your map? [3] A. Yes.

Q. With your grids and your estimates of students in those grids? A. These are the maps here. This is the senior high school map, here is the junior high school map here, and this is the elementary schools.

Q. Where is your demographic map showing the number of pupils in each grid? A. I submitted all three copies of those I had colored in color to the Court. However, these

are the three maps that we worked from because they are a larger scale.

Q. But those maps don't show the number of pupils in each grid. A. I'll have to get my printout where I took them, apply my templet that we used that I demonstrated to you before and apply that on each school and then take the grids that we used and then get the number of children off of the computer printout on that.

Q. Would you mind letting me see the computer printout, whatever it is you used? A. Yes. If you will excuse me a minute. We returned it to Dr. Church. (The witness leaves the hearing room.) (He returns.) These are the printouts right here. This was done in January of this year. So it was from these the elementary, the junior high and senior high that I worked from.

Q. Now, what do those printouts show? A. It shows the number of children grade by grade, grid by grid.

[4] Q. All right. Now, let's take East Mecklenburg High School. Can you find that on the printout? A. Uh huh. Here is East Mecklenburg.

Q. Now, according to the estimates that were made by your staff under the Court directed plan, East Mecklenburg would have 2147 students. A. All right.

Q. I'd like to know what your printouts show with respect to the number of students who would be assigned to East Mecklenburg, the total number. A. The total number presented to the Court shows 2100.

Q. Well, under this exhibit which was in the Finger plan, which is what I understand you operated under, you have a total of 2147 students assigned to East Mecklenburg. Now, will your printout show the total number of students who will be assigned to East Mecklenburg? A. Mr. Cham-

bers, what I'll have to do to get that will be to take all the grids in East Mecklenburg off of my map there, come over here with the same number here and add all those grids together. I'll have to go to a map and pull off grid by grid all in the East Mecklenburg area and come back to this map here, this printout here, and take all the grids or any portion of those grids and apply that right back down to this right here and that should total, when we add them all up—this was taken from there and therefore it should add to [5] that number of children.

Q. Let's look at something smaller. We would like to add those printouts as exhibits, but let's look at a small elementary school and see how you got your numbers. Would you look at the printout for Villa Heights? A. All right. You didn't pick the easiest one.

Q. While you're doing that, why is part of the Villa Heights zone colored and part not colored? A. This indicated that the Villa Heights school was paired with certain other schools. That indicates the pairing. Another example would be Lincoln Heights is colored this color here because it's paired with Merry Oaks, with Albemarle, with Idlewild. So this map indicates the pairing.

Q. Why isn't all of the Villa Heights school zone colored blue? A. Well, this was the map that we started on originally to prepare for the Court and the attorneys felt this was too big and too cumbersome to be handled and managed effectively and could we reduce this down in scale to the size of a map that we sent in. So we ran a reprint of this map, reducing it in half, and when we started that we just stopped the fellows wherever they were in completing this map to go to work on the other maps and not spend any more time on this. The fellows were instructed and that's the only reason I can explain to you.

Deposition of J. D. Morgan March 19, 1970

Q. Let me ask you a question. Grids 209C, D and 300B, this [6] portion above this line colored blue, are these part of the Villa Heights district? A. Yes. This is the Villa Heights area. Under the new rezoned plan it would run up here like this and I've got a question mark as to why this line was run in. I have to go back and check some figures to see why that line was placed in here.

Q. You're saying that grids 298D and C are not part of the Highland district? A. Under the . . .

Q. Court order plan. A. No.

Q. All right. A. Because it shows Highland . . . all right, that's sufficient. You realize you're asking me to do something here that was done by someone else that submitted this.

Q. That submitted the attachments to the Finger plan? A. As far as calculating the total number of children in the area that was submitted to the Court previously, I did not work on that at all. But you're asking me to go back and get something that I've got to go back and pull out someone else's work here.

Q. You submitted the affidavit talking about the number of pupils who would be . . . A. I'm talking about the number of students in the rezoned area now. You asked me the total number of children submitted on [7] that and I only worked on the areas that had been rezoned.

Q. You have as an attachment in this affidavit the number of pupils who would be provided transportation under the Court directed plan, not only dealing with the rezoned areas but also with the paired schools. A. In the Villa Heights area, rezoning does not apply to Villa Heights. Villa Heights is paired and therefore all the children in grades 1 through 4 at Villa Heights would be transported to the schools that they have been paired with.

Deposition of J. D. Morgan March 19, 1970

Q. How did you determine the number of students who are in grades 1 through 4 in the Villa Heights school? A. I took the number of children . . . let me get that, I have that figure down in my office. If you'll excuse me to get that. (The witness leaves the hearing room and returns.) All right, Mr. Chambers, so you'll understand Villa Heights, if you will look at this document. Total number of students for which additional transportation is required by the Court ordered plan, and turn to the last sheet on that section. It's the last page of this document starting right here.

Q. I have that. A. All right. Now, if you will look at Villa Heights you will see that I have said paired 797, a total of 797. All right, that came from information that was submitted to the Court taken from the computer printout which I have right here showing the total.

[8] Q. Wait a minute. Which exhibit are you referring to? Is that the attachment to the Finger plan? A. Mr. Chambers, I don't know which. That's the same you're using there?

Q. That's right. A. I thought it was, that looked like it.

Q. Yes. A. All right, flip back now to the sheet prior to that one.

Mr. Horack: Is there some way that we can identify?

Mr. Chambers: We will identify it as Plaintiffs' Morgan March 19th deposition Exhibit A, the Finger plan.

A. That is the same figure I worked from there, adding those up that is paired and that gives you the 797 that will be transported to the schools with whom they are paired.

Deposition of J. D. Morgan March 19, 1970

Q. What you are saying, then, is that you didn't really go and count the grids in Villa Heights. A. No. It was done on that submitted to the Court.

Q. You just took the numbers that were shown in the Finger plan, which is now identified as Morgan March 19 Deposition Exhibit A. A. For the paired schools, yes.

Q. For all of the paired schools you just took the number of students from Plaintiffs' Exhibit A. [9] A. That's correct for all paired schools. Mr. Chambers, let me clear up one thing. I took all of that but if you will look at this sheet here, however, I was told that it was submitted in here that this would also take place right here. So that your figures—if you want to add up figures and double-check me on it—you can find that assigned from areas to increase desegregation at Oakhurst, Shamrock Gardens and Thomasboro. Now, this was assigned from this so when I was doing my computation to figure the total number, I took the total number of grades 1 through 4 and came up with 4,984. Of grades 5 and 6 to be cross-bused back to those schools, I took a total of 4,932. To that figure the ones from Oakhurst, Shamrock Gardens and Thomasboro on there that were assigned to increase integregation in those schools. That gave the 10,206 which I have on my sheet.

Q. The assignments to Oakhurst and Shamrock Gardens and Thomasboro would not be cross-busing. As I read it, this is just some black students assigned from inner-city to these schools. A. Well, you could refer to that as a satellite.

Q. This isn't cross-busing, is it? A. For those three schools, no. It would be a satellite. For my purpose of figuring I had to put those 209 to get the total number of children. I counted the satellite the same as a paired school.

Deposition of J. D. Morgan March 19, 1970

[10] Q. So you came up with a total of 10,206. Is that the rezoning and the pairing? A. No, that's just the paired. In the summary you'll see here I gave the total number of elementary as 10,206 in the paired school. And in the rezoned schools I could have counted those 209 in this area here but I just kept all the elementary together there.

Q. You're talking about you could have put the black kids being bused to Shamrock Gardens and the other two in the satellite schools? A. Yes, the 209 could be placed there. The important thing to me was that it was 10,206 that would be transported one way or another. Then we come to the rezoned area and we broke the rezoned area into the 2,223, giving a total number of elementary children to be transported 12,429.

Q. All right. So that's how you say you arrived at the figure for the paired schools, by taking the number that is attached or shown in the Finger proposal. Show us how you arrived at the number of students in the zoned schools. Myers Park is an example. Let's look at Myers Park elementary.

(Off the record by consent at this time.)

A. All right. (Drawing on the map.) In these areas right here this would all be . . . . I wish I had a copy of the Court order map with the colored areas. It would make it so much faster and easier.

[11] Mr. Horack: May I inquire, I don't want to interrupt our proceedings, if we would go borrow from the Court one of those maps so that we can . . .

Mr. Chambers: We have no objection to it. We didn't get a copy of the maps.

Mr. Horack: Obviously we haven't got one either.

A. The Court required three copies.

Mr. Horack: I understand the reason why but the fact remains we don't have one.

A. We sent the Court all three copies. We rushed through to get them.

Mr. Chambers: We don't mind going now to the court.

A. Let me check. I had the fellows to fix Dr. Self a copy. I said while they're at it make him a copy. May I check and see if he has it? I believe he has a copy of that which will help and save all this time in trying to go over them again.

(The witness leaves the hearing room and returns.)

Q. We are trying to determine the way they determine the number of students in Myers Park Elementary School.
A. All right. Here we created this legend to make it clear for everyone to understand.

Mr. Horack: For the record may we identify we're looking at item 6A which is a map of the attendance areas of the elementary schools, which is a [12] colored map submitted to the Court.

A. The Myers Park area under the Court approved plan is this area here. We used the crossed hatch to indicate the original Myers Park area and the corresponding darker green color to show that portion that had been rezoned

into Myers Park Elementary School. So that shows us the new area and it was only these children as we applied our mile and a half from this school under the amended order, it was my understanding that we were only to include those children that were more than a mile and a half from the Meyers Park Elementary School. So we counted all of the youngsters in these grids.

Q. You're talking about the dark colored grids? A. The corresponding green color. We counted all of those youngsters in those grids, checking the mile and a half out to make sure those would be eligible. As we indicated in the columns here, there were a total of 235 children in that area.

Q. Would you show us how you figured the 235? A. Four of them are now being transported. We know where they are being transported. We took, then, the 153 that would be more than a mile and a half from the school and there would be 78 in these areas that are less than a mile and half from the school.

Q. All right. Now show us, if you don't mind, how you determined there were 153 living more than a mile and a half from the school. [13] A. As I demonstrated to you before on the big map, we put the templet on it that demonstrates those children that live within a mile and a half of the school and we counted only those youngsters outside that area.

Q. Is this scale here one inch equal 4000 feet? A. This is the one of 2000 and this is the one 4000.

Q. Would you point out the grids in the Myers Park district that are more than a mile and a half from the Myers Park Elementary School? A. Let me get my templet to put on that. See, this is the same area that I was showing there.

Deposition of J. D. Morgan March 19, 1970

Mr. Horack: May I inquire, Mr. Chambers, do you want him to explain the process or do you want him to figure it out?

Mr. Chambers: Both.

Q. I understand that this printout here has the number of students in the grids and we would like for him to identify the grids so we can look at the printout to see the number of kids in the grid. A. That's right. Let me get my templet and put on that.

Mr. Stein: Could you also get a ruler that we could use?

A. Yes.

(The witness leaves the hearing room and returns.)

Q. You have attached to the map a circular instrument which I understand measure one and one-fourth miles. [14] A. That would indicated 6000 feet, that's 3 inches.

Q. I'm talking about your exhibit attached to the map. Does that measure one and one-fourth miles or one and one-half miles? A. It measures less than one and a fourth mile.

Q. Less than one and one-fourth miles? A. Yes.

Q. Would you identify the grids that are in the Myers Park district that are more than one and one-fourth miles from the school? A. That is a radius. Now, that is a radius of less than one and a fourth miles. It's not the distance we measure the way the road runs to the schools. In other words, you have to take the nearest way you can drive to the school. Therefore, you can't take the number of children straight down and say that's less than a mile and a half. You have to take the way the road runs, the nearest way to get to the school.

Deposition of J. D. Morgan March 19, 1970

Q. You're talking about applying a state standard now to the Court ordered plan. A. That was my understanding of the order we were to follow.

Q. Well, would you identify the grids now that are outside this one and one-quarter radius? A. All right.

Q. In the Myers Park District. A. 403—I got 9/10 on that; 370D.

[15] What was the first one that you got 9/10 on? A. I got more than a mile and a half.

Q. What was the first grid you indicated? A. 403B.

Q. That's entirely within the circle. A. But you have to know the distance it takes to get here, how you would drive.

Q. We have a circle that you say is one and one-fourth mile that you say you used to account for the roads and you don't use the circle of one and one-half mile. Now you're saying you include within that— A. We use it as a basic guide. We couldn't just apply that flat and say that was it entirely. We had to take our knowledge of where the roads run and how you get to the schools.

Q. Mr. Morgan, would you first of all tell us the grids that are outside this one and one-fourth mile circle in the Myers Park district? A. We have all or practically all of 370D.

Q. That's not all, it's about 75% of 370D. A. But if you will measure the distance on this road and run your car the nearest way you get to this school from this point right here, down Queens Road, right on down and get into the Myers Park School and it will be a mile and a half.

Q. Mr. Morgan, the only grid in the Myers Park district outside of the one and one-fourth miles would be 370D? [16] A. And a portion of 430D.

Q. And a small portion of 430D. A. Yes.

Q. That's not really 430D, that's really 456B. Would

you come here and look at this grid? Now, this is 456B, is that correct? A. That's correct.

Q. And you've got a very small portion of 456B? A. Yes.

Q. And you've got about 75% because I understand this orange color here is not in the Myers Park district. A. It is.

Q. Why is it orange rather than— A. I explained that this coloring was before. See, the new lines run here.

Q. Let's look at your map. A. It runs all the way up here like that.

Q. So you've got a portion of 370D. Would you look at your printout of the exhibits and tell us how many students are shown in 370D? A. And 456B. 456B shows a total of 7 children.

Q. That's in the whole grid, is that correct? A. That's in the whole grid.

Q. And we have only a very small portion of that included in the Myers Park district. [17] A. There are four children in the area, in that particular area.

Q. Let's look at 370D. A. 370D, there are a total of 181.

Q. Well, let's see, your printout shows 150. A. No, it shows the total, see. You have to take all the children in the grid.

Q. A total of 181? A. A total of 181.

Q. How did you figure the percentage in that district who would be included in the Myers Park district? A. Well, Mr. Harrison ran a calculation on it as we worked with it. We worked grid by grid and all of that grid would be more than a mile and a half from the school. Furthermore, some portion of these grids, although it's within the circle and within as the crow flies within a distance here, nevertheless as the car would have to travel or the child

would have to travel by the nearest road to get to the school, a portion of those would be within a mile and a half.

Q. Well, do you have a map of the present Myers Park district? A. I believe the old line of Myers Park ran something like this. You can see right here, here's the old line, right here up like this.

Q. How did those students who were living in grid 370C get to school? Grid 370C is in the present Myers Park district, is that correct? [18] A. Yes.

Q. And according to your circle there, they are more than a mile and a half from school. A. That's correct.

Q. How do they get to school now? A. As all the children in the inner-city now get to school.

Q. How is that? A. All of them in the city, whether they are a mile and a half or five miles, they walk to school.

Q. Would the kids in the new district 370D be any further from school than the bids in 370C? A. But our order was that transportation shall be provided for all children rezoned who are more than a mile and a half. That was my understanding of the order.

Q. Well, you say presently the kids in 370C walk to school. A. I don't know, Mr. Chambers, how they get there.

Q. Do you have a bus, do you provide public transportation? A. No, we do not provide it.

Q. Isn't there a bus from the City Coach line that runs out to Myers Park Elementary School? A. I do not know. We're showing, Mr. Chambers, that of those 181 at Meyers Park that I mentioned, we're showing that 153 of them would be eligible for transportation. So we only included of the total of 335 in this area—let me make the record straight in case there is a misunderstanding about it, [19] that we took of the total I called off 181 from the printout.

Q. You said there was a total of 181 in that grid. A. We

said 153 of them would live beyond this mile and a half limit, so I was mistaken in about—

Q. You said your circle really is a mile and a fourth. A. As the crow flies, yes, but our experience has indicated that you can lay a ruler down or a straight line down and measure out that distance and when it actually comes to it those children will be a mile and a half or more as the roads run.

Q. Well, look at the Shamrock Gardens district. A. All right.

Q. You indicate there that 45 are included in the rezoned district and that you would have to transport an additional 45. A. In other words, there are a total—here's the Shamrock area, the original or that portion that remains in it or in the area after the lines were redrawn.

Mr. Horack: Identify that by color on the Court map submitted to the Court.

A. At Shamrock Gardens the cross hatch in yellow indicates that portion of the attendance area that will remain there. The darker corresponding yellow indicates the area that has been rezoned to Shamrock Gardens. And at Shamrock Gardens we say there are a total in the new area rezoned into it, there are a total of 302 children. There are 39 of those that are [20] presently transported and there will be 45 of them who will live in the rezoned area more than a mile and a half from the school. This would be the portion of the children that live the fartherest from the school. And there would be 218 in the area that would be within walking distance of the school.

Q. All right. Now, let's use your circle again on the larger map for Shamrock Gardens and identify the grid

that is outside of the circle. A. All right. Right here, applied on the Shamrock Gardens you can see the new rezoned area runs under this point here.

Q. Those are grids 299A— A. 299A.

Q. A portion of B. A. A portion of B and a portion of C.

Q. It's not really all of 299A, is it? A. No, it's a portion of 299A, B and C. 299—that was A?

Q. Yes. A. A portion of A, a portion of B.

Q. And a portion of C. A. And a portion of C.

Q. How many students are in 299A? A. All right. 28.

Q. How many are in 299B? A. 33.

[21] Q. 299C. A. 102.

Q. You've got about one-half of C that's outside this circle. A. All right. Of those 163 in all areas there are approximately one-half of them who will require additional transportation or they are now being transported to a school.

Q. When you have half a grid, what do you do, divide two into the total number of students in the grid? A. Yes, if we say that there is one-half of it, then there will be 14.

Q. That's the way you make your determination? A. Yes.

Q. If you've got one-third, you divide it by one-third? A. One-third is one-third, that's right.

Q. Well, the point is you don't actually have a house by house count of students in each grid. A. Yes, we do.

Q. You do have? A. Yes.

Q. Then you can tell the Court now the number of students who live in a certain zone and attend school in another zone since you have a house by house count? A. Yes.

Q. You can tell the Court that now? A. Yes.

[22] Q. It seems that all of the students in 299A, B and

C are outside the 1957 city limits. A. Repeat your question.

Q. It seems that all of these students in 299 A, B and C are outside the 1957 city limits? A. 299A and B, yes, and a portion of 299C.

Q. Well, the portion of the students in 299C who live according to your circle more than a mile and a half from the school would be outside the '57 city limits. A. That's correct, but they were assigned to a school, Plaza Road here, that was less than a mile and a half from their home. Although they lived outside the '57 city limits, they were assigned to a school less than a mile and a half from their home.

Q. You're talking about the students in 299C were previously assigned to Plaza Road? A. That's correct.

Q. And where were the students in 299A and B assigned? A. 299A and B, all right. They were all assigned, all of these were assigned to Plaza Road.

Q. Now, where are the 30 students who are now being transported residing? A. In 299—in which?

Q. Well, you indicate in your report that 39 of those students are already being transported.

[23] Mr. Horack: What school are we talking about?

Mr. Chambers: Shamrock Gardens.

A. Yes.

Q. Where do they reside now? A. They reside in either 299A or B.

Q. And you say they are assigned to the Plaza Road Elementary School? A. That's correct. According to these lines here, if I can make out the lines I'm looking at here, that's correct.

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Q. Would you tell us from your figures there the number of students you indicate would need transportation, the total number in Shamrock Gardens?

Mr. Horack: You mean additional?
Mr. Chambers: No, the total number.

A. The total number adds up to 84. That's 84 out of the total of 163 that have been rezoned into Shamrock. No, more than that. Some are within walking distance of Shamrock. There have been 302 rezoned into Shamrock Gardens, 84 of whom have transportation, 45 of them additional transportation and 49 of them now being transported.

Q. Would you look at the Billingsville district. A. All right.

Q. You indicate a total of 128 additional students to be transported. A. That's correct.

[24] Q. Now look at the Billingsville district. A. Billingsville is indicated on the map by the remaining portion of the original attendance areas indicated in a cross hatched blue line. The rezoned area to it is indicated by a corresponding solid blue color.

Q. Now, would you use your circle again and tell us the grids that are outside the circle? A. All right. A portion of 432C, 458A, 458D, a portion of 458C, and 485B, a portion, the majority, practically all of 485B. It would be all of 485B and 458A.

Q. All right. Would you check and tell us the number of students living in those grids? A. Did anyone take them down as I was writing?

Q. Yes. A. That's 458A, B and a portion of C.

Mr. Horack: Can we get off the record a minute?

Mr. Chambers: Yes.

(Off the record by consent at this time.)

A. I come out with a total in just those grids that I called out, 432C, 67 pupils; 458A, 46 pupils; 458B, 57 pupils; 458C, 45 pupils; 485B, 24 pupils; 485A, 69. I show on my report 272 so I deducted those portions in that, a total of 38 children just in those grids alone that would be excluded for a part of 458C. If you want me to, I can go back and check. I think I'm in the ball park but—

[25] Mr. Horack: May I suggest that you double check the applicable grids? Not that our list wasn't correct but I got to meddling with your business.

A. I said a portion of 432C, 458A, 458C—that looks like all of C. Now, for the record, let me recap my recount. 342C, 67 pupils; 458A, 46 pupils; 458C, 45 pupils, 458D, 45 pupils; 485A, 69 pupils; 485B, 24 pupils; 485C, 17 pupils; and 485D, 22 pupils.

Q. Would you total those up? A. I wanted to recheck before I gave it for the record.

Q. OK. A. There are a total of 335 pupils in those grids. Our record shows that 112 of these are now being furnished transportation and there will be 128 additional students to be transported, totaling 230 out of the 335.

Q. How did you determine that 112 are now being transported? A. They are now being transported, the vast majority of those are being transported out of the Pinehurst Apartments to Sharon.

Q. Are they the only ones? A. I said a large portion of the 112.

Q. Where are the others?

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(Off the record by consent at this time.)

Mr. Horack: Explain for the record just exactly what you said.

[26] A. In explanation of the 112 who are now being transported, I made the statement that the majority of those were coming out of the Pinehurst Apartments. Here is where McMullen Creek crosses Providence Road and all of those apartments are in this new area that has been reassigned to Billingsville Elementary School.

Q. Grids 485A and B? A. Pinehurst Apartments are all—a portion of them might be in B, yes.

Q. Are there other students—

Mr. Horack: He didn't explain where those students were previously transported.

A. These students in here are presently in the Sharon attendance area and are being transported to Sharon at the present time. This was a former county school and this, you see, was outside the '57 city limits.

Q. Are there other students in the rezoned Billingsville district who are also being transported besides those in the apartments you mentioned? A. There are a few in 485B and are now being transported to Cotswold and that will account for the 112. The 128 I'm accounting for for additional transportation will be all of these children in this area that are now within a mile and a half of Cotswold Elementary School and are now walking to Cotswold.

[27] Q. You're talking about grid 458A . . .? A. 432C, 458A and 458 C and D.

Q. Now, are all of those grids or the areas that you indicate you will provide transportation for for the Billingsville School outside the 1957 city limits? A. Yes.

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Q. You have estimated in a previous affidavit that it would take an hour and a quarter for the students in the paired schools to get to school. A. In my previous statement I stated that it would require a bus route of approximately two and a half hours a day averaging throughout the entire system. You cannot pick out an isolated situation and say that that is it, in an area like we were just looking at. You have to average it throughout the entire system and that's what we estimate the travel time it would take a bus.

Q. Two and a half hours round trip? A. Round trip, yes, sir.

Q. You're talking about to school and then in the afternoon back home. A. To school and back home.

Q. Are you talking about from the time the bus driver leaves home until he stops the bus after he unloads the students? A. Yes, I am.

Q. You're talking about the total time. A. I'm talking about the total mileage that a bus will have to [28] travel.

Q. From the home of the driver. A. Because our route description describes the route from the point where it leaves the driver's home to the last stop where it discharges pupils and parks.

Q. Mr. Morgan, why did you give the total time for the travel rather than one way trip as you have been doing for buses now operating? I show you, for instance, copy of the principal's monthly reports for the period December 1 to January 7, which is an exhibit that has been introduced. I note on that exhibit that in your reporting now you report only one way for time. A. Well, for the purpose of figuring the total mileage, I just figured the total mileage and total travel time. I was not figuring mileage one way and time one way. I was taking the round trip and I was using the

round trip and the total mileage for that round trip. Our state form simply calls for it in this manner, total mileage for the route, and then they ask just time required to travel one way.

Q. My question is, you have been reporting time for just one way. A. Yes.

Q. But in this instance for the Court ordered plan you report time round trip. I was just wondering why you would report it for the round trip rather than the way you have been doing. A. No particular reason other than to show the total mileage and [29] the total travel time.

Q. Now, would you look at your map again, the one showing the paired schools. A. Would you like me to put that up?

Q. Yes, if you don't mind. A. This is the one we submitted to the Court.

Mr. Horack: Mr. Chambers, would you again identify for the record which map it is we're looking at?

Mr. Chambers: We're looking at map #1. The map we are looking at is the map showing the paired schools as submitted to the Court for the elementary schools.

Q. This map shows the schools that have been paired under the Court ordered plan. It also has a scale of one inch for 4000 feet. A. That's correct.

Q. All right. Now, would you take your ruler and let's start with the pairs here. How far is Albemarle Road from Lincoln Heights? A. That's a total of 10¼ inches.

Mr. Horack: May the record show that the witness is making his measurements as the crow flies.

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Q. All right. Now, how far is Idlewild from Lincoln Heights? A. Approximately 10 inches.

[30] Q. And how far is Merry Oaks from Lincoln Heights? A. Approximately 5¾ inches.

Q. How far is Hickory Grove from Tryon Hills? A. 8⅛ inches.

Q. How far is Briarwood from Double Oaks? As the crow flies, 5½ inches.

Q. And Devonshire? A. 7 inches.

Q. We're talking about as the crow flies. Approximately how far is it by route from Briarwood to Double Oaks? A. Well, I estimated this for the average. I can only tell you what we figured the average throughout the entire system and not isolating any one particular situation.

Q. Well, you would have to have some figure for all of the situations to get an average, wouldn't you? A. Yes, and that was based on our experience and the experience we are having with some of the in-city transportation now from the driver's home to pick up the youngsters to carry them back to school.

Q. Have you or have you not determined how far Briarwood is from Double Oaks? A. The exact mileage as to the way the bus would run, this has not been done and will not be until the assignments are made and the principals run their routes.

Q. How did you determine your average? [31] A. Based on our experience with the in-city transportation and knowing the experience from where the drivers live and our problems with locating drivers in the proper location.

Q. Well, Mr. Morgan, are we talking about in terms of your estimated average the distance from the school to the school to which the students are being assigned or the dis-

tance from the driver's home around all of the students in the particular district and then carrying them over to the school? How are you arriving at an estimate? A. There are going to be many routes that will be more than the thirty miles daily. There will be other routes, of course, that will be less than the thirty miles.

Q. How are you determining that? A. Based on our experience and our operation with our present fleet.

Q. Could you tell us what that experience is so we can know what you are using to make that determination? I don't presently see any school there in the clustered schools that is more than fifteen miles from the other school or is fifteen miles from the other school. A. I have not said from school to school that it was fifteen miles. I am saying the distance the bus will travel will average thirty miles daily or more.

Q. I would like to know how you make that determination. A. I didn't pin it down. When we took the average I didn't pin [32] it down when we just took the elementary schools alone. We took into consideration and my testimony was for the entire system.

Q. Well, let's talk about the clustered schools. How did you determine an average for the time it would take for these buses to make the routes that you would have to go? A. Well, I had a principal to check a given situation the way his bus would have to go. I also secured information from the Transportation Department based on the experience of routing the buses and where the drivers live that it would take that mileage.

Q. Is any of that information written? A. No, sir.

Q. We are trying to find out how you made your determination and we would like to know, if possible, what you are basing your average on.

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Mr. Horack: I believe he already answered that.

Mr. Chambers: He said experience and we'd like to know what that experience is.

Q. Is it safe to say, Mr. Morgan, you really don't know? A. No because I think our experience will prove and when the principals actually get the children assigned and work out the bus routes and we add them all up, I think you'll find that our figures are fairly accurate.

Q. Well, tell me what the experience is so we'll know what you [33] are making your estimates on. A. Well, you're speaking only of clustered schools and my testimony was based on all schools, junior high schools, senior high schools and elementary schools.

Q. Well, talk about the senior high and junior high for the present purpose. We want to know how you made a determination that it would be approximately an hour and a quarter for the students to get to school. A. Well, I had Mr. Harrison to run several checks on given situations and to....

Q. Let's talk about those checks that Mr. Harrison made. Do you have those in writing? A. No, sir, I don't.

Q. What checks did he make? A. As I say, I had one principal to check who is presently having experience at Idlewild and the way that it would be necessary for him to route his bus from Idlewild school to Lincoln Heights school and on the basis of his experience on routing buses, I asked him to make a run of that to show what it would do. I didn't pick out necessarily any other school, I just took that as one example of a principal who had considerable experience in making and he gave me the way his bus would have to run, which would be out Central Avenue and up Trade Street, across Trade Street to Beattys Ford Road and up Beattys Ford Road and into Lincoln Heights.

He said that [34] this is the safe way a bus could be routed. That was one check I used. Then I asked Mr. Harrison to also run a check and to see what several typical situations would be and to give me an average based on that, where drivers lived and where the children lived and the best way to get to the school.

Q. What checks did he make? A. He ran some checks on schools and I don't know which schools he ran them on. I just asked him to give me what would be a fair representation so we would make sure that we were correct when we put our figures down.

Q. And you don't know what he did. A. I don't know the particular schools he used, no.

Q. Is he here? A. No, sir.

Q. Where is Mr. Harrison? A. I suppose he is at the Transportation Department or out on some of the routes maybe, I don't know.

Q. What time did the principal from Idlewild tell you it would take to get from his school to Lincoln Heights? A. Before I answer that, let me say this. In calculating the mileage, the speed at which we could go through town, we felt that an average of 12 miles an hour was as fast as we could travel through town. The principal, when he made his check, used his car and did not take a school bus and make the run. [35] As I recall, he gave me a distance of either 13 or 14 miles one way and that just included the distance from his school to the Lincoln Heights School. He did not take into consideration where the driver would live or how many pupils would have to be picked up beyond that point who would live more than a mile from Idlewild School who would be going there.

Q. What time did he tell you it would take? A. He said he could not judge it by using a car versus a bus.

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Q. He didn't tell you how long it took him to drive? A. No. Just from the school I guess we could multiply it out and travel 12 miles an hour. What would 12 miles an hour times 13 or 14 miles give you in time?

Q. I thought maybe you had some figures that you were using to make your estimates. A. I had on distance but not on time because I couldn't compare a car's travel time with that of a bus.

Q. Now, did Mr. Harrison give you some estimate of time? A. His estimate of time was that it would require throughout the entire system an hour and a quarter travel time on an average for all the routes.

Q. Is that from the bus driver's home? A. Yes.

Q. Is that picking up students in the neighborhood also? A. It's allowing for picking up some at the farthermost point.

Q. Would the time be reduced if you just used the time from [36] school to school? . . . . rather than pickups. A. Yes. But by law, if they are more than a mile from the bus route we've got to route the bus to them. This is state law.

Q. If they walk to school as they are doing now? A. Well, you're mixing apples with oranges now. A child walks to school if he is less than a mile and a half. However, the law states that we must route a bus, if he's transported to school, it must be routed within one mile of his home. So all of those children who are more than a mile from the school, the bus must be routed to pick those youngsters up.

Q. The only question I'm trying to find out is whether you plan to route the buses for the clustered schools from school to school or around the area to pick up the students. Of course, that will have some bearing, too, on the number

of buses you will need. A. Not on the number of buses but on the travel time.

Q. Well, would you state whether you have tried to route the buses from school to school or some other way? A. Depending on what we find to be the safest way to get the children to school. If we find that it's unsafe to congregate 500 children at a school with buses coming in another direction in there, it may not be wise to do this and we would certainly want to route the buses to provide the safest way for the children to get to school.

Q. At present you don't know how you're going to route the buses. [37] A. Not until the children are assigned and the principals can pinpoint where they live and then make their runs and set their stops, and so forth.

Q. And you don't know how much time it would take to get the students to school. A. Well, I'll state my original estimate. There will be some children that it will require an hour and a quarter or more.

Q. Well, now, have you seen the charts that were prepared by the plaintiffs of the time and distance presently required for transporting pupils to school? A. No, sir.

Q. Let me show you these charts. This is for the period September 5 through October 4, 1967. That was taken from your principal's monthly reports and it shows that you have 48 buses now traveling an hour and a half.

Mr. Horack: Does Mr. Morgan understand that this chart was prepared by you?

Mr. Chambers: I just said that.

A. Yes, sir. I have not seen it before. But you must know the circumstances on the routing of each bus and where it runs and how it runs and how many stops it makes,

what kind of traffic is involved before you can take the existing transportation, which the vast majority of it is out either in the periphery or the rural area. This is where you get averages like this, where they could make better time traveling than they can [38] interstate traffic.

Q. We are going to talk about the present inner-city transportation but for the purposes presently we just wanted to show from your record what was presently happening in the city. A. I don't know.

Q. I see three buses that are traveling four hours a day. A. Yes. You have to know the circumstances surrounding that before you know what's taking place on that because that is in a section that is isolated. I know of one example of a situation that's isolated around Lake Norman and they must travel out into Iredell County and come all the way back down in order to get there. That's bound to be an isolated situation.

Q. I understand that one of those buses goes to Garinger High School. That is in the city, is it not? A. I would have to check the records. Garinger is located on the periphery. It's in the present city but it's out in the periphery. It's not in the inner-city.

Q. Is not Eastway Drive that runs by Garinger one of the major thoroughfares? A. Yes. But the roads that branch off it to run out into the rural area of the county.

Q. Well, I recall some of your testimony in the other depositions where you indicated that you have some problem with student drivers traveling long periods of time and your records [39] indicate that the bus going to Garinger is driven by a 16-year old student. That's takes three hours and fifty-five minutes to get to school. A. How many loads does the bus make?

Q. Three. That students seems to be able to make his

route, drive three hours and fifty-five minutes one way and get to school. A. I don't know what his schedule is and what his load is. He may miss as many as two periods a day.

Q. The average that you have given for transporting pupils under the Court ordered plan would be the present average the buses are traveling in the system today. In fact, it would be les than the present average, would it not? A. I have not made that comparison.

Q. Did you not submit an affidavit testifying that your present average was an hour and thirty minutes? A. I'd have to check back. I have talked for seven or eight hours. I would have to check back and see.

Q. Is it true that your buses today travel an average of an hour and thirty minutes one way? A. If that's what I testified, if I testified to that we must have made some check to verify it. I don't recall.

Q. Do they or do they not, if you know? A. I don't know the average other than what you were showing me there.

[40] Q. Do you know whether they travel an average of 47.9 miles a day? A. I'd have to go back, Mr. Chambers, and check our records.

Q. Do you have those records available? You're talking about taking your principals' monthly reports which we have already introduced? A. Yes.

Q. Would you take your rule again and let's complete the distance in the paired schools. Would you tell us how far your rule shows it is from Huntingtown Farms School to Bruns Avenue? A. 9⅝ inches.

Q. How far is Sharon School from Bruns Avenue? A. 8⅞ inches.

Q. How far is Starmount from Bruns Avenue? A. 9⅛ inches.

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Q. How far is Park Road from Marie Davis?

Mr. Horack: I'll object to this, Mr. Chambers. The maps are in the record and it's purely a mechanical thing to measure them. All of these schools are as the crow flies, the distance indicated by a rule extending between any two designated schools. I don't think we need to sit here and have Mr. Morgan do all the mechanics of all the ruler measurements.

[41] Mr. Chambers: We'd like to get it in the record.

Mr. Horack: It's already in the record, the maps are in the record.

Mr. Chambers: In testimony in the record.

A. Mr. Chambers, in all sincerity let me point out to you again and I know you understand that measuring this doesn't tell you anything. It just gives you the distance as the crow flies. You have to know the way the roads run and actually run the road to get there. It doesn't tell you anything.

Q. Mr. Morgan, you didn't really know how far it was from one school to another. A. I have not measured the distance. I told you that until the routes are established and the way the buses run, we will not know that.

Q. Well, we're trying to get an estimate. A. I can give you school by school, of course, as we are doing right here. Unless you're checking my measuring against your measuring to see whether we come out the same. Marie Davis to Park Road 3⅛ inches.

Q. What about Pinewood to Marie Davis? A. 3½ inches.

Q. You don't have an estimate, Mr. Morgan, of how far those schools are apart. A. The only estimate I have is

what I originally testified as the distance the buses will have to run.

[42] Q. You testified that in determining whether to provide transportation for students that you used the measurement of one and one-quarter miles. Can't you do the same thing for the schools or would a different rule apply? A. Well, as I said, the averaging out of the distances, it would average out that, but that scale just tells you that point and beyond that point you'd have to actually, as I say, measure it on to the end of the attendance area to find out the accurate figure.

Q. You mean that a different rule would have to apply in determining the distance between the schools than between the home of the child? A. No. We did this to get the number of children who would be transported.

Q. Did you think that was a safe and fairly accurate way of determining the number of children, using the measurement of a mile and a quarter? A. Yes.

Q. Why don't it also determine the distance from school to school? A. Repeat that question.

Q. Why wouldn't your same method for determining the distance of the child's home from the school, namely, the mile and a quarter circle that you had, also determine the distance from school to school? [43] A. Well, as you move out from a relatively small area the roads begin to branch out in many directions from that and feed into the main roads.

Q. You're saying that the same rules would not apply, is that what you're saying? A. I'm saying you'd have to take each individual bus route into consideration before you could.

Q. You have made an estimate of the average on some information you say you got from Mr. Harrison and you

don't have any more accurate way of determining the distance from school to school than what you have given us. A. No.

Q. Now, moving to your estimated number of buses, I take it that you again have estimated the number of students who need transportation and divided it by 44. A. No, sir.

Q. All right. Would you turn to your estimate of the number of buses that would be required?

Mr. Horack: May we get off the record?

Mr. Chambers: Yes.

(Off the record by consent at this time.)

RECESS FOR LUNCH

A. Mr. Chambers, for the record I wanted to clarify your question so I'll make clear to you about the ruler. You asked me why if I did it with a templet on that why I couldn't do it [44] with the ruler the same way for the balance of the area and I stated that as you move into the outer area and a bigger circumference the roads run out in different directions and spread out further. But we use the ruler just as you were using it there to estimate mileage but we have found from experience and trying it out many, many times in the past that using the distance that the ruler will measure as the crow flies—for example, we measured one there from Lincoln Heights to Idlewild. I believe I stated that that was 10 inches. Now, the method which we use to calculate to give us an idea of exactly how many we are speaking about—

Q. How many miles? A. Yes. Would be on this map, which is a 4000 foot map, a scale of 4000 feet, then that

would give you 40,000 feet measuring it that way. We have found through experience that by adding 25% to measuring it that way will give you a fairly accurate mileage distance as the road runs to the school. This comes about only through the vast experience we have used in trying this method out time and again. I didn't make that clear to you. I wanted to make sure when you asked me could I, yes, we can but you must add 25% to that.

Q. What does that give you? A. That would give you, of course, 10,000 more on to that which would give you 50,000 feet.

Q. So all of these schools, then, you could estimate. [45] A. From school to school, we can, but beyond that point, now, we cannot. There are some other factors that have bearing on it.

Q. What other factors? A. If I might use this example here when you measure out to this school here.

Mr. Horack: What is that school?

A. It's Idlewild, from Lincoln Heights to Idlewild which is the one we used where we had ten inches for easy figuring purposes. When you figure that, you can figure the distance fairly accurate from Lincoln Heights to Idlewild. Now, not having that experience in the inner-city streets with this—this is the method we use in the outlying areas and I have not applied this same principle and not had the same experience of applying that rule to the inner-city and to say unquestionably that it would work, I could not. But the other point that I was making . . .

Q. Mr. Morgan, just on that point, we were talking a moment ago in terms of the rezoned areas and they were inner-city, as I recall, and you felt that you could use your

one and one-quarter mile diagram for those. A. Yes, but the rezoned areas are areas tied more closely together than what we are talking about here and I don't know the network of roads and all coming across here. But I could assume that we could apply it and get it fairly accurate.

[46] Q. The areas you're crossing are the same areas you used for the one and one-quarter mile, aren't they? A. Yes, but I say I have not had the experience of whether or not a direct route from Lincoln Heights over here, the manner in which it has to be run. I testified before either 13 or 14 miles. What would this figure out? If I divide my 5280 into that, that comes out to 9½ or close to 10 miles, we'll say. Now, my statement was that the principal gave me by car the way he would have to route the bus. That came closer to being 13 miles. That would be a principle which we'd apply or a method we would apply but you never actually know until you get on the ground and run it. The other factor that I was pointing out that would be different would be this right here. If on a road like this at this point here, which is a road that runs by Idlewild School, Idlewild Road, there is a child that lives more than one mile from this school, then that bus must be routed to pick that youngster up and, therefore, the bus driver may live at this point but instead of coming to here to pick them up, he may have to run the route all the way out here to a safe turning around point and turn around to pick the youngsters back up that live a mile from this walking point here.

Q. Aren't those children already bused at Idlewild School? A. If they are more than a mile and half they are, yes. But you were asking me the question could they not walk into the [47] school. Your question to me was could they not walk into that school and be picked up.

You're stating now can these children not ride that same bus and ride it into Idlewild and transfer?

Q. Yes. A. Yes. That adds mileage to what that child travels. He's not going to travel from here to here, he's going to travel from here to there to there. I'm getting at total mileages he is going to travel.

Q. The point is that in the Idlewild district the children are already being bused to school and you have the same compact areas in the inner-city schools that you are presently operating on and those children are already walking to school and I don't think that any of them are more than a mile and a half from the school. A. Then using our calculations here, then, you're just going to transport them 10 miles farther than now.

Q. I understood that's what the Court ordered. A. That's what I'm saying but I thought you were trying to get at examples of how children. . . . I just wanted to make sure I cleared it up for you. I was trying to clear it up, at least.

Q. Another thing, the 12-mile per hour trip that you talked about for the Idlewild School, was that contemplating your bus stopping on the route to the school? A. This was calculating the overall time. There would be times [48] when he would make more than 12 miles an hour. There will be times when he will make zero miles per hour when he stops. So we figured a fair way to average it out would be the 12 miles. This way my opinion. Mr. Harrison thinks I am too high. He does not believe it will average that but I was of the opinion that we could probably average that.

Q. If the bus ran from school to school would it average more than 12 miles an hour, instead of stopping? A. A bus can certainly average more when it travels straight

non-stop but remember the stop lights in the city is going to slow you down.

Q. I understand but you have an overall average of 12 miles an hour now and you're stopping to pick up children. In addition you're stopping for stop lights. A. And I pressed on this say one time we get him he may not average that in here, no. One time you get him out here, he can move freely.

Q. We're talking about 12 miles an hour now on the overall trip from wherever he picks up the children to the school to which he is carrying them, is that correct? A. Yes

Q. And that includes the inner-city traffic. A. That's correct.

Q. And you say that if the bus ran just from the school to school without stopping to pick up children that the average would [49] be greater than 12 miles an hour? A. No.

Q. It would not be? A. No.

Q. Mr. Morgan, maybe you don't understand the question. If you average now 12 miles an hour on your overall trip, stopping to pick up children, and you're going to run directly from school to school, are you saying you would have the same mileage per hour? A. Let me see if I can explain it to you this way. In working to figure out this average miles per hour, we made allowance that the children in highly compact areas would be able to walk into the school there and be picked up and taken on a trip without picking up additional children, just the normal stops as required by heavy traffic in the inner-city, stop lights and intersections and whatever other problem they run into, and coming out to this school here.

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Q. That's Idlewild? A. That's Idlewild School from Lincoln Heights. By the same token, we said that this child traveling in the other direction, that the bus must stop to pick them up out here and it might be longer going this way and what we tried to do is to take throughout every school we had and try to get an average which is a dangerous thing to do, I realize, but we tried to get an average and to make sure we had as accurate an average [50] as we could come up with on the travel time and we did take those things into consideration when we were computing it.

Q. In computing the 12 miles per hour average did you anticipate the bus stopping from Idlewild to Lincoln Heights to pick up children?

Mr. Horack: I believe he answered that, that that was not as you suggest but an overall average of all schools everywhere.

Mr. Chambers: I am asking in that overall average is he anticipating the bus stopping on the trip between Idlewild and Lincoln Heights.

A. No, but I was anticipating it stopping before it got to Idlewild.

Q. You testified a moment ago that children who would be west of Idlewld who would be living more than a mile and a half from the school would have to be picked up and transported over to Lincoln Heights. A. A child living more than a mile from the school, yes.

Q. West of Idlewild? A. I don't remember that I testified west, I meant east. This is east.

Q. Take the child who would be west of Idlewild and is more than a mile and a half from school. A. All right. Then he must be transported into Idlewild and from his

present transportation transferred onto a bus at [51] Idlewild, doubling back over the same route he came, to go to Lincoln Heights.

Q. Does your estimate anticipate that or does it anticipate the bus going from Idlewild to Lincoln Heights stopping to pick them up? A. I anticipate the average of all of them working together.

Q. Was the factor of the bus stopping on the way from Idlewild to Lincoln Heights considered in your determination of 12 miles an hour average? A. Mr. Chambers, what I'm saying is that one time the bus gets its load to here at Idlewild, then it would not necessarily be picking up any more children on the way to Lincoln Heights.

Q. You did anticipate that in making your average of 12 miles an hour, the bus stopping? A. The bus would have made its stop when it picked up its last child at Idlewild to go to Lincoln Heights and would have had its load and, therefore, would not be picking up any more children. But we might find it advantageous, if we had 36 children on this bus at Idlewild, to run this bus by here and stop and pick up those children on the way to Lincoln Heights. This way the child is going to be involved in the same amount of time.

Q. The only question I'm asking is did you consider that in determining that the bus would travel an average of 12 miles an hour. [52] A. We took all the factors into consideration.

Q. Now, if you eliminated that factor, that is, the bus stopping, would your average still be 12 miles an hour? A. Let me make sure I understand the question now. You're saying that if the child was brought into Idlewild and put on the bus then?

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Q. Mr. Morgan, in making your average of 12 miles an hour, one assumes you talked about the speed limit of the bus, the speed limit of the city, that is, to travel 35 or 20 miles, whatever it is, an hour, the stop lights the bus would have to stop at and the distance and what the bus would be doing on the route from wherever it was going to where it was going. Now, one of those factors that we understood you to say that you considered in determining it would run an average of 12 miles an hour over the trip was that the bus would stop en route to the school to which it was going. A. It could or could not.

Q. Well, we asked if you had anticipated that it would and that's all we're trying to find out. A. We're not tuned in on this. I'm not tuned in with you.

Q. Well, let's move to something else. Would you use your same 25% addition to the measure of inches on Park Road and Marie Davis to get how far those schools are? A. We would use the same method on all schools to determine our estimates until the buses are actually routed and the stops [53] set up. I gave that distance.

Q. Marie Davis to Park Road is 3 1/8 inches and what was your estimate of the distance between Pinewood and Marie Davis? A. We used Park Road, approximately three miles.

Q. Let's turn to your estimate of the number of buses that will be required. Before getting into that, Mr. Morgan, we want to get these distances in inches between schools because we don't have a copy of the map. We would like to get them in the record. A. Mr. Chambers, let me ask you this, we will have to make some copies of these maps. Well, we can do it here. I was just trying to save some time.

Q. Would you give us the distance between Hidden Valley and Druid Hills? A. 3 7/8 inches.

Q. What is the distance from Beverly Woods to First Ward? A. Call it 7½ inches.

Q. What is the distance from Lansdowne to First Ward? A. 8¾ inches.

Q. And from Olde Providence to First Ward? A. 11 inches.

Q. What is the distance from Ellenbrook to Oaklawn? A. 5 inches.

Q. And from Paw Creek to Oaklawn? A. 8 inches.

[54] Q. Paw Creek Annex to Oaklawn? A. 7-15/16.

Q. What about Tuckaseegee to Oaklawn? A. 7-1/16 inches.

Q. What is the distance from Hickory Grove to Tyron Hills? A. If something is going to check on this, I want to make sure I'm right. I don't know if that makes that much difference. 8⅛ inches.

Q. What is the distance from Montclaire to University Park? A. 10⅛ inches.

Q. What is the distance from Rama Road to University Park? A. 10⅝ inches.

Q. What is the distance from Selwyn to Villa Heights? A. 6½.

Q. And from Windsor Park to Villa Heights. A. 4¼.

Q. From Winterfield to Villa Heights? A. 4-1/2 or 7/16.

Q. That covers them all. Would you look now at your estimate of the number of buses. At East Mecklenburg you indicate that you have estimated you have 465 additional students to transport and that you would need 11 buses. A. Yes, sir.

Q. Now, would you tell us how you arrived at this 11? A. Yes, sir. For the senior high schools we calculated, as we [55] have on all of this, that we use 54-passenger buses.

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Now, this is a figure that we have used standardizing throughout the entire system using this size bus. Realizing that in some cases we will be able to use a larger capacity bus and in other situations it will require a smaller type bus. Mr. Dark, in discussing city transportation with us some time ago when it appeared that the legislature was going to enact a law providing transportation for all, stated to us that he felt like in an area such as ours it might be wise for us to go to 48 or 36 passenger buses but, nevertheless, for our purpose here, we have stuck strictly to the 54-passenger capacity bus. Now, a 54-passenger bus has nine seats on each side of the bus for a total of eighteen seats. Each seat has a span of 39 inches. In our calculations for seating adults, which the majority of seniors are adults, we figure it takes 18 inches rump space for each child, thereby you can only seat 36 senior high school children on a 54-passenger bus. For our calculations here for junior high schools we used a figure of 40 children per bus, and we did this school by school. So, to anwser your question, at East Mecklenburg 465 children, we divided 40 into that at that school and came up with 11 buses with 25 children over. So we said that. . . .

Q. That you'd use 11 buses. A. We'd use 11 buses, yes, sir.

Q. Did you consider the buses already operating in that school [56] district? According to the principal's report you now have several buses now operating in the East Mecklenburg school district. I call your attention to the principal's report beginning November 27, 1969, and ending January 9, 1970—it shows presently East has one bus transporting 44 students. A. The average number transported daily on the first trip. The first trip is to East and

it shows 44, that's correct. By the same token, it shows it transporting only 39 elementary children. You see that?

Q. On the second trip? A. On the second trip, yes.

Q. And 5 more on the third trip. A. Well, this third trip I would have to check to see where that bus runs. The third trip could very easily be when it makes its second trip to Lansdowne that that same bus picks up five drivers and this bus runs to East Mecklenburg with the five drivers.

Q. But it shows that it transported 44 high school students to East Mecklenburg. A. Yes.

Q. On the first trip. A. On the first trip, that's correct, and, Mr. Chambers, I'd have to know again exactly where that bus route is. That's only 9 miles that it's running and it could be very easy that the last four of those children are picked up right close to [57] the mile and a half limit which means they'd only have to stand for that short distance. You'd have to go back and know the route description of this to tell exactly what is taking place.

Q. I understand that but the fact is that it presently transports 44 high school students on the first trip to East Mecklenburg and 39 elementary students to Lansdowne and five more students on a third trip, is that correct? A. The five more would be the system where this bus in this compact area from Lansdowne to East Mecklenburg is a relatively short distance and the drivers have to get over there and we allow a bus to carry the drivers to the school. This is the only way we can get drivers.

Q. Here's a second bus going to East Mecklenburg that carries 58 students to high school on the first trip, 33 students to Idlewild on the second trip and 4 more students on a third trip. A. That's correct, high school 58.

Q. And 33 to Lansdowne on the second trip? A. That's correct.

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Q. And 4 more on a third trip. A. Right.

Q. Here's a bus, the driver's name is Hugh McCrory, that carries 32 students to East on a first trip, 38 students to Oakhurst on the second trip and 1 student on a third trip, is that [58] correct? A. I would assume that the 32 and the 38 are correct. If that's the only bus at Oakhurst, then . . . I don't know.

Q. It shows further on in the column that the 1 student on the third trip goes to East. A. That's the only bus at Oakhurst. That's the only reason for it.

Q. That bus makes three trips, is that correct? A. If you want to call the trip from Oakhurst to East Mecklenburg the third trip. It's officially recorded it runs with no children on it.

Q. It's making a trip from Oakhurst to East. A. It's making a trip from Oakhurst to East to take the driver over there and have it serviced as well. That's the central service point.

Q. That's the third trip the bus makes. A. That's right.

Q. Here's another bus driven by Ralph Marett. It carries 39 students on the first trip to McClintock and 2 students to East. Is that correct? A. Yes, two drivers. Two students the second trip . . . Mr. Chambers, to know exactly on these reports, what they are doing, I'd have to call the principal of East Mecklenburg in to explain this third trip and these second trips with 1 or 2 children. All I can do is to give you the experience that I [59] have stated there that I think those are drivers rather than students.

Q. Well, Mr. Morgan, the records show that you have been rather liberal in the number of students the buses carry and also the number of trips the bus makes under the present system but under the estimates you make here you have the bus making one trip and carrying a limited number

of students. Will you explain why the difference? A. Run that through again.

Q. Your records show now that you permit a bus to carry more than your 40 students that you have indicated and the bus to make more than the one trip as you indicated and under your estimate for the additional buses that would be needed you say you're going to have one bus making one trip carrying 40 students. Would you explain why the difference? A. By the same token you see one bus here carrying 19 children and why the difference there? I can't explain the difference to you without knowing the route.

Q. The 19 students are on a second trip, are they not? A. First trip.

Q. And how many on the second trip? A. 19. So that indicates that we're not putting them. . . .

Q. They are not going to East, though, are they? A. These are smaller children and you can put many more elementary children on a bus than senior high school children.

[60] Mr. Horack: May I ask him a question off the record?

Mr. Chambers: Yes.

(Off the record by consent at this time.)

Q. Mr. Morgan, in an affidavit that was submitted by the Board from Mr. John W. Harrison, Sr., he attaches the explanation for the principals' monthly bus reports. Would you read for the record what column 8 is supposed to show? A. Column 8, maximum legal capacity of bus. The rated seating capacity of North Carolina public school buses is based on minimum standards for school buses

adopted by the 1964 National Conference on School Transportation. In rating the seating capacity of a school bus, it is assumed the bus load will be comprised of pupils in grades 1 through 12, having various weights and sizes. Under the rating standard each standard 39-inch seat will provide seating space for three pupils. The pupils seating capacity to a particular school bus may be calculated by multiplying the number of bus seats by 3. The State Board of Education, under authority granted by statute, permits local school authorities to assign to a bus and transport at the same time pupils in excess of the bus rated seating capacity by 25%. Aisle space in the bus is sufficient to provide one and one-half square feet of standing space for each pupil standee. Grab handles on top of each seat are provided for each standing pupil. The maximum legal [61] rated capacity of a school bus may be determined by referring to the following table: The table gives the type of bus for conventional type buses, for transit type buses. Number seats per bus; under conventional type buses panel 12, 16, 18, 20 and 22; the number seats per bus transit type buses, 8, 10, 12, 22, 23, 24, 26; rated pupil seating capacity for conventional type bus, 18, 36, 48, 54, 60 and 66; for the transit type buses, 20, 25, 30, 66, 73, 72, 78. 25% of rated seating capacity conventional type bus, 0 with an asterisk saying no standees permitted due to lack of standing space, 9, 12, 14, 15 and 16; for the transit type buses, 5, 6, 7, 16, 18, 18, 19. Rated pupil maximum capacity, conventional type buses, 18, 45, 60, 67, 75, 82; for transit type buses, 25, 31, 37, 82, 91, 90 and 97.

Q. Now, the present state regulations and what appears to be the practice as shown by the principals' monthly reports is that you transport more than 40 senior high school

students on a 54-passenger bus, is that correct? A. We're transporting 44 students on a 75 capacity bus.

Q. Now, that 75 capacity is 25 times the seating capacity. A. According to those records, whatever it is. I'll have to go back.

Q. Is that correct? A. I don't know. The chart for a 75 conventional bus would have a total of 10 seats on each aisle, a total of 20 seats. Is [62] that your question?

Q. As I understood column 8 from what you read, the rated maximum capacity would be 25 times the seating capacity. A. The rated pupil seating capacity is 60 with 15 standing.

Q. Column 8 asks for the maximum legal capacity of the bus? A. The rated pupil maximum capacity was 25%; on a 54-passenger is 67.

Q. Right. The rated maximum capacity of the bus driven by George Johnson to East is 68 and that 68 represents, does it not, 25 times the seating capacity on the bus? And in that bus you transport to East 58 students. A. This chart does not show maximum legal capacity 68.

Q. It shows 67. A. It shows 67.

And it shows on that 67 capacity bus 58 children being transported to East Mecklenburg.

Q. And that is your 54 seating capacity bus that you have been talking about, is it not? A. That would mean, yes, on the seating capacity there would be. . . . That would indicate, based on what I have said, of the 36 seated on a bus that there must be 22 standing or there are some little folks on the bus, one. There are some little seniors on the bus where they are able to get three to a seat.

Q. Are you stating that you presently have 22 students standing on a bus? [63] A. No. I do not know, Mr. Chambers, without seeing the bus, and I don't know how

close . . . even if this bus is doing this, I don't maintain that is right and is a safe way to transport them.

Q. The fact is that you can carry more than 40 students on a 54-passenger bus, more than 40 seniors. A. Yes, you can put more than that on but I don't think it's a safe thing to do. It wouldn't be necessarily by choice.

Q. I notice that the state rules talk about the rules being applicable to all students grades 1 through 12 for the seating capacity. A. That's what the state rules say.

Q. And your practice in the system now shows that's what you're doing. A. The practice shows that we are now . . . we don't mix them all up on buses. Those are all senior high or elementary or junior high school children.

Q. I understand. The point is that you limited your number of students that you would transport on these additional buses to 40 and I was curious why you would have a different rule for the additional buses than what you presently operate under. A. Well, in transporting the distance we will be, we think this is the safest way to do it.

Q. They are not going to be transported any further than they [64] are already transported. A. I don't know. I can't tell you how many of those are real close to a school. There may be 15 standing but they might not stand but a mile and a half. We don't think it's safe, nor should children with books and other gear they have to take back and forth to school try to stand on a bus through the city of Charlotte.

Q. Are you telling the Court that on the 54-passenger bus you can't put 54 senior high school students sitting? A. That we cannot seat 54?

Q. Yes. A. No, sir, I don't think we can.

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Q. Well, your rules indicate that you can. A. That's what the rules say but we have to judge it from our actual experience.

Q. Your actual experience shows that you're doing it. A. We don't show we're seating them.

Q. Now, for East you say you will need 11 more buses and I would like to know whether you considered the buses that you already have operating there in making that determination. A. Yes, we did.

Q. All right. Would you tell us what consideration you gave to the buses you have operating there now? A. The buses that we have operating in the present East Mecklenberg area—the area that has been rezoned to Independence, [65] those children who are now eligible for transportation and are riding to East Mecklenburg would ride those same buses to Independence High School.

Q. What about those students who are presently in the East Mecklenburg district and will remain in the East Mecklenburg district? A. All right. As you can see, the present East area runs from this point right here back to the school at this point right here.

Q. And the end of the county line. A. And to the end of the county line bordering South Mecklenburg and Independence. Now, from this area that has been added . . . and the youngsters from the north side are presently being transported out here. Now, in estimating or in our computation of the number of buses needed, none of the children . . . let me check before I say none. There are presently in th eEast Mecklenburg area that live in a rezoned area would continue transportation wherever they're going, but we're interested, I gather, in the 465 children that have been rezoned into East Mecklenburg. Based on our buses that are now operating out of this area, it would require

the 11 new buses to handle the youngsters that have been rezoned into it.

Q. Mr. Morgan, did you consider in arriving at that estimate utilizing these same buses to pick up these students in the northern part of the school district? [66] A. We can't do it.

Q. Could you tell us why you couldn't? A. Because the loads they are presently making into the schools.

Q. Well, do you know how many buses you have operating the East Mecklenburg area that live in a rezoned area Chambers, but I don't know where. The reason you couldn't tell it from this is because there are other buses serving East that are going to other elementary schools or junior high schools, making other trips, and we cannot utilize those buses for making more trips than they are now making. Our overall record is that our buses are now making 1.8 trips and to add any more trips on to these buses would mean that the drivers would have to make their same trips and add other trips on top of that.

Q. You, in effect, excluded any possibility of the buses now operating transporting students added on the rezoned areas. A. We feel like the ones we are now operating are operating at capacity, making as many trips as we can get out of them.

Q. Even the ones carrying 19 to Cotswold? A. It's making two trips, I believe.

Q. Yes. A. The time element.

Q. It says here that it travels one hour one way and your buses going to East travel one hour and thirty-five minutes. A. Mr. Chambers, let me see what you're getting at. I don't [67] know what you're getting at.

Q. Your bus carrying 19 students to Cotswold travels one hour. A. All right. You're talking about John Marett.

Q. Yes. A. It's making two trips.

Q. That's correct, and it takes him one hour. A. And it takes him one hour to make those two trips. Now remember this, this is in a very compact area. Cotswold is a very small area.

Q. I understand, but it also says he travels 13.6 miles on the first trip, 23.5 on the second trip and he does both trips in an hour. A. He is traveling 6-3/10 miles. I remember now. This is the total mileage. So that is 6 miles and let's just say 6 and 12, that's 18 miles.

Q. That he travels in one hour. A. That he travels in one hour.

Q. And your estimates in the compacted area for the additional buses is one and a quarter hours for 12 or 13 miles. A. That's correct. And again you'd have to know the area and know what problems they have along the bus route and how many stops they have to make to pick those 19 children up.

Q. I understand. This is the same kind of compact area that you say the buses at the paired school district would be traveling. [68] A. Some of them yes, not all of them.

Q. This bus traveling one hour, the one driven by John Marett, and it makes the two trips and the bus makes three trips at East which you say you couldn't utilize for the additional students travel one hour and thirty-five minutes, is that correct? A. The one transporting the 44 children, the time required to make those two trips. . . .

Q. Three trips. A. Those three trips is an hour and thirty-five minutes.

Q. And that's the one driven by Harry Stegall? A. Yes.

Q. The one driven by George Johnson makes three trips in one hour and thirty-five minutes? A. Yes.

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Q. And the one driven by Hugh McCrory makes three trips and it takes one hour and forty-five minutes. A. But you've got to know the distance on that third trip from Idlewild to East Mecklenburg, Mr. Chambers.

Q. Yes, I understand that, Mr. Morgan. The question that we had is why you could not utilize the buses that you presently have operating in the system to carry the additional students. A. Well, they'd have to make those trips, they make three trips and what you're proposing to do is to add four trips to it and the time schedule is getting them to idlewild and East [69] Mecklenburg would mean the travel time back from that point all the way back to the beginning point and pick these children up and add a fourth trip to it.

Q. I'm not talking about adding a fourth trip. The bus now operating in the East district would have to make a trip around in the northern area, it does that now, is that correct? A. I don't know where the route is.

Q. You have buses operating in the north. A. We have buses operating in the northwest area.

Q. And is there anything that would prevent him from going further to cover the whole northern area? A. Well, this bus. . . .

Q. On the first trip. A. This bus at Idlewild that you're speaking about, though, look here. Here's East Mecklenburg and here's Idlewild school, see here?

Q. I understand. You're pointing northeast of East Mecklenburg. A. I'm pointing to Idlewild which is just a very short distance. What you're saying is that I could run that same bus back, all the way back to here.

Q. The bus already runs north of East High School and the only question I'm asking is why couldn't it run further north to cover the whole district on the first trip. A. I'd have to examine the routes and know. . . .

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Q. You didn't consider that in deciding that you would need [70] 11 additional buses for East. A. We considered that bus was already making two trips.

Q. You didn't consider the possibility on the first trip of it covering the whole district. A. And we know that it already has 44 students on the first trip.

Q. I understand that the rezoned area will cut off some of those children. You indicated a moment ago that some of the students now attending East will be going to Independence. A. We made our adjustments as we went through this to make sure we were not duplicating buses. I'm trying to say we're going now just to do away with it. All the buses in this area were not necessarily assigned to here.

Q. I understand that but we'd like to know what happened to these students who previously were in the East district and now are going to Independence. Why couldn't the bus that was previously picking them up now cover the added district? A. Well, the children right here that had transportation to East that are now assigned to Garinger. You can't isolate just one situation, you've got to take what happened to these children in here. The bus you are speaking about could very easily have been utilized to haul these children in this direction here.

Q. Was it utilized to carry them to Garinger? A. Yes. We took every one of the areas.

[71] Q. When you cut off the area previously in East and added it to Independence, how many buses did East lose? A. I'd have to go back. . . .

Q. Don't you have some records on that? A. No, sir, I don't. I don't know what we did. We've worked up so many figures and so many different times that I don't— As we went through it, we made our calculations to make sure we were not.

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Q. Are you telling the Court you do not know how many buses you would be assigning to Independence? A. Yes, we know. I'd have to go back through the records.

Q. Can you show us the records now? A. No, sir, I'd have to go back.

Q. We'd like to see them, Mr. Morgan. A. I'd be glad to do that.

Q. Can we stop now and do it? A. I don't know whether I can dig them up at the moment or not.

Q. Do you know how many additional buses Garinger will require, if any? I'm talking about the rezoning and cutting off part of the East district. A. No because we tried to utilize those buses and make those calculations as we went along.

Q. Can you show us how you utilized them? A. I can get the men in here who worked with me on it and we did them one by one because I had computations made by more than [72] one person rather than just me, isolating them out. We had two people working on the map and two over here taking it down.

Q. We'd like to examine whoever would know. You have submitted an affidavit saying you will need these additional buses and we'd like to find out. A. I'm also stating on my honesty that we worked out to utilize what buses we presently have in operation.

Q. We'd like to see the figures, Mr. Morgan. We'd like to know how many of those buses presently in operation are going to be used. Could you show us one example where you utilized an existing bus? A. (No answer.)

Q. Mr. Morgan, let me call to your attention also that under the Court directed plan East Mecklenburg would have 2147 students assigned to it. There are presently 2140 students assigned to East Mecklenburg. The school is ac-

quiring only 7 more students and we'd like to know, if you could tell us, why you're going to need 11 more buses to carry the 7 more students. A. Repeat that question for me, please, sir.

Q. Read it back.

(The Court Reporter reads the question on Line 14 above.)

Mr. Horack: May we go off the record just a moment?

[73] Mr. Chambers: Yes.

(Off the record by consent at this time.)

A. Mr. Chambers, in the rezoning the Court order instructed, as was interpreted to me, that all children that were rezoned into a school and lived more than a mile and a half from that school would be eligible for transportation. Is that correct?

Q. Yes, sir. A. 465 children in the inner city . . .

Q. Let me say only that my interpretation of the order is slightly different, but go ahead. A. Well, the number of children that we list here to provide additional transportation for live inside the pre-'57 city limits and therefore have never had transportation. Those children were all shifted to East. So apparently to balance that off, the youngsters who were at East Mecklenburg were shifted to other areas so that explains why East Mecklenburg would have the same number of children but to promote integration we brought these 465 children here out to East Mecklenburg who had never had transportation before.

Q. Mr. Morgan, your affidavit submitted to the Court shows that you have only 25 students living within the

radius of a mile and a half of East which means that presently you are transporting over 2115 students to East Mecklenburg. A. All right. It means that there are that many children [74] eligible for transportation to East Mecklenburg now. To help you understand it, let me show you the whole picture. Those children who were taken out of East Mecklenburg and were entitled to transportation, we utilized those buses that were being used to East Mecklenburg to transport those children to the schools to which they were assigned and I used as an example East Mecklenburg to here. Now, you want to know where I got Garinger, the additional students for Garinger. The Garinger area was extended all the way almost to West Charlotte. None of these children in here—see, here's the pre-'57 city limits line—none of these children in here have ever had transportation. All of those have been rezoned to the Garinger area so we must provide them transportation.

Q. Mr. Morgan, the only thing you're doing is just shifting some students from one school to another and you indicated you were going to utilize some of the buses from East in transporting students to Independence. Now, how many buses are you going to utilize that are presently in existence for transporting students to Independence that were previously assigned to East? A. This is what I'm saying, I'd have to go back and count the grids and these buses in here.

Q. Would you stay at the map a moment and let me call to your attention that at Independence you presently have 1212 students assigned and you assign under the Court order 1481. [75] Does that tell you anything about the number of additional buses that you will need? A. Now you're beginning to tie the whole picture together. See where the Independence new line comes? Now you begin to get the whole picture. Right here is the Independence line.

Q. You're pointing north of Independence? A. I'm pointing north of Independence. Now, as you can see, these children have been transported to Independence. These will now be transported from right here on the county line all the way across the county to center city, West Charlotte.

Q. Those children are already being transported. A. Now, those children that are in here are already being transported and they will be provided transportation there and that's what happens to the children at Independence.

Q. What buses are going to go from East to Independence? A. The buses that we presently have in here, we took these grids down and estimated how many children would be in there and we applied the same principle to them going over here as we had previously done.

Q. Mr. Morgan, who helped you determine the number of buses or how you would utilize the buses in existence? A. To do this, I had a total of 11 people in here. We worked 675 hours on this to get the figures and to make sure we had them right and doublechecking them.

Q. Is there anybody on your staff or who assisted you who can [76] tell us now how many buses previously assigned to East will be assigned to Independence? A. Yes. I'll have to go back and dig this out again and bring these people in here to help me do the counting and all to show you where we did it. But I can assure you it's there.

Q. We would like to see it, Mr. Morgan. A. You see what happened to the children, Mr. Chambers, when you began to question me about the balance of children?

Q. No, I can't. The problem that I have, I don't see your utilization of the buses already in existence. A. Well, it's just because I don't show it on the chart. The Court didn't call for me to give the number of buses we were using over there and, therefore, not calling for that information, I

didn't keep a record. I kept a record only of the Court ordered information and that's why I'm saying I'll have to go back and recalculate now. I'm stating something again that we figured the utilization of them at that time to make sure we were not having buses standing idle. Now I'll have to go back and figure that because I didn't keep records. I didn't know I would be called upon to present that information. But I can explain to you what happened to the children and how we utilized the buses and can show you where all of these children have been assigned, for example, to West Charlotte.

Q. Let me ask you this, Mr. Morgan. You indicated a moment ago that you had not devised any new bus routes under the Court [77] ordered plan. A. No, and the actual route descriptions cannot be made until the children are assigned, the principal pinpoints where they live and runs his bus along those routes.

Q. How can you testify now that you're utilizing those buses when you don't know where they're going to run! A. We knew how many children were in this area. Look at West Charlotte just a minute. To show you how we utilized our buses, we said at West Charlotte that there were 1409 children in the rezoned area for West Charlotte. To show you how we utilized our buses, we said that 1135 of them are now being transported and thereby we did not add any buses to it but we utilized those same buses that transport the 1135 children to transport them all to West Charlotte. Now, we did this, we took West Charlotte and we applied that same principle of the measurement that I showed you to West Charlotte and we took all outside of this area, who did not presently have transportation but lived more than a mile and a half from the school, and we came up for the West Charlotte area that we would have 219 more.

So we're saying that we'll only have to transport 219 additional children to West Charlotte. What I'm trying to demonstrate is that we did utilize those buses and we took them out of the numbers.

Q. How many buses do you have assigned to West Charlotte? A. Again, that information was not asked for and we took the [78] ones that would be going and added five buses to West Charlotte to transport those youngsters.

OVERNIGHT RECESS

Friday, March 20, 1970:—

Q. Mr. Morgan, yesterday when you were talking about how you utilized the present buses in the system you made reference to your chart that you submitted in your affidavit to the fact that in your column talking about students now transported and additional students to transport, I call your attention to that chart. Start on East Mecklenburg. A. All right. Let's see, Mr. Chambers, which—

Q. This is the chart showing the children living in different zones under the order directed by the Court. Your second column there shows the students living in the new zone who are now being transported. Would you tell the Court how many you say at East Mecklenburg, for instance, 4 students are now being transported. How many of your existing buses are being utilized to transport these four students? A. I do not know.

Q. You say for Garinger that 365 are now being transported, in the new zones. How many of your existing buses are being used to transport these students? A. I don't have those figures. I guess we could go back through the monthly reports and pull out the number of buses that are being used to transport those children.

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[79] Q. The thing we were interested in, you indicated some buses were being shifted to other schools, etc., and you advised the Court that you won't need bus transportation for these students because they are now being transported. We'd like to know how many of your buses are being utilized or will be utilized under the plan directed by the Court to transport these students. A. Well, those that are now being transported that live in a rezoned area will be utilized out of the present fleet of buses we now have.

Q. I understand that but we'd like to know how many buses you are saying you will need to transport these 365 to Garinger. A. That live in a rezoned area to Garinger—

Q. Could you just give us a number? A. No, sir, I couldn't.

Q. You can't give us a number of any of these schools? A. No, sir, I can't. For the record, Mr. Chambers, I don't know whether toward the end of the meeting that I became confused over your question or not as to the number of buses running by areas and I'd like to clarify if I did misunderstand and if I told you wrong I want to correct it. I was using total numbers of children off this report that are now transported.

Mr. Horack: Are you trying to get back to the same map?

[80] A. Yes. At the close of the meeting I was attempting to show and I'm afraid as I got to thinking about it last night and reworking the way I was telling the Court was that the total number of children that had been shifted from the East Mecklenburg area to the Independence area, we would utilize the same buses. Now, I do not know, Mr. Chambers, how many buses are in there. I stated that as

we went through it we computed. I think this is where I was getting off track. All we said was that if we are now transporting the 23,000 children on the total number of buses we are now using that those buses would be utilized not in this area, from East Mecklenburg to Independence, from the Independence area to West Charlotte, from the East Mecklenburg area to Garinger, and so forth. Now, to tell you the exact number of buses in this area, I could not because—

Q. Mr. Morgan, you also couldn't say whether those buses in the Independence area, for instance, already being used or those you propose to assign could not also be used to transport the additional students that are now being added to that district. A. Well, the buses that we are now utilizing in Independence, in refining it through the year, we are utilizing the total number of buses it takes to transport them to Independence. Therefore, I could not assume that any more would be available from Independence to come pick up additional children [81] without adding more trips to those buses now being used.

Q. But your number of students at Independence will remain basically the same. A. Yes.

Q. Why will additional buses be needed if you're going to have the same number of students? A. It could be that additional buses will be needed here because I do not know this yet until the principal actually runs the route in there. I could not tell you for this reason, Idlewild School is located close to Independence—I mean close to East Mecklenburg. If it is located close to East Mecklenburg, then on the second run that it makes to the elementary school the driver has time to meet his second period class at East. He may not have time to meet his class and get back to Independence which may be five times as far away. It would put him 10 or 15 minutes late to his class.

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Q. But you don't know that. A. We will not know it until the principals actually run it but I can assume that it will take more buses to serve this area because of the rezoning for it as well as anyone can assume it will take less buses.

Q. Would you tell the Court what factors you are using to assume more buses? A. The fact that I am saying that a bus that now brings the second load to Idlewild Elementary School and then comes on [82] to East Mecklenburg.

Q. You told me that— A. I'm saying where it may take more buses. The bus that now runs its first load into East Mecklenburg runs a second load and comes into Idlewild. When the bus driver unloads the children at Idlewild he is real close to East Mecklenburg and can get over there in a very short period of time to meet the second period class. I'm saying now, then, in reorganizing this and when the principal gets down to it, when they make the first load into Independence and the bus has to come back in there and make a load into Idlewild, that driver may not have time to get all the way around back to Independence as he would to get to East Mecklenburg. It could make him, I don't know, 10, 15 minutes late or more for his class there and, therefore, we wouldn't have a driver.

Q. Would you state, Mr. Morgan, whether that driver now going to East is making two or three trips? A. As demonstrated there, if you want to count the third trip, the trip where he hauls student drivers only.

Q. Do you call it a third trip in the principal's monthly report? A. You have to account for it some way and they have been using this for the entire state. They have no way of showing another trip.

Q. Is it accounted for as a third trip? A. It has to be

on their reports but we don't count it as a [82] third trip where he's only hauling drivers.

Q. It's a third trip according to the report you filed with the state. A. Yes and the state can't adopt a special form for us here in Charlotte-Mecklenburg.

Q. You call it a second trip going to McClintock after he drops the children off at East, is that correct? A. Yes. He drops the children off at East and makes another trip, a second trip to McClintock.

Q. Isn't it possible that instead of the bus going now directly to East for the first trip that the bus will be routed to McClintock and then to Independence? A. All right. It could be routed then to Independence and then he has to get back to East Mecklenburg.

Q. The students are assigned to Independence, that's what you were telling us. A. Yes, but the driver may not be assigned to Independence. If you're talking about the driver living as close to the school as possible—

Q. You don't know where the driver lives. A. No, but we would try to find one as close to the school as possible.

Q. And that's the extent that you have considered the buses now in use for transporting the students in a new attendance zone, what you have just described. [84] A. Yes. Mr. Chambers, just as I told you about the original areas, we won't actually know because this is going to change the whole bus-routing system throughout for our existing fleet as well as the new fleet. This is the entire thing that has to be done.

Q. Mr. Morgan, I understand that there are presently 5000 students transported by City Coach Line in the city to and from school each day. A. I believe that was a statement made by Mr. Deaton.

Q. Do you know how many of these students will now be

riding school buses rather than city coaches? A. No, I do not.

Q. And you don't know what effect the relief from the 5000 who might be assigned to school buses will have on the system either? A. Repeat that for me.

(The Court Reporter reads the question on Line 13 above.)

Mr. Horack: Repeat that again for me.

(The Court Reporter reads the question on Line 13 above.)

Mr. Horack: Which system are you talking about?
Mr. Chambers: City buses.

A. Free transportation provided for youngsters—I do not know how many of them would discontinue riding a city bus but under the order, whereby no children will be provided additional transportation in the existing areas, a great many [85] of those are now served by the city buses.

Q. I thought you testified yesterday that you don't know exactly where those students lived who rode city buses. A. I say I do not, but we know this .... when I say I don't know, I don't know the exact location, we know in the attendance area of that school. Myers Park, for example, we know out of the present Myers Park area that so many are served now with city buses. Many of them are within a mile of the school. I see those buses stopping and getting children less than a mile from Myers Park.

Q. Just as an example, what would prevent the City Bus Lines from providing service for all the students in the Myers Park area? A. If they have that capability.

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Q. Well, if you are now providing public transportation for some of them, wouldn't it relieve some of the 5000 now riding the city buses? A. I don't know that it would because many of those are less than a mile and a half from the school now, riding on the buses.

Q. There's nothing that would prevent them from continuing, is there? A. Those less than a mile and a half, they have no transportation one way or the other.

Q. Doesn't the city bus operate in the northern part of the Myers Park district? [86] A. I don't know where their buses run.

Q. That's in the city, isn't it? A. That's right.

Q. Doesn't the city bus operate in the northern part of the Garinger School district? A. See, right here is where the Myers Park line cuts off. They have no buses in this area now serving the Myers Park children and we did not include any of these children presently being served by those same buses, we didn't include them in this.

Q. I understand, but the city bus line operates in the northern area of the rezoned Garinger district, they operate in the northern area of the Myers Park High School district, do they not? A. I would assume they do.

Q. And some students now living in the northern area of the Myers Park district have opted freedom of choice to go to the Myers Park School when you closed Second Ward High School. A. You say they did?

Q. I'm asking if you know that to be true. A. No, I don't.

Q. Well, you didn't consider that factor, either, in determining the number of additional buses that would be needed. A. I considered only the number of children in the rezoned area that would be additional children.

[87] Q. Would you state for the record whether you considered the City Coach Lines transportation as a pos-

sibility for reducing the number of buses that would be needed? A. By contract transportation?

Q. By any kind of transportation. A. Yes, we approached the coach company.

Q. I'm talking about, Mr. Morgan, in determining whether the City Coach will provide all the transportation that would be necessary for the Myers Park High School, did you or did you not consider that? A. I don't know.

Q. And you didn't consider whether City Coach Lines would provide some of the transportation in the Garinger High School district. A. No, I had no instructions to.

Q. You didn't consider whether the City Coach Company could provide some of the transportation for the students now in the West Charlotte High School district, the rezoned district? A. No.

Q. Do you know this area here, Mr. Morgan, the area north of 85 commonly referred to as Northwood Estates area? A. Just off Beattys Ford Road?

Q. Just off Beattys Ford Road. A. Yes.

Q. Do you know that those students are now being transported to [88] North High School? A. Yes.

Q. Did you consider the reduction in the number of students who would be now assigned to West Charlotte and less than a mile and a half from West Charlotte? A. Yes, because that's the total number of the children in the rezoned area for West Charlotte.

Q. Did you consider their reduction in the number of students who would be required transportation? A. Yes.

Q. Will you show us where you considered it? A. Mr. Chambers, as far as these youngsters are concerned here from North Mecklenburg, there are a number of children not just in the Northwood Estates here but in this entire area north of Interstate 85 to the new rezoned line. All

of these children were assigned in here and we said there. . . .

Q. Assigned to West Charlotte? A. Assigned to West Charlotte. We're saying that there are 1135 of them who are being transported there.

Q. Who are being transported to West Charlotte? A. Who are being transported to North Mecklenburg. See, all of these children here in Northwood Estates and all of this entire area all the way out here to Interstate 85, all those north of Interstate 85, all these are being transported now to North Mecklenburg and our count gave us a total of 55 who [89] would live in the area that is within a mile and a half of the rezoned West Charlotte area who would not be transported. Now, that's in the rezoned area only, we had 55 children.

Q. Are you saying there are only 55 children from Northwood Estates who will not be provided transportation? A. In the West Charlotte area.

Q. That's your estimate of the total number of children in that area? A. Yes. Or it could be not in the Northwood Estates alone, Mr. Chambers, but it's all within a mile and a half of this school. Some of them could be over in this area here.

Q. You're pointing to an area east of Beattys Ford road? A. Yes, sir.

Q. That's the only reduction in the number of students being transported to North who now would be assigned to West Charlotte that you counted? A. That's right, yes, sir.

Q. Going again to your estimate of the number of buses required, as I understand what you're testifying to about your determination of the number of buses, you would take a 54-passenger bus and assign only 40 students to it

and you then divided it into the number of students you estimate would need additional transportation. A. Yes, sir. And, Mr. Chambers, in addition to that, you called my attention to something that I went back last night and [90] reviewed. Out of the first five months reports you had picked out only one situation, bus #17, and. . . .

Q. I thought we talked about three or four buses. A. We did but I was using 17 as one in particular that you talked to me quite a bit about which showed on the fourth month report 58 children on the first trip which went to East Mecklenburg. So I went back and looked at each one of these and I found that bus 17 the first month of school transported only 32, the next month 33, then the next month 58, which indicated to me that something was going on in the way of increase in enrollment or something that brought about an overload on that bus. So I looked back and then I came on to the fifth month, which was not available at the time I submitted this to the Court, which I went back and got also and indicated that same bus is transporting for the fifth month 36 and for the sixth month 36.

Q. 36 high school students? A. Yes, sir.

Q. Did you check, Mr. Morgan, the other buses transporting students to East Mecklenburg?

Mr. Horack: Let him finish whatever comments he wishes to make on this.

A. I was simply pointing out that Mr. Chambers had picked out just one month here where the average number of youngsters transported daily was 58, whereas if you looked at the entire [91] picture you get a different picture. If this bus had an overload, then we came back and made

adjustments to that bus in the fifth month and the sixth month where only 36 were riding in it.

Q. Let's look at bus #12. A. I did the same thing for bus #12. The first month it had 51, the next month it had 48.

Q. What month is this? A. This is the first month.

Mr. Horack: May I ask that we identify, Mr. Morgan, you're referring to the first, second, third, fourth, fifth and sixth months. Identify those by calendar, months and years, please.

A. These are principals' monthly bus reports.

Mr. Horack: What month for what year?

A. For the current school year, 69-70 school year.

Mr. Horack: The first month being what, September?

A. September 2 to October 1. During that month bus #12 transported 51; the second month adjustments were made to where it transported 48; the third month it was adjusted to where it transported 46; the fourth month 44; the fifth month 41 and the sixth month 41. So we are constantly, as this county changes and enrollment grows, we are trying to balance our buses and you can pick out any month and maybe find a bus loaded beyond what we would say is desirable to have on a bus. [92] We are constantly working to reduce this all the way through.

Q. Look at the same page, Mr. Morgan, for the bus driven by Chris Nelson. A. That's the one for Randolph Junior High School.

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Q. Would you read that out for us? A. All right. Now bus #37, which is a bus that serves Randolph Junior High School. These are junior high school youngsters and this is where I indicated on the form that we use that we will put more junior high school children on a bus than we will on elementary.

Q. And along with that same explanation, did you increase the number in determining the number of buses you would need for elementary and junior high schools? A. Yes, sir.

Q. What number do you use for elementary? A. We worked out a formula to use the same formula all the way through senior high school 40, and we said number of students 54 to 58.

Q. What do you mean by that? A. In other words, on a 54 capacity bus, which is a 67 maximum, we stated from 54 to 58 one bus. In other words, it would take one bus utilizing 54 to 58 children.

Q. Why did you divide 40 into the numbers? A. That was for senior high schools.

Q. What are you using that for now? [93] A. This is elementary and junior high school. They are smaller children and more children can get on a seat.

Q. Instead of 40 for the junior high schools you used 54? A. 54 to 58 for one bus. We worked out how many buses it would take if you had that many children. Two buses would transport 108 to 116. I did this on a chart form so I could look when we were computing this up, that we could look over on the report and see school by school the number of children you can put on a bus. And then we looked at the number of children in the rezoned area assigned to these schools and applied this formula against it to arrive at the number of buses.

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Q. All right. Now, would you read the number of students transported on the bus we are talking about? A. All right. On bus #37 there were 68 on the first trip, 52 on the second trip.

Q. How many on the third trip? A. The third trip, which was to carry drivers only, to get them from the school where they stopped to the senior high school, 3 children. So that means that there were three drivers from two other buses that must have stayed at Randolph that got on there to ride on that bus to East Mecklenburg. The second month there were 76 and 75. Now, this tells you something because it must be a rapidly growing area where the children had increased. The third month there were 75 [94] and 68. On the fourth month there were 63 and 59; on the fifth month there were 70 and 63; and on the sixth month there were 67 and 59. So as they fluctuate and we try to adjust and utilize buses in an area, we try to balance the loads off. Of course, we are not always able to do that. Because we're transporting this number, Mr. Chambers, I'm not saying that makes it right. It's a necessity that we have to live with because we don't have money to buy more buses to put on to relieve the loads.

Q. Now, you were talking about high school. I'll show you the principal's monthly report for Garinger High School for December 1, 1969, to January 9, 1970, the bus driven by Jessie Tennent transported 53 children to Garinger Senior High School, is that correct? A. Yes.

Q. The bus driven by George Mahatha transports 30 children to Garinger High School on the first trip, is that correct? A. That's correct.

Q. The bus driven by Frank Wallace transports 51 students to Garinger High School and the bus driven by Jerry

Dahl transports 56 students to Garinger High School, is that correct? A. That's correct.

Q. The bus driven by Joe Thompson transported 62 students to . . . 61 to Hidden Valley and 30 to Garinger High School. A. Yes.

[95] Q. The bus driven by Dean . . . well, another bus transports 65 students to Garinger and 38 on a second trip to Garinger, is that correct? A. Yes. Now, Mr. Chambers, to do that I'd need to get every monthly report and put it out in front of me and look and see what's happened for the first month and the second month. I selected one month here. It may have been a growing area, there may have been changes in it. I just can't pull out one month.

Q. All of the bus reports that you have given us are of record and are before the Court. A. Yes, sir.

Q. Now, for these additional buses you also have a column here about the parking areas and you say that in many instances you need to make some additional parking facilities for the buses. Do you anticipate under your estimate that each of these buses will go on one trip to the one school with the number of students indicated and will park there all day? A. We state that there will have to be space for them to pull into that school and unload whether they stay there or not. We still have to have unloading space and a safe way to unload the children whether they stay at that particular school or not.

Q. Well, I understand that you are transporting 760 some black students from the inner-city now out to some white schools. [96] What additional space did you provide for at those schools, the black schools from which the students are being transported? A. At some of the schools we already had spaces available for them. At Sharon, for example.

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Q. I'm talking about the schools from which these children are being transported. Oaklawn Avenue is one example, you're transporting some students from that area. Did you provide any additional spaces at that school? I'm talking about for the 764 black students you are now transporting out to white schools. A. At Oaklawn we said that the number of buses required there would be 9 and we would have to have space available to park the buses.

Q. Are you presently transporting 764 black students from the city to the white schools? A. Scattered out to various areas, yes.

Q. Didn't you testify earlier that Oaklawn Avenue was one of the streets that you traveled and isn't it a fact that some of the black students being transported now come from the Oaklawn School? A. Oaklawn . . . unless they exercised freedom of choice to go from majority to minority situation, Mr. Chambers, they were not supposed to be going from Oaklawn School.

Q. Did you close Fairview School at the end of the 68-69 school [97] year? A. Yes.

Q. Do you know where the Fairview attendance area was? A. I could locate it on the map.

Q. Do you know where the black students who constituted the 764 students going into white schools now reside? A. I know the attendance area in which they reside.

Q. What attendance areas? A. Well, Fairview, Bethune, Isabella Wyche, Zeb Vance, Alexander Street, elementary children.

Q. What about the 73 students who were in overcrowded black schools? A. If they exercised a freedom of choice to go.

Q. I thought you reported to the Court they had exercised a freedom of choice. A. I don't know how many of

them did. Now, let me say about this, these schools have been closed. Now, we're doing something there we have been talking about differently from these other schools. We're talking about all walking in to a point to be picked up. We're running the bus through the area and picking them up at key points along the way and making that a route as we would for any bus.

Q. Did you make any additional ground preparations? A. The schools were closed and we ran the buses through the neighborhoods not to do that.

[98] Q. Would you explain how you arrived at an additional 7000 parking areas space for Garinger High School? A. Well, at Garinger Senior High School we are presently parking them in drives and so forth, which is not what we want and we have not had the money to go to Garinger and develop a bus parking lot for these buses.

Q. You're presently not parking them in areas that you tell the Court you need for the new buses? A. We don't have the space prepared for it and we have to park them in the streets and what not. As money is available we will provide spaces. If I get money to do it with, I'll do it.

Q. Are you telling the Court that you are presently parking these buses on the sidewalk and now you tell the Court for the additional buses you've got to have some parking areas? A. We park them on the drives, not the sidewalks.

Q. You can't park these 11 additional buses you estimate you need for Garinger the same way? A. I don't think so.

Q. Why can't you? A. Because we already have a number of buses there already and to add 11 more to the fleet—

Q. How much space do you have there now? A. The survey that was made, we actually do not have a bus parking lot there now, but we need one and it's been [99] recommended we put one there, and haven't had the money to do it.

Q. I understand that but I would like to know, if you can tell us, how much space you've got there now. A. Land is available to convert it to space but we have—

Q. Mr. Morgan, do you understand the question? Could you tell us how much space you have there now that you're utilizing for parking? A. We're utilizing the drives, and so forth, to park them in.

Q. You're saying you're utilizing all of the drives, is that what you're saying? A. No, we're utilizing the back drives. The front drives, where it was necessary for traffic, student traffic, we keep the buses separated from the student traffic altogether.

Q. How much of the back drives were you using? A. How much of it? I'd have to go out and actually see.

Q. You made this report without being able to tell the Court presently how much you have. A. I made it on the basis of the additional buses we would have there.

Q. Would you tell the Court why you would need 5400 additional spaces at Myers Park High School?

Mr. Horack: Excuse me, Mr. Chambers, you're reading from that last column. Those are dollars not spaces, are they not?

[100] Mr. Chambers: I don't know.

A. That's dollars. It would take $5,400.00.

Q. Would you tell the Court what you have to do there to spend that amount of money? A. We would have to develop a bus parking lot.

Q. Do you have a bus parking lot at Myers Park now? A. We do not have a bus parking lot now. They utilize the drives around the gymnasium and all at the present

time and that's utilized for city bus transportation which we estimate that will still have to be continued because of the area we have not provided transportation. They'll still come in there by city bus transportation which by necessity will have to be continued since the children in the present Myers Park attendance area that's left in the area will continue utilizing city transportation because no other transportation is provided for them.

Q. Do you have school buses at Myers Park now? A. I believe we have.

Q. And they park in the driveway? A. Yes, sir.

Q. But these new buses can't park in the driveway? A. There are just so many you can park in the driveway.

Q. Can you tell the Court how much parking space you have in the driveway now at Myers Park High School? A. Well, we have the area from the back of the auditorium to the [101] gymnasium where all the city buses line up in the afternoon to pick up the children. I have observed those buses along the streets.

Q. Can you tell the Court how much space you have now at Myers Park that you presently utilize for parking buses? A. We estimate that this is for seven additional buses there.

Q. But you aren't talking about the same type of parking space for these additional buses. A. No, sir. We're talking about a safe way of parking them and not just parking them on the streets.

Q. You can't tell the Court how much parking space you now have at Myers Park that you utilize for parking. A. Only that area I described.

Q. Do you know the square footage? A. No, sir, I don't.

Q. Can you tell the Court why you say you would need

to spend $6,600.00 at South Mecklenburg High School? A. Yes, sir, because the present area we have will not take care of it and you have to expand the present bus parking lot.

Q. Do you have a bus parking lot now? A. Yes, sir.

Q. Do you know how much square footage you have there? A. I can get it off the plans in here. We have it.

Q. May we see it? [102] A. Yes, sir. (The witness leaves the hearing room and returns.) Here is the plot plan of the school and to give you the square footage I will have to measure it off.

Q. Can we make a copy of that, Mr. Morgan? A. Yes, sir. I think I can get a copy of it, I'm sure I can. Would you like it?

Q. Yes, please. We'd like to get a copy. A. This demonstrates, Mr. Chambers, to you how we feel that it's necessary for the safety of children to arrange bus parking areas separate from all other traffic. For the safety of children, to load and unload and service the buses and parking the buses, this demonstrates what we try to do. And I say again we don't have any space like this that we say is safe for children to, for buses to park and it's a desirable way and a safe way and I'm saying that we've got to expand South Mecklenburg. You can see right here that we have an area where this parking lot will have to be expanded to take care of it.

Q. Mr. Morgan, according to the plan directed by the Court, South Mecklenburg will have 2247 students, is that correct? A. That's correct.

Q. And it presently has 2114, is that correct? A. Yes.

Q. According to the affidavit that you filed with the Court only five students live within a mile and a half of South [103] Mecklenburg. This is the affidavit you filed with the

Court showing the students within a mile and a half and students living within two miles. A. That came off of a different exhibit, didn't it?

Q. Yes, sir, that's the exhibit you filed on March 13. A. That's right, I remember it. South Mecklenburg indicates that five children live within . . .

Q. According to your testimony all students living within a mile and a half or beyond a mile and a half of South Mecklenburg are presently provided transportation. A. Transportation is available for them.

Q. Now, would you explain why you're going to need so many more buses at South Mecklenburg when you are already transporting about all the students in there? A. Mr. Chambers, we are not transporting all of those children now. Many of them drive their own cars to school.

Q. Will they stop driving with the new arrangement? A. We do not anticipate them stopping. They haven't exercised it heretofore and we don't have a reason to believe they'll change their pattern.

Q. Do you anticipate you're going to need that many more buses out of the rezoned area? A. Yes.

Q. You do? A. Yes, sir. May I explain why?

[104] Q. Yes, if you don't mind. A. We have found that in areas that the income of the parents is not as great, they exercise the right to ride a bus more than those who live in a more affluent area. And so we estimate from that based on the experience of those who utilize it when it's provided in an area like that that the children assigned to South Mecklenburg from this inner-city area will most certainly utilize transportation. This comes from the principal of the former Second Ward School and . . .

Q. I'm looking at the map, Mr. Morgan, and it seems like the present attendance area is just about the same thing as

what the new zoned area will be. A. The South Mecklenburg area comes, as you can see, and stops off at this point here and you're adding all of this.

Q. You're adding . . . A. All of this to it.

Q. Well, let's specify for the Court. You're adding 342 grid C and D, 343 grid C and D, 369 grids A and B, 368A and a part of B, 367 B and C and D. A. That's right, you're correct. It comes on up here.

Q. A part of D? A. All of D.

Q. Part of D is already included. A. Yes, part of D is already included.

Q. Well, do you know how many buses you presently have at South? [105] A. We'd have to look on the report or I can call the Transportation and ask him how many buses.

Mr. Horack: Mr. Chambers, isn't this the same line of questioning which Mr. Morgan has already answered and explained in the example that involved East Mecklenburg and Independence?

Mr. Chambers: No, it isn't, Mr. Horack. We're talking about Mr. Morgan's estimate of the additional parking space.

Q. Mr. Morgan, I show you a copy of the principals' monthly report for a period December 1, 1969, to January 9, 1970, and ask you if it does not show the buses serving South. A. Well, it shows not only those serving South but other schools around South.

Q. Is it prepared by the principal of South Mecklenburg? A. That's correct but, Mr. Chambers, there's another factor that enters into this. As the buses come in, they may come in and not necessarily terminate at South Mecklenburg and stay there. They may go on to another school

and they'll have to unload the children there and space has to be provided for them to unload.

Q. Mr. Morgan, I thought you testified earlier that the buses that stay at the school are accounted for by the principal of the school and that's why we have the report from South Mecklenburg. [106] A. Yes, that's right, he accounts for the ones that stay there but I'm saying he is not accounting for those that pass through.

Q. If he accounts for those that stay there, he would show those that are there that require parking space. A. Yes, but what he would not show would be the number that he must provide a space for to unload and go on for another trip.

Q. Well, if there is any other bus that passes South Mecklenburg to unload or pick up students, they would be shown in the principal's monthly reports, would they not? A. They would show, that's correct, in the reports. That's right.

Q. And you have given us copies of these monthly reports which we have introduced as exhibits. A. Yes, sir.

Q. Turning to your exhibit about the cost . . .

Mr. Horack: What page is that?

Mr. Chambers: It's not a page. It's the Court Ordered Plan, Charlotte-Mecklenburg Schools, Senior High Schools, showing capital outlay, cost operation, personnel.

Q. Do you have that? A. Yes, sir.

Q. Under capital outlay you've got 69 buses which you estimate you will need. Are these 54-passenger buses you're talking [107] about? A. Yes, sir.

Q. And you estimate a cost of $5,387.64 each. A. Mr. Chambers, this was the contract price this past year. As I

indicated in previous testimony that the bids that have come in to units in the State of South Carolina and Georgia, they have been averaging $400.00 more per bus than this, but I could not testify that will cost us that until the new contracts come in.

Q. Do you know that the State Board of Education has already received bids for the next school year? A. It was my understanding they were going to take bids on the 27th of March. That was the information I had from the Division of Purchase and Contracts in previous correspondence. Have they received them?

Q. Well, I can't . . . A. Excuse me, I thought maybe you knew something I don't know.

Mr. Horack: Let's swear Mr. Chambers.

Q. Under column B you have equipment $1,750.00. Would you explain what that is? A. The equipment needed is a variety of the different types of equipment that was estimated that would be needed to service these buses such as air compressors, small tools, grease guns, and the like of that that we would need this additional equipment for servicing the buses.

[108] Q. You don't already have such equipment? A. We have equipment but it's used to capacity now.

Q. Now, how did you estimate the cost of $1,750.00? A. It was run through at the present cost of each of these items.

Q. Do you have any record of what you did to make that computation? A. I don't have it with me. I'd have to go back and dig out where and how we figured that out.

Q. You estimate you need three additional service trucks. How did you arrive at that? A. To service the number of

buses that will be on the road. We'd have to have the formula we currently use.

Q. What is that formula? A. I believe it is that one service truck will service, I believe it will service 20 to 25 buses. I'm giving you a range here of between 20 and 25.

Q. Is that the state formula? A. That's the formula we found we need here in our system.

Q. For 20 to 25 you need one? A. Yes, sir.

Q. What is the state formula? A. I don't know that the state has a formula. You know, it varies from county to county, the complexity of the situation. You know, we have one of the most complex programs in the [109] system here that we have in the state.

Q. I understand. You have a gasoline delivery truck. What's your formula for determining the gas delivery truck? A. We need one truck for a minimum of 69 and when you reach past that, we say when you get over into the 84 then you've got to have more than one for it.

Q. Well, now, could you tell us your formula, whatever it is? I'm talking about determining the senior high school buses. A. Gasoline trucks.

Q. Gasoline trucks, that's right. A. Mr. Chambers, we have stated that it would take, for senior high schools, one truck to service 69 buses.

Q. So your formula is that you need one truck to service 69 buses. A. Well, we have stated that this one would serve it here. What I was trying to get at was that in trying to work this out to show you senior high school by junior high school by elemnetary school that we said that it may be, when I turned over two gasoline trucks for 84 buses at the junior high schools, then that possibly that that gasoline truck could help pick up some of the load of the senior high schools.

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Q. I would just like to know your formula that you worked with. A. Well, it was based on the number of gasoline trucks that it now takes to serve our present fleet.

Q. How many gasoline trucks do you now have to service? A. I'll have to go back and get that.

[110] Q. Do you have that information available? A. We used it. I'd have to call and get it.

Q. Could you call now and give us the number of gasoline trucks? Also check the service trucks, if you don't mind. A. Is there anything else?

Q. We'd like to know the number of supervisory personnel you have and the number of clerical personnel you have.

(The witness leaves the hearing room at this point and returns.)

Q. Are you ready to give us the formula for determining the service trucks? A. Yes, sir. You had asked the present number we now have. We presently have 12 which we were short on servicing our vehicles. We have two on order, have been on order for some time and we're expecting delivery soon. So that will give us 14. Taking this 14 into the approximately 300 buses we are now operating—this is for all programs, the regular school program, Child Development Centers—that . . .

Q. Let me ask you this, Mr. Morgan. How many buses do you regularly use for the regular academic program, not the special programs? A. I believe I said in the report here that the regular program . . . I submitted to the Court.

Q. Wasn't it 280? A. It was 284. I believe that's right.

[111] Q. OK. A. But on this formula here of service trucks, 14 into the approximately 300 buses would give one

service truck for each 21 buses, and I testified that our formula ran somewhere 1 for 20 to 25 buses. So currently we are using 1 for each 21 buses. We now have five gas trucks that are serving the 300. That's 1 per 60. Now, there is one thing, Mr. Chambers, that I think I alluded to this and I don't know whether I made it clear or not. For the purpose of the Court, to separate senior and junior and elementary, we tried to put down figures here, but we do not operate a system for senior high schools and a system for junior high schools and a system for elementary schools. We tie the whole thing together and to get the clear picture of what we did and how we applied what we are presently doing against that, we'll need to take all of them for the entire system because we are a centralized operation. I'll do it any way you want to but it would be better for us, I think, to get the overall picture.

Q. How many gasoline trucks do you presently have? A. Five.

Q. How many supervisory personnel do you presently have? A. We have three and we're badly understaffed.

Q. You have three? A. Yes.

Q. How many clerical personnel do you presently have? [112] A. We have four and we are understaffed again.

Q. And the three supervisory personnel are taking care of the 300 buses, or the 284 buses, and your four clerical personnel are taking care of your 284 or 300 buses. A. Yes, sir.

Q. Now, in your cost of operation how did you determine the average daily driver salary? A. This I requested Dr. Cameron, who is the Controller for the system, to figure this out for me, the actual salaries taken, and to give us an average salary of our present operation.

Q. Well, what factors did he consider in arriving at this average daily salary? A. The average daily salary was taken by taking the total salaries paid to all drivers and getting an average for the present fleet of drivers.

Q. Do you pay drivers by the hour? A. Yes, sir.

Q. Well, let's see now, you have buses that you recommended for the additional transportation required who would be making one trip, is that correct? A. Yes, sir.

Q. And the buses now operating are making two and in some instances three trips? A. Yes, sir.

Q. Well, how did you use your present system to determine the [113] salary for the additional bus transportation? A. By taking the average hourly salary times the estimated number of hours that we said it would take for the fleet to get them there.

Q. Was this estimated number of hours that it would take the fleet to get there your one and a quarter hours and two and a half hours a day? A. Yes, sir.

Q. And you estimated one driver for each bus you told the Court you thought you would need? A. Yes.

Q. Now, how did you arrive at your figure for gasoline and oil and grease, and so forth? A. That came from our current records of operation, taken directly from that, and applied on a mileage basis to this.

Q. Is that 15 mile average one way? A. Yes.

Q. How did you determine your mechanics' salaries? A. We based that on the present salary schedule of the mechanics.

Q. How many mechanics did you estimate you would have? A. Well, again we went back to the number of mechanics that we have presently to operate our fleet on and applied that same formula just as we did to the gasoline trucks and supervisors and so forth, and we also

did this; we scattered them out according to the number of apprentice mechanics, the number [114] of mechanics 2 and mechanics 1 we would need. We didn't put all top mechanics in here. We put them on the same basis as we have now.

Q. You don't know how many mechanics you now have? A. I'd have to dig it out from the records.

Q. How did you estimate your repair parts? A. Based on our current figures on parts that it takes. We did not allow for any increase in parts. We are experiencing anywhere from 3 to 6, 7% increase in the cost of parts and tires, and so forth. We did not allow that in there. There are a number of factors, Mr. Chambers, and I feel like my figures are really conservative and will be low because we did not allow for the increase in the cost of these items.

Q. Well, did you allow for the fact that these additional buses are not going to be traveling like the buses you now have in service? A. Yes, we made the allowance for it.

Q. For just making one trip? A. Yes, sir. We based it on a mileage basis.

Q. Who made these computations for you? A. I had several people working with me.

Q. Would you just explain for the record how you allowed for all of these factors in your determination that repairs would run $16.56 per day? A. This was based on what our current records show that it is [115] costing us to operate our present fleet.

Q. What adjustments did you make to allow for the factors we have been discussing?

Mr. Horack: Would you mind repeating the factors, Mr. Chambers?

Mr. Chambers: The ones we just discussed, Mr. Horack. Mr. Morgan said he made allowances for all these factors.

A. I didn't make allowances for the rising cost factors.

Q. You made allowances for the fact that the additional buses would be making one trip. A. I said we took it on the mileage basis.

Q. What did you do, determine the cost you average now to run the buses you now have and use that as a daily average? A. Mr. Chambers, look down at tires and tubes. We did not make any allowance for tires and tubes the first year because we said if we get all new buses it will not be necessary to put tires and tubes on them the first year but it is going to be necessary for a certain amount of repairs even though it's a new bus. We experience breakdowns and mechanical failures.

Q. Mr. Morgan, I'm only trying to find out how you determine your average daily repairs. A. Based on our current operation.

Q. Average daily cost for repairs today? A. Yes, sir.

[116] Q. And that is the only factor you considered? A. Yes, sir.

Q. I think you testified that you presently have three supervisors. How did you estimate you would need one supervisor for the high school and three for the junior high schools and five for the elementary schools? A. We based it upon the work load of the present supervisory staff that we now have.

Q. You now have three supervisory personnel servicing the 300 buses? A. We now have three supervisors servicing the 300 buses.

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Q. And you would estimate you would need nine to service the 492 buses? A. Yes, sir. I have requested in my budget each year for an increase in supervisory personnel, that we do not have enough for them; I have requested each year that we need more men, that our buses were badly lacking in mechanical repairs, our fleet is going down for the lack of personnel and if we're going to add this many more to it, our fleet is going to soon get in such a state of repair that I would not want to be responsible for the operation of these buses unless we get adequate people that it will take to do it. We're treading on dangerous ground.

Q. The Board of Education felt that you didn't quite need that many people. [117] A. I don't know. The money wasn't available.

Q. And the Board of County Commissioners didn't appropriate funds for it. A. We didn't get the funds to operate on.

Q. How did you determine you would need five additional clerical personnel? A. Well, we now have four for 300 buses and we came up with five for the additional 400.

Q. What would these clerical personnel do? A. They keep all records of bus reports, of cost, salaries, and all of the regular routine work that goes into running the Transportation Department.

Q. They keep records? A. They keep records, yes, sir.

Q. I notice in your elementary schools you say you need a bus dispatcher and an assistant bus dispatcher. What is a bus dispatcher? A. A bus dispatcher is a person that we must have in order to use these buses as they are being used for more and more activities and to keep up with the fleet of buses that will be operating, in making sure that a bus is sent out if there is a breakdown in a bus and it

requires a substitute bus somewhere, to get it, or doubling a load or whatever we have to do to get the buses to school. We must have some of these people in order to look after the buses, and to make sure [118] we've got them in the right place, and so on and so forth.

Q. How many bus dispatchers do you have now? A. We don't have any. We're utilizing our three people about 14, 15 hours a day to do this.

Q. You don't have any assistant bus dispatchers then. A. No. I finally got another person added to the staff this year who we refer to as a technical person, really in a coordinating position to handle just nothing . . . we use him for many more things. He was employed to handle the field trips, the special programs that are in effect, the concerts, and so on and so forth, and we are finding his duty eaten up with other things now rather than doing that which we employed him to do.

Q. Like what other things? A. Investigating accidents, check routes, working with drivers to keep enough drivers on hand, training drivers, and things of this type.

Q. Well, who takes care of arranging for the transportation of pupils when buses break down now? A. That's done by the person that is available in the office.

Q. Now, you talk about mechanical supervisors for the elementary schools. How many mechanical supervisors do you have now? A. We have one.

Q. And you estimate you need two? A. Yes, sir.

[119] For the elementary schools? A. Well, again, we pulled it out, Mr. Chambers. I'd have to tie the whole fleet of buses to it. Just for the purposes here we simply put it under elementary and this was just for a system of showing. That's where the largest number of buses are.

They'd also have to help supervise some of the existing of the ones for junior and senior high schools.

Q. Well, what does the mechanical supervisor do? A. He occupies the same position as when you go into a garage to have your car repaired and you meet the man on the line to tell him what is the trouble and he's the expert who can analyze and take down what is wrong and then direct mechanics to repair that. If they don't know what's wrong, they call upon that person to come help them.

Q. Where is your present mechanical supervisor located? A. In the bus garage.

Q. How many bus garages do you have? A. One.

Q. Do you anticipate building another one? A. We are needing very badly now to add to our existing plant and we had put money in this past bond issue for the expansion of this facility but we didn't get enough money to do it. We have had to delay it. We have three men, these three supervisors I'm talking about, occupying three desks in a space that's about 12 by 12.

[120] Q. We're talking about mechanical supervisors? A. Well, I was just illustrating to you our need for space and we'd have to also add space to our present plant.

Q. Well, at present you don't have any funds or any plans for building any addition to the garage or building another garage. A. One of two things. We can't continue servicing where we are. We have got to either expand in a satellite operation or in the present facility. Or, Mr. Chambers, I'll say this, if we don't, all I can say is that I'm deeply concerned and I have expressed this before to the school officials, that I'm deeply concerned about continuing our present operation as crowded as we are.

Q. I see. Would your answer be yes or no to the question? A. That we do not have money to do it with, no, sir.

Q. You don't have present plans to do it. A. We have plans prepared.

Q. But you haven't any authorization from the Board to do it. A. No, sir.

Mr. Horack: May I make an inquiry? Are we talking about plans with reference to your existing fleet?

Mr. Chambers: Yes.

Mr. Horack: You're talking about the needs of the existing fleet.

[121] A. Yes, sir.

Q. What about your personnel manager, how many personnel managers do you have now? A. None. Just our Director is having to look after all of this.

Q. You don't have any personnel manager now? A. No, sir.

Q. What about the driver training supervisor, how many do you have now? A. Well, the driver training supervisor. This is furnished by the Department of Motor Vehicles.

Q. You have indicated here you have to pay for it. A. I'm saying we need, in addition to what the State furnishes, we've got to have one of our own.

Q. How do you know the State won't furnish this one? A. Personnel Manager?

Q. Driver training supervisor. A. Well, in addition to . . . excuse me, I'm off the track there. We need, in addition to what the State furnishes, we need another person who can work with nothing but training drivers, recruiting drivers.

Q. Mr. Morgan, you reported to the Court that you estimate you'd have to have 400 and some buses. Now, we have

gone over several instances of additional personnel that you told the Court you would need and some of them you say you don't even have such persons now. We're trying to find out what basis [122] you have for telling the Court why you're going to need a driver training supervisor. You told us that the State already furnished that person.

Mr. Horack: He explained that.

A. Well, let me see if I can make it clear. At the present time the Department of Motor Vehicles furnishes driver trainers but they don't do the complete job.

Q. As you would like to see it done. A. As it's got to be done to see that these youngsters are properly trained and trained on specific pieces of equipment. It may be that they will take their training on one type of equipment and they may be assigned to a different kind of bus and we need a person on our staff who can fill in and substitute for them just as we're doing now. We're doubling up with the three people we have now.

Q. Have you approached the State about providing another one? A. We asked them and they assigned us ¾ of one. This is still not adequate.

Q. You're saying that because of the additional buses you have to have this person or without these buses you have to have him? A. And we're going into. . . .

Q. Would you answer that? A. I'm saying because of the additional buses we'll have to have them.

[123] Q. Because of the additional buses you have to have the driver training supervisor? A. Yes. We're going into something beyond the State operation.

Q. Well, we're going to come to that. Have you approached the State about providing this person if you have to put the buses into operation, this driver training super-

visor? A. That is one of the things on that list of activities I gave you that I was to do and I haven't had a chance to.

Q. I see. So this is an item that might be paid for by the State? A. The State, Mr. Chambers, as you know, furnished the minimum to any system and the minimum is not enough to insure the safe operation of buses in this school system.

Q. Are you saying that's true even today without the additional buses? A. Yes, I'm saying it's true today.

Q. Now, what is this bus route specialist? A. All right. This is a person that we need to check bus routes for safety, that the buses are running in the safest manner possible, that the stops are safe, adjusting routes when it becomes necessary, rerouting buses, and working with the principals of the schools to make sure that the bus routes and the buses are routed in the most efficient manner to give the greatest service to the children, working altogether with routes. Presently we've got men doubling up on it and not [124] half-way doing the job. It's not being checked out.

Q. Are you saying you don't have one now? A. We are utilizing people presently to do that that do not have the time to do it.

Q. You don't have a bus route specialist today? A. We've got really, I think, three of them. They are the three supervisory personnel that's doing all these other jobs.

Q. And these additional nine that you're adding couldn't do that? A. No, sir, I don't think so.

Q. So you don't have a person today with the title of bus route specialist? A. No, sir.

Q. Now, all of these duties you were just describing you said that the bus dispatcher would be doing basically. A.

The bus dispatcher, I said, would be sending buses where you have a bus broken down. He wouldn't be checking routes.

Q. I see. Mr. Morgan, have you checked the new attendance zones to determine which one of these zones would qualify for state support in terms of providing transportation? A. No, sir.

Q. And all this money you indicate down here, the zones that would qualify for State assistance, you would receive the same kind of State support you have been receiving in the past. A. Mr. Chambers, it was not in my directions to estimate where [125] the money would come from or who would bear any portion of the expense. I was simply directed to get the overall picture and not take into consideration where the money would come from.

Q. Mr. Morgan, you have filed an affidavit and have testified this cost would be money that would be paid for by the local Board of Education. Now, have you considered, again, what portion of these funds that you estimate you would need would be paid for by the State? A. May we go off the record?

Mr. Chambers: Yes.

(Off the record at this point by consent.)

Mr. Chambers: Read the last question.

(The Court Reporter reads the question on Line 5 above.)

A. My answer is no.

Q. Just as an example, Mr. Morgan, the State provides transportation for students who live outside the 1957 city limits who attend schools outside those limits or who live

in the city and are assigned to schools outside those limits, is that correct? A. Under the present law the State furnishes the operational money for the transportation of all children who are eligible for transportation outside the '57 city limits and for those children that are assigned inside the '57 city limits to schools outside the '57 city limits. Was that your question?

[126] Q. Yes. Just as an example, Tryon Hills is inside the city limits of '57. A. Yes.

Q. And Hickory Grove is outside the city limits. A. That's correct.

Q. Students being transported from Hickory Grove to Tryon Hills would receive State assistance. A. I don't know what the present law . . . that letter we got from Dr. Phillips and Davis and all that, I don't know.

Q. Excluding what you understand to be the anti-busing law, under the present State law would the students who are assigned from Tryon Hills to Hickory Grove be provided State transportation? A. I don't know what the present State law is.

Q. Didn't you just describe, Mr. Morgan, that the students who are living inside the '57 city limits and are assigned to school outside those limits are provided State transportation? A. Yes, but, Mr. Chambers, you asked me under the present law. Until that present law is cleared up, I. . . .

Q. We also said exclude what you understand to be the anti-busing bill. A. If they applied the present law to this situation, yes.

Q. Would the students under the formula you have given us a moment ago and excluding any consideration of the State [127] anti-busing bill, who reside in Tryon Hills

and assigned to Hickory Grove be provided State transportation? A. Yes.

Q. Would the students in Hickory Grove assigned to Tryon Hills be provided State transportation? A. Yes.

Q. Would the students in Devonshire and Briarwood who are assigned to Double Oaks be provided State transportation? A. For those children who are eligible for it, yes. I don't know the lines up in here, Mr. Chambers.

Q. Were eligible under this formula you mentioned a moment ago, is that what you're saying? All right, you want to talk about Lincoln Heights and Merry Oaks and Idlewild and Albemarle Road? A. Yes, right. Now, under the present law, excluding what you described . . .

Q. You're talking about excluding the anti-busing bill? A. Yes. The children assigned from Lincoln Heights to Albemarle Road and to Idlewild would be eligible for transportation.

Q. Under State support? A. Under State support, yes. Those assigned to Merry Oaks would not be.

Q. Except those students residing outside the '57 city limits who are in the present Lincoln Heights zone. A. Right. And the children assigned from Albemarle Road and [128] Idlewild would be eligible for State transportation. Those children in Merry Oaks that live outside the '57 city limits and assigned to Lincoln Heights would be eligible, but those inside would not be.

Q. Mr. Morgan, have you determined the number of students, the average number of students who are eligible for bus transportation but who do not utilize buses for getting to and from school? A. Mr. Chambers, under the original exhibits that I submitted to the Court I was requested to figure up State transportation, Finger plan; State transportation, Board plan; and the same thing with-

out transportation, but we were figuring that and the game has changed so much with me to get up one set of figures to present and then come back to another one, I'd have to go back and dig all those out to see who would be eligible. We did figure it up one time, those we estimated would be eligible by State, but how that would apply to what I have done here, rezoning, I'd have to go back and figure that all up again.

Q. The only thing I'm asking you is under your present operation what percentage of the students who are eligible for transportation take advantage of it. A. I do not know.

Q. Do you have any approximate figure? A. I do know this, that there are large numbers of children [129] that are eligible for transportation that if they did exercise their right to ride the bus, there would be a considerable increase in the numbers riding. For example, you mentioned East Mecklenburg. East Mecklenburg has approximately 2100 children. I believe our reports show that only about 600 of them ride the bus. So there are 25, I believe we stated, that are in the area eligible—maybe I'm getting tangled with South Mecklenburg here—but, anyway, approximately 25 eligible in the present area . . . not eligible for transportation, excuse me. And of the balance, if we use 2100 and take 25 from that and that leaves you 2075, only approximately 600 of those children are not exercising that right. I use that as an example to show you if all the children did exercise the privilege of riding that there would be a considerable increase in our present transportaton under the State law. We find that this will vary from area to area. The percentage riding at South Mecklenburg will be greater than the ones riding from East Mecklenburg, and we can come on to West Mecklenburg and all the schools and you would find this to be true. This is where

I came at it a minute ago, saying that the children in rural areas and other economically deprived areas of our present system, that more of those children ride than do youngsters in the more affluent areas.

Q. Do you have an average? A. No, sir, I don't.

[130] Q. Well, if we took the number of students from these lists that you have supplied to determine those eligible and used your monthly reports to get the average number of students who are transported, we can determine the average number of students in the system who are eligible for transportation but who provide other means for getting to and from school. A. Yes, sir, we'd have to do that with the principals school by school in order to get that.

Q. The monthly reports would show that, wouldn't they? A. No.

Q. They don't show the number of students transported each month? A. They show the number of children but they don't show the number eligible.

Q. I know, but we can take your list of the pupils in the school who are residing within a mile and a half radius of the school and subtract that from the total number assigned to determine the total number eligible, could we not? A. Yes. On the original 23,384 we took off of the senior high schools where we fairly well knew the senior high schools, which was the easiest for us to do, and applied a percentage to get that 23,384. Otherwise that number would have been much larger than the figure I showed. We did apply that to the senior high schools because these are youngsters who drive to school.

Q. You didn't apply it to these later figures that you submitted [131] to the Court. A. The rezoned figures, no, because it was an entirely different picture then because you begin to get into areas where youngsters do not have the means of furnishing their own transportation.

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Q. Mr. Morgan, isn't East Mecklenburg and South Mecklenburg still there and don't you still have these same exceptions in the East Mecklenburg and the South Mecklenburg rezoned attendance areas? A. The areas that are presently in East Mecklenburg you're saying? Mr. Chambers, look here. What I'm saying is you'll find these children down in this area here. . . .

Q. You're going to the southern part? A. The southern part of East Mecklenburg's area. You'll find a very high percentage of these youngsters riding the bus to school, whereas when you get in closer to East Mecklenburg you will find youngsters driving to school or parents are dropping them off at school on their way to work. That's the only way I know to explain it.

Q. Well, the point is you did not apply the formula that you indicated you used in your earlier reports which considered students eligible but who did not ride the bus in the figures that you submitted to the Court of the number of students who would be entitled to bus transportation under the Court ordered plan. [132] A. The 23,384 would be a much higher figure because from senior high schools only we tried to make sure we were trying to use the same thing and not inflate the figures. We used those percentages —and I'll say this—for only those children in the areas I described to you. When we begin to move out into areas where we knew they used transportation, we applied maybe 95% of them would ride.

Q. Did you apply any sort of formula like that to the figures you submitted to the Court on March 17? A. We used the same basis for figuring those that we did originally.

Q. You applied the percentage formula? A. Yes, sir.

Q. For East Mecklenburg? A. Yes, sir.

Q. I thought when we went through East Mecklenburg the other day to determine that you'd have about 469 who

live in the rezoned area, 4 who were now transported and 465 who would be eligible. A. That's what I was trying to explain to you here. In this rezoned area of East Mecklenburg we took these children in this area originally in the 23,384 and we applied about a 95%. See this area right here. In these grids up here we said that approximately 95% of those children would use transportation in the 23,384. In this 19,000 figure here that [133] we used, we used the same, we went on the same basis.

Q. You applied 95% or 100%? A. 95%.

Q. Would you show me on the affidavit you submitted on March 17 where you applied only 95% A. Well. . . .

Mr. Horack: Mr. Chambers, he didn't say that he had said that in his affidavit, I don't believe.

Mr. Chambers: Well, that's all I've been asking him about.

Mr. Horack: He's explained to you, as I understand, how he arrived at the figures submitted, and it was on a school by school experience basis.

Q. Let me ask this question. Mr. Morgan, in the affidavit you submitted to the Court did you list as additional students to transport 100% of the students eligible in all of the areas? A. In the rezoned areas?

Q. Yes, sir.

Mr. Horack: He said 95%.

A. I said we applied the same principles to those that we did utilizing the entire area. Down here we may have said only 35% would use it down in here.

Q. Let's take East Mecklenburg and let's apply your formula. We didn't go through counting the grids but let's

count the [134] grids in East Mecklenburg and use your printout chart and see how you applied 95%.

Mr. Horack: I object to this line of questioning, Mr. Chambers. Mr. Morgan assuredly is not a statistician and it's already been represented that he worked together with a staff of 11, 12 or more people with computers that worked out this data and I don't think it's fair to put him in the middle of all this detailed data when admittedly he is not a statistician and require him to come up with a specific figure. Therefore, I object to this approach and really should have interposed that same objection on some of the same matters and techniques when we were convened yesterday.

Mr. Chambers: Mr. Horack, Mr. Morgan testified that they had determined the number of eligible pupils in the rezoned area, those additional ones that would be added to the area and had applied a formula of 95% of these pupils in the inner-city who would take advantage of it and would elect to be transported rather than provide their own means of transportation. He has also testified that in the area nearer to East Mecklenburg that most of those students, although eligible, [135] provide their own means of transportation and that they had applied a formula for those students, too. The only thing we asked Mr. Morgan is to show us how he applied that formula.

A. The thing, Mr. Chambers, that I'm having difficulty with here is determining those grids that a part of them are in the area and I testified that the printout that they

have on house by house, or student by student in the grids that the school he attends is coded there.

Q. Mr. Morgan, for the 95% formula you indicated you were concerned with the inner-city children in the northern part of the East Mecklenburg school district. This, I thought, would be concerned with the students from grid 377A north. A. It would also be concerned, Mr. Chambers, in inner-city, of the children here.

Q. You're talking about grid 458A? A. That portion of it.

Q. But you just testified that students in this area generally provide their own means of transportation to school. A. Well, I didn't testify that particular area. I said in the area as a whole. You'll have to know the particular areas and know where that is in order to know whether they do or not.

Q. Do you know that area? A. Yes, sir, it's just off of Sharon Amity.

[136] Q. Isn't that the section where students generally provide their own transportation? A. Off of McAlway and those streets in there, not altogether, no, sir.

Q. You testified a moment ago that you had about 2000 students under the old zone at East Mecklenburg who were eligible for transportation and you transport only 600. A. I believe the records will show that.

Q. And you said that because you were adding the northern section of that attendance zone that you thought that about 95% of the students would elect to be transported by public transportation. A. I said of the rezoned area to East Mecklenburg. There are other areas in there other than these areas that have been rezoned.

Q. I understand that but you testified that in the area immediately northwest of East Mecklenburg that those

students generally provide their own transportation. A. I didn't say all of them would.

Q. I understand. We have a figure of one-third of the students in the old attendance zone who have elected to be transported by public transportation; two-thirds provide their own means of transportation. A. I'll have to go back. I came up here with a total of 577 and I have here, lived in rezoned area 469; 4 are now being [137] transported; 465 that are being rezoned. As I counted the area, I didn't count all the blocks that you mentioned, Mr. Chambers, because part of that is already in the East Mecklenburg area. See, I didn't count 377. Here is the East Mecklenburg area at the present time so I didn't count that. You said 377, I didn't count that.

Q. Are 345C, A, and 320 C and A, are these presently in the zone? A. Yes, sir . . . . no, no. And 319B and D.

Q. Mr. Morgan, just looking at the map, you say that 600 students are electing to be transported in the old zone and you say that most of these students are coming from the southeastern part of the zone. A. No, no, I didn't say that. I said that a larger number of children in this southeast, south of the school will utilize transportation more than they will in the area immediately around East Mecklenburg and I did not include areas on farther out because we have found they use transportation more than those that live immediately around the school where the parents drive by the school or take them.

Q. Let me ask you this, Mr. Morgan. Apparently presently only one-third of the students in East Mecklenburg who are eligible for transportation elect to ride public buses, 600 of 2000.

Mr. Horack: You mean school buses.

Q. School buses, yes. Is that correct? [138] A. Yes.

Q. In your report that you submitted to the Court on March 17 you said that 469 students lived in the rezoned area, additional students. A. Yes.

Q. Is that correct? A. Yes.

Q. 469 new students were added to the rezoned area, is that correct? A. Yes.

Q. What percentage of those students did you determine under the formula that we have talked about under the present system would elect to provide their own means of transportation? A. All right. 100% because 465 and 4 makes 469.

Q. So you say you are not applying any percentage formula to the affidavit you submitted on March 17. That's all I asked you before. A. I see what you mean now. No, I took the number of children.

Q. You used the percentage of 100%? A. Right.

Mr. Chambers: I have no further questions.

By Mr. Horack:

Q. Mr. Morgan, it's a fact, is it not, that in assembling all this data in these two recent submissions in response to the Court's request as contained in the order that I believe was [139] dated March 6 you did have a group of people working with you to ferret out all this information and to check and cross check it, did you not? A. I had a total, I believe, of eleven people who worked with me in compiling all of the data. Some of those worked on the maps for the Court. Others worked with me on the counting of the rezoned children and the other data that was required.

Q. In your affidavit you gave an estimate of the total

amount of man hours that were employed. I ask you what that figure was and if that represents all of the time that ultimately was used on this project. A. At the time I gave you that, Mr. Horack, there were other hours put in after that were not included in the hours I gave you. I believe I gave you some approximately 600 man hours and I believe that some of us worked some additional time which brought it to about 675, as I recall, total hours, of the people who worked with me plus the secretaries who we used on various occasions to help us, doing the typing and working the reports out.

Q. Would it be fair to describe this as being a very laborious process?

Mr. Chambers: I object to that.

Mr. Horack: Well, strike it.

Q. Mr. Morgan, refer to the cover page of item 2. I direct your attention to the column entitled now transported which shows [140] a grand total of 9,016. Would you please tell us whether you anticipate the children represented by that total figure, that they will travel a greater or lesser distance than they are now traveling? A. I have stated here that a substantial number of them will travel a greater distance.

Q. Would you explain why? A. Well, using the high school map. . . .

Q. I direct your attention to the West Charlotte area under the Court plan. If you think that would be truly representative, please comment on that or if you don't think it will, pick out another one. Pick out whichever one you think best illustrates whatever you have to say. A. The children here presently being transported to

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Independence and the children in the area that have been rezoned from Garinger to West Charlotte will travel a greater distance to school than they would have to .... they'll travel a greater distance farther to West Charlotte than they would to Garinger or Independence. You can see by the map the distance to these two schools and so you see they are traveling .... I don't know how much distance—it would have to be calculated—but it's a considerable distance to West Charlotte.

Mr. Chambers: I object to the word considerable.

Q. What effect, if any, would these greater distances have on costs of bus operations and time of students traveling? [141] A. Well, it's additional mileage which, of course, is going to take more money for operation.

Q. I direct your attention to the map that was colored up and submitted to the Court, map #1, attendance areas for elementary schools.

Mr. Chambers: Showing the paired schools?

Q. That's right, showing the paired schools, and when we began our deposition yesterday we were measuring as the crow flies with a ruler the various distances between the respective paired schools. Comment, if you will, what effect of the distance the bus must travel and the distance the children must be transported with reference to the areas that lie beyond the school, using Olde Providence as an example. A. The children in Olde Providence that are paired with the youngsters in First Ward, the fifth and sixth grade youngsters traveling to First Ward, of course, will travel a much greater distance but, by the same token, the children in grades 1 through 4 paired with the young-

sters in Olde Providence will, by the same token, have to be transported much farther.

Q. What I'm asking you to comment on, using Olde Providence Elementary as paired up with First Ward as an example, how will it effect the distance traveled for those 4th and 5th graders who will be cross-bused to First Ward who live in the various southern portions of what is shown in brown as the [142] Olde Providence area on this map. A. Well, Mr. Horack, it's the 5th and 6th grade youngsters.

Q. Excuse me, 5th and 6th grade youngsters. A. A 5th or 6th grade youngsters that is on Highway 51 that's picked up by bus there and travel to Ray Road. . . .

Q. Are you pointing to the more southernly margin? A. I'm pointing to the most extreme margin, yes, sir. That are picked up on 51 and travel to Olde Providence must then travel on the nearest route to get to First Ward.

Q. So that extra distance would be in addition to whatever the measured distance is between the two schools, two paired schools involved, is that correct? A. Yes.

(Off the record at this point by consent.)

Q. There were certain inner-city children—is that beginning with the 1969-70 school year? A. Yes, sir.

Q. Who were transported from the certain inner-city schools out to certain outlying schools located predominantly in the white suburban area. Would you please tell us what your conclusions are from having made that study of the number of buses and the distances now being traveled by those buses? First of all identify the inner-city schools previously attended by those children and the schools in the predominantly white areas to which they are

now being transported. [143] A. This information came from the fourth month bus report for those youngsters who were assigned by the Board which was approved by the Court for closing and assigned to outlying schools. There were a total of 30 buses that traveled for that month 1,051 3/10 miles. I divided the 30 buses into that to get the average daily mileage per bus.

Q. And what was the daily average per bus? A. 35 miles daily.

Q. Is that round trip? A. Yes, sir.

Q. So half of that would be a one-way trip and it would 17½ miles one way, is that correct? A. Yes, sir.

Q. I ask you to identify the inner-city schools previously attended by these children and also the schools to which they are now being transported.

(Off the record at this time by consent.)

Q. I believe I have a list and I would read them off to you, Mr. Morgan, and you will simply tell me whether I'm correct or not.

Mr. Chambers: If it was showing the time. . . .

A. I can give the schools from memory and then I'll stand to check myself.

Q. First of all the inner-city schools. A. The schools were Fairview, Bethune, Zeb Vance, Isabella [144] Wyche, Alexander Street, Ervin Avenue and Metropolitan Senior High School.

Q. To what outlying schools are these children now being transported? A. They were assigned to Olde Providence, Beverly Woods, Sharon, Selwyn, Park Road, Idlewild.

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Q. By referring to one or more of the maps already in evidence, using the same ruler technique employed earlier in this deposition yesterday, you could measure by a rule as the crow flies the distance between these inner-city schools and the outlying schools to which the children are now being transported, could you not? A. Yes.

Q. Would such a crow fly rule measurement be indicative of the actual distance traveled by one or more these 30 buses to which you referred? A. In some schools yes, in some schools no.

Q. Why not in some schools? A. Well, because the children do not travel from school to school. They travel from their home to the school.

Q. Do they travel as the crow flies, as the straight line rule would measure? A. No, but they have to travel the nearest and safest route for them to follow.

Q. Is that or is that not normally a longer distance than the [145] crow flies? A. Yes.

Q. You testified that in computing your figures to ascertain the number of additional buses which will be required, namely, a total of 422, you have based this on what we refer to as a 54-capacity bus, is that correct? A. Yes, sir.

Q. What, if anything, do you have to say with reference to the use of 54-passenger or larger capacity buses in the in-town areas, inner-city areas? A. Well, . . .

Q. As far as the suitability of large buses or small buses or whatever. A. We will find many instances of where it would probably be necessary to use smaller buses. I indicated yesterday that there would be 36-, 48-passenger buses and there would also be occasions when we would be able to use the larger capacity bus, the 67-capacity bus, but our estimates are that it will average out to a

54. It could be that when we get deeply involved with inner-city transportation that we will find it necessary for maneuverability in the inner-city to use a smaller bus. We are experiencing this now, where we could use to advantage smaller buses although we have 54 capacities now running in these 30 buses we are presently using. So until the routes are established and the determination of [146] where the children live and how will be the safest and best way to serve these youngsters, we will not know exactly what capacity buses are needed on each route, but I'm fairly confident it will average out to a 54-passenger bus. And if I might interject something else here, Mr. Horack, I have never said that what we're doing in our present transportation system is the safest and best way of transporting children. If we had the money and could afford the additional buses, I would seat every child that rides a bus and we would put a seat belt on that bus.

Q. You mean on the child. A. A seat belt on the bus so the child could buckle himself in because I think it's not only in the inner-city area but all over that I feel this is a much needed safety piece of equipment needed on our buses.

Q. How would you relate what you have just said to the desirability or undersirability of allowing children to stand on buses? A. I don't consider it the safest and best way for children to ride and I have so indicated that I have never felt that and although we try with our present system to have children seated, we try to only have those standing that have to stand the shortest distances.

Q. Who would be those who would stand the shortest distance? A bus at the beginning of the pickup route of the bus, I [147] presume the bus is empty when it starts and it fills up as it goes along, is that correct?

A. Yes. An example of an undesirable situation where we need to do something about it was the example Mr. Chambers pointed out this morning of the number of children riding those two loads to Randolph Junior High School where we have 68 children on a bus. This is not desirable, but. . . .

Q. Why do you permit it? A. Well, Randolph is a fairly compact area and the children that get on last have the shortest distance to ride and we do not have buses to solve all those problems.

Q. Why don't you get the buses? A. Well, it's a matter of funds.

Q. Along this same line, would you care to comment, please, with reference to the standup problem, if it is a problem, comparing junior and senior children standing up on the one hand and elementary children on the other from a safety standpoint.

Q. Well, from the safety standpoint I consider it more dangerous, of course, for elementary children to stand than I do either junior or senior high school.

Q. Why? A. Well, they are smaller youngsters; there are discipline problems on the bus, they are pushing and shoving and horseplay that should not go on. However, it does go on and the [148] youngster is not as conscious of safety as the older child is.

Q. What you're saying is that you have a great number of situations as far as over-capacity, having too many children on a bus, under the existing setup? A. In many cases we do and we work throughout the entire year to adjust routes and adjust loads to make it safer for the children.

Q. Would what you have just described account for the differences in the load figures as they appear from

month to month in the principals' monthly bus reports? A. Yes, sir.

Q. Would you care to give us your views on the wisdom or lack of it of having children stand on long interrupted, perhaps even express bus routes from the outer area schools into the paired schools?

Mr. Chambers: I object to that question. I don't know of any discussion that we had on direct examination dealing with students standing and I understand that Mr. Morgan has estimated that the 54-passenger bus would be able to seat all the students that he said were needed to transport. He used 40 students for the senior high schools and he said he used a range of 54 for the junior high school grades.

[149] Mr. Horack: Well, we'll let him answer the question and then . . .

Mr. Chambers: I can't stop you from asking the question. I just wanted to note my objection in the record so we wouldn't have anyone misled.

Mr. Horack: Would you read the question back, please?

(The Court Reporter reads the question on Line 13, Page 148.)

A. I don't think it's wise. I don't think it's wise on relatively short runs to have them stand.

Q. Are there any special factors in the inner-city that might lead you particularly to this conclusion? A. Well, the nature of the city traffic, the congestion in the inner-city, the number of vehicles that are encountered in an inner-city area where the traveling public is coming back

and forth. There is a concern on my part as to that and it is for that reason that I said we have some presently operating that I do not consider safe and our reports will show that you will find in these buses that are now operating in the inner-city, those 30 buses I mentioned, that where we had one bus serving Park Road and Selwyn, as soon as we could readjust loads and use another bus we put another bus on there to reduce the load to that particular school. It was such a problem that the principals reported to me at both schools that they had a problem with children standing and [150] it was the only safe thing to do to split these loads up and we finally were able to shift around and use another bus to relieve this load. So it's not just these that we're talking about for the future, it's those we now presently have that I am concerned about as well and we're making every effort to reduce the numbers on those so that as few as possible, if any, will have to stand.

Q. Turning to another subject, I want to be sure I'm clear on this point. Reference was made to the principals' monthly reports that in some instances show a third trip that carries one or maybe sometimes it's two or three passengers. Did I understand you correctly to say that those undoubtedly were instances where the passenger was a driver being transported to the school? Explain that. A. Our report shows third trips.

Q. By our report you're talking about the principals' monthly reports? A. I'm speaking of the principals' monthly report. There has to be an accounting to show the mileage driven and how many students transported, and so forth, and by necessity it has to show it somewhere for the record. So we record it as another trip but actually . . .

Q. Is that required for the State reports? A. It is required for the State reports. But if we are going to secure

drivers, they cannot drive to a school and stop [151] and not have any way to get to school. So we let a bus go from that point on to the senior high school to where they are assigned and it just simply shows up as a third trip. If you look at the mileage, you can see it's a relatively short mileage. It's 2 miles or 3 miles or 2½ miles from the elementary or junior high school to the senior high school.

Q. Now, heretofore in various submissions to the Court your affidavits have referred to the number of trips traveled by a bus or the average number of trips traveled by a bus. Did you count as a trip the type of trip you have been referring to here included in the State reports to the State when they are only carrying the driver? Was that included as a trip in your previous computations? A. I don't know, sir. Mr. Horack, I might add this to it, that you will see on some principals' reports showing a third trip on them, showing three trips. Now, it can very easily be that one bus is serving two schools and it will drive to one school and deposit youngsters and then will go on to the other school and deposit the balance of them and then it will make a third trip on to another school. But all of these are schools that are very close together where it's permissible to do this. In the accounting of it the principal should have shown that as one trip but it shows up in some instances as two trips.

Q. Referring to the cost figures set forth as item 2 in the [152] information recently submitted to the court, I direct your attention to the drivers' salaries listed under a caption cost operation, using the senior high pages as an example. Did I understand you to state that those computations were based upon one driver per each additional bus? A. Yes.

Q. Do they include any supplemental or substitute drivers? A. Their salaries are computed on an hourly basis.

Q. I know, but this represents the estimate of the cost involved in providing drivers' salaries and I understood you to say that those salaries are based upon one driver per bus, is that correct or not? A. Yes, it's based on one.

Q. Is there any figure in here in the estimated cost of providing this additional transportation that takes into account any additional or supplemental or substitute drivers? A. Well, if a driver does not drive the bus for those hours he is not paid for it. His substitute is paid in his stead. Now, if you're getting at field trips and extra trips such as that, there is no computation in here on that. If it's extracurricular activities and all that, we have not accounted in this. This is based upon the hours required to drive to the schools and not for extracurricular. If a driver does not drive and a substitute driver drives in his place, the regular driver is not paid for the hours he does not work.

[153] Q. So that would not involve any additional cost is what you're saying? A. No, sir.

Q. Do you have in our existing operation substitute drivers or a need for them? A. Yes, sir.

Q. Do you have any approximation as to how many additional are needed? A. Somewhere in previous testimony or documents I worked it out and I stated that there were so many substitute drivers required each month but I do not have that figure. It will vary from month to month; it will vary from day to day; whether a youngster is sick, whether he has some conflict in the school program and he has to get a substitute to take his place. There are many variances where we have to use substitute drivers and this can amount to probably, with our present fleet, close to a hundred substitute drivers that are needed to fill vacancies from day to day.

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Q. Do you presently have a full complement of these extra hundred relief drivers that you say are needed? A. Not all the time, no, sir.

Q. Again with reference to drivers' salaries, how is a driver paid? Is he paid for the period when he is actually transporting children or is he paid . . . what basis is he paid on? A. The driver is paid from the time he cranks up his bus.

[154] Q. You mean in the morning? A. From the time he starts his bus until he terminates the bus and the children are unloaded and he makes his count and takes the report into the principal.

Q. What about at the end of the day? A. The same way, from the time he enters the bus and cranks the bus up and until he gets to his home and parks his bus. He's paid for that time, and is paid on the minimum wage for student drivers. Adult drivers, we have paid them according to our classified salary schedule.

Mr. Horack: I believe I'm through.

Mr. Chambers: I just want to ask one or two things.

By Mr. Chambers:

Q. To show possibly some exceptions to your third trip, I show you the principal's monthly report for December 1, 1969, through January 9, 1970, the bus driven by Frankie Stroud, and it shows a total of four trips. It looks like he carries 45 students on the first trip to Davidson, 5 students on the second trip to Cornelius, 11 elementary and 6 high school students to Alexander on the third trip and 29 students to north on the fourth trip. A. All right. First of all, this is an 82 maximum capacity bus. On the first trip

there are 45 children that get off at Davidson. On that bus he has picked up also 5 children who [155] are dropped off at Cornelius. You know Cornelius is just a short distance from Davidson and so the bus drives on down and deposits those children and then picks up a load of youngsters that are going to Alexander and to North Mecklenburg. North Mecklenburg is only, oh, 2/10 of a mile or so from Alexander. So what he is doing, this shows four trips, Mr. Chambers, and that's what I was trying to point out. This should really be two trips.

Q. It shows on the report to the State that he carries 46 students on the first trip, 34 on the second trip, 36 on the third trip and 29 on the fourth trip. A. Right, and what he's actually doing, these children right here, the bus turns in and drops them off at Alexandar and goes on down to North Mecklenburg.

Q. Would you look at the bus driven by David Gorman. A. That is a 75 capacity bus. On the first trip to Long Creek they transport 55 youngsters, well, 56. I don't know whether the driver is included in that or not—could be. And the next trip shows a total of 60 children going to Alexander and then other children that have come in on buses to Alexander are then transferred on that bus just to go on to North Mecklenburg. It's only about two minutes or so from the school there.

Q. Well, the 40 students are going to North Mecklenburg, they wouldn't be bus drivers, would they? [156] A. No, sir, they would be children that had come in on other buses from the remote area to that.

Q. I show you another bus that seems to make a trip to Myers Park High School to deliver 29 students and then two more trips to Selwyn elementary school, the first trip carrying 42 and the second one carrying 27. A. I'm trying

to figure out, Mr. Chambers. Look at this. It shows bus 17 and 16 here. In parenthesis it shows two buses here. No, that's the age of the drivers. I'm trying to find out the number of the bus and why.

Q. Anyway, we can't quite explain whatever appears as the third trip is delivery of drivers. A. No, sir, and it would not be and I can't . . . I'd have to go back to the principal and driver to see what they have done here.

Q. I just had one question about something that appears. This is also the fourth month report for Smith Junior High School. This shows a first trip, the bus driven by M. Hance, with 84 students. A. A 90 capacity bus. They no longer make those buses. That is one of the cab over the engine. I guess you'd refer to it as a transit type bus. As I say, we no longer get that size bus. It shows a maximum capacity of 60 with 84 on it . . . a maximum capacity of 90 with 84 on it.

Mr. Chambers: I have nothing further. I'd like [157] to get a copy of this and include it as an exhibit to Mr. Morgan's deposition.

(Exhibit attached to all copies of deposition.)

• • •

CERTIFICATE

I, Evelyn S. Berger, Notary Public/Reporter, do hereby certify that J. D. Morgan was duly sworn by me prior to the taking of the foregoing deposition; that said deposition was taken and transcribed by me; and that the foregoing 157 pages constitute a true, complete and accurate transcript of the testimony of the said witness. I further certify that the persons were present as stated on the caption.

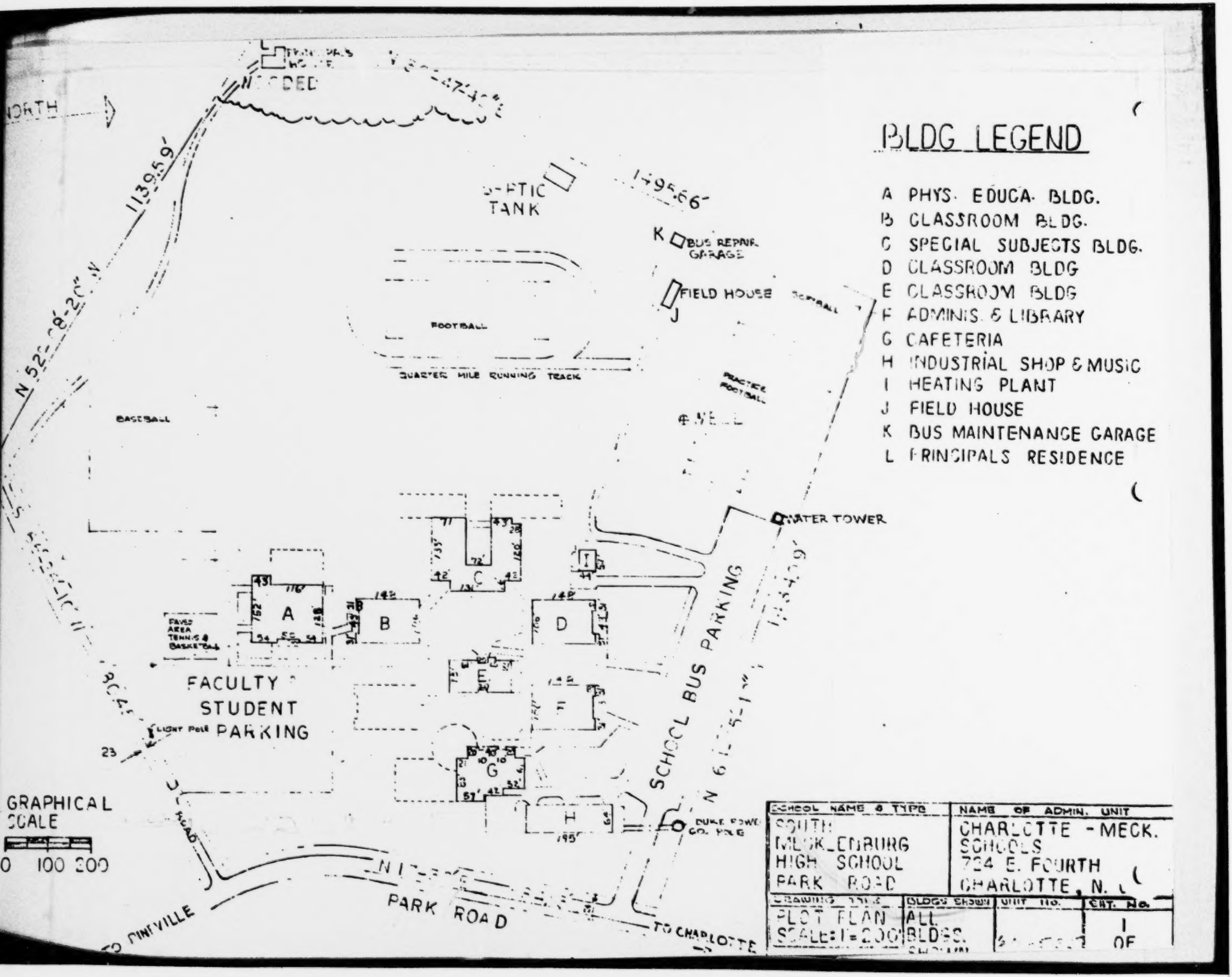
I further certify that I am not of counsel for, or in the employment of any of the parties to this action, nor am I interested in the results of this action.

In witness whereof, I have hereunto subscribed my name this 3rd day of April, 1970.

/s/ EVELYN S. BERGER
Notary Public in and for
County of Mecklenburg
State of North Carolina

Exhibit Attached to Foregoing Deposition

(See Opposite) ☞



BLDG LEGEND

A PHYS. EDUCA. BLDG.
B CLASSROOM BLDG.
C SPECIAL SUBJECTS BLDG.
D CLASSROOM BLDG
E CLASSROOM BLDG
F ADMINIS. & LIBRARY
G CAFETERIA
H INDUSTRIAL SHOP & MUSIC
I HEATING PLANT
J FIELD HOUSE
K BUS MAINTENANCE GARAGE
L PRINCIPALS RESIDENCE

SCHOOL NAME & TYPE	NAME OF ADMIN. UNIT
SOUTH MECKLENBURG HIGH SCHOOL PARK ROAD	CHARLOTTE - MECK. SCHOOLS 724 E. FOURTH CHARLOTTE, N. C.

DRAWING TYPE	BLDGS SHOWN	UNIT NO.	SHT. No.
PLOT PLAN SCALE: 1" = 200'	ALL BLDGS.		1 OF

Plaintiff's Exhibit, March 20, 1970

(See Opposite) ☞

ESTIMATED DISTANCE AND TRAVEL TIME BETWEEN CLUSTERED SCHOOLS [1]

OLS	DISTANCE					NUMBER OF TRIPS [4]	TRAVEL TI	
(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	
	Black	Inches on Map [2] (a↔b) (1"=4000')	Miles (a↔b) (c x 4010/5280)	25% of [3] Miles (25% x d)	Miles by Road (d + e)	Total [3] Distance Traveled (f x h)		Time [5] 12 MPH in Minutes (f x 5)	T M
owne		9 5/8	7.3	1.8	9.1	72.8	8(4/4)	45.5	1
	Bruns Avenue	8 7/8	6.7	1.7	8.4	33.6	4(2/2)	42	1
t		9 1/8	6.9	1.7	8.6	94.6	11(5/6)	43	4
d		.3 1/8	2.4	.6	3.0	21.0	7(4/3)	15	1
	Marie Davis	3 1/2	2.7	.7	3.4	44.2	13(7/6)	17	2

igures contained in the chart are as supplied by the defendants. Plaintiffs contend that the estimate as t
ren to be transported, the number of buses required and the factor (column "e") added to determine distance
nflated. Plaintiffs further contend that the average speed of the buses (12 MPH) is grossly underestimated

[1] Item 6a of Defendants' Submission of March 16, 1970.

[2] D. Morgan testified in deposition on March 18, 1970, that an accurate estimate for the distance for a bus
schools can be determined by measuring the distance on the map, point to point, and adding 25%.

[3] nformation is contained in Defendants' Submission of March 17, 1970. The number of trips equals the number
ach bus is scheduled to make only one trip. The number of buses projected for transporting black students
umber of buses from the white schools to the black schools are given. The latter figure is apportioned betw
hools based upon the number of buses projected for the black students and is the second figure within the pa
l number of buses projected for each cluster is as given in the Defendants' Submission.

[4] D. Morgan testified in deposition on March 18, 1970 that the estimated average speed for the all new buse
e order to be 12 MPH. If the buses average 20 MPH rather than 12 MPH, the average travel time would be red

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ESTIMATED DISTANCE AND TRAVEL TIME BETWEEN CLUSTERED SCHOOLS [1]

DISTANCE					NUMBER OF TRIPS [4]	TRAVEL TIME	
(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
ches on Map [2] →b) (1"=4000')	Miles (a↔b) (c x 4010/5280)	25% of [3] Miles (25% x d)	Miles by Road (d + e)	Total [3] Distance Traveled (f x h)		Time [5] 12 MPH in Minutes (f x 5)	Total Time in Minutes (h x i)
9 5/8	7.3	1.8	9.1	72.8	8(4/4)	45.5	360
8 7/8	6.7	1.7	8.4	33.6	4(2/2)	42	168
9 1/8	6.9	1.7	8.6	94.6	11(5/6)	43	473
3 1/8	2.4	.6	3.0	21.0	7(4/3)	15	105
3 1/2	2.7	.7	3.4	44.2	13(7/6)	17	221

n the chart are as supplied by the defendants. Plaintiffs contend that the estimate as to the number ted, the number of buses required and the factor (column "e") added to determine distance to be fs further contend that the average speed of the buses (12 MPH) is grossly underestimated.

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fied in deposition on March 18, 1970 that the estimated average speed for the all new buses transporte MPH. If the buses average 20 MPH rather than 12 MPH, the average travel time would be reduced to 20.2

ESTIMATED DISTANCE AND TRAVEL TIME BETWEEN CLUSTERED SCHOOLS

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
rwood	Double Oaks	5 1/2	4.2	1.1	5.3	58.3	11(5.6)	26.5
nshire		7	5.3	1.3	6.6	79.2	12(6/6)	33
den ley	Druid Hills	3 7/8	2.9	.7	3.6	43.2	12(6/6)	18
rly ds		7 1/2	5.7	1.4	7.1	71	10(5/5)	35.5
sdowne	First Ward	8 3/4	6.6	1.7	8.3	91.3	11(6/5)	41.5
vidence		11	8.3	2.1	10.4	52	5(3/2)	52
marle		10 1/4	7.7	1.9	9.6	76.8	8(4/4)	48
wild	Lincoln Heights	10	7.6	1.9	9.5	57	6(3/3)	47.5
y Oaks		5 3/4	4.4	1.1	5.5	22	4(2/2)	27.5
nbrook		3	3.8	1.0	4.8	33.6	7(4/3)	24
Creek	Oaklawn	8	6.1	1.5	7.6	53.2	7(4/3)	38
Creek x		7 7/8	6.0	1.5	7.5	15	2(1/1)	37.5
aseegee		7	5.3	1.3	6.6	39.6	6(4/2)	33

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ESTIMATED DISTANCE AND TRAVEL TIME BETWEEN CLUSTERED SCHOOLS

(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
5 1/2	4.2	1.1	5.3	58.3	11(5.6)	26.5	231.5
7	5.3	1.3	6.6	79.2	12(6/6)	33	396
3 7/8	2.9	.7	3.6	43.2	12(6/6)	18	216
7 1/2	5.7	1.4	7.1	71	10(5/5)	35.5	355
8 3/4	6.6	1.7	8.3	91.3	11(6/5)	41.5	456.5
11	8.3	2.1	10.4	52	5(3/2)	52	260
10 1/4	7.7	1.9	9.6	76.8	8(4/4)	48	384
10	7.6	1.9	9.5	57	6(3/3)	47.5	285
5 3/4	4.4	1.1	5.5	22	4(2/2)	27.5	110
3	3.8	1.0	4.8	33.6	7(4/3)	24	168
8	6.1	1.5	7.6	53.2	7(4/3)	38	266
7 7/8	6.0	1.5	7.5	15	2(1/1)	37.5	75
7	5.3	1.3	6.6	39.6	6(4/2)	33	198

ESTIMATED DISTANCE AND TRAVEL TIME BETWEEN CLUSTERED SCHOOLS

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
ry Grove	Tryon Hills	8 1/8	6.2	1.6	7.8	78	10(4/6)	39
laire	University Park	10 1/8	7.7	1.9	9.6	96	10(4/6)	48
Road		10 5/8	8.1	2.0	10.1	111.1	11(5/6	50.5
n		6 1/2	4.9	1.2	6.1	54.9	9(4/5)	30.5
or Park	Villa Heights	4 1/4	3.2	.8	4.0	40	10(5/5)	20
rfield		4 3/8	3.2	.8	4.0	36	9(4/5)	20
						1374.4(k)	203(l)	
							Average	Distance Per Trip
							Average	Time Per Trip in

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FOR REMAINDER OF PAGE

ESTIMATED DISTANCE AND TRAVEL TIME BETWEEN CLUSTERED SCHOOLS

(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
8 1/8	6.2	1.6	7.8	78	10(4/6)	39	390
0 1/8	7.7	1.9	9.6	96	10(4/6)	48	480
0 5/8	8.1	2.0	10.1	111.1	11(5/6	50.5	555.5
6 1/2	4.9	1.2	6.1	54.9	9(4/5)	30.5	274.5
4 1/4	3.2	.8	4.0	40	10(5/5)	20	200
4 3/8	3.2	.8	4.0	36	9(4/5)	20	180
				1374.4(k)	203(l)		6812 (m)

Average Distance Per Trip in Miles (k/
6.8 Miles

Average Time Per Trip in Minutes (m/l) =
33.6 Minute

Defendants' Response to Plaintiffs' Exhibit

(Filed March 21, 1970)

Submitted herewith is Defendants' Response to Plaintiffs' Supplemental Exhibit of March 20, 1970, in the form of an Affidavit by J. D. Morgan and John W. Harrison, Sr.

The information which the Plaintiffs' Supplemental Exhibit purports to refer to was the Deposition of J. D. Morgan taken at the instance of the Plaintiffs on March 19 and 20, 1970. The Defendants have not received and hence have not examined the transcript of that Deposition and enter an objection to a consideration by the Court of the Plaintiffs' Supplemental Exhibit of March 20, 1970, for the above-mentioned reason and also for the reason that it completely ignores the explanations, the data and information given by Mr. Morgan on that occasion. The Defendants submit that no consideration can be given to the self-serving, piece meal accounts of the Plaintiffs.

Respectfully submitted, this 21 day of March, 1970.

/s/ William J. Waggoner
William J. Waggoner

/s/ Benj. S. Horack
Benj. S. Horack
Attorneys for Defendants

Response to Plaintiffs' Supplemental Exhibit of March 20, 1970

J. D. MORGAN and JOHN W. HARRISON, SR., being duly sworn deposes and says that:

1. J. D. Morgan is Assistant Superintendent for Business Services and John W. Harrison is Director of Transportation for the Charlotte-Mecklenburg schools, and as such are thoroughly familiar with the bus transportation requirements that will be necessary to provide transportation between the clustered elementary schools under the Court approved Plan.

2. Mr. Morgan has read and analyzed the Plaintiffs' Supplemental Exhibit of March 20, 1970, and says that the statements, the purported calculations and conclusions set forth therein are gross distortions of the true facts as they relate to the transportation requirements which will be necessary with reference to the paired and clustered schools. Both Mr. Morgan and Mr. Harrison reaffirm that the estimates and projections previously submitted by the Defendants are correct.

3. Attached to and made a part hereof is a tabulation of the number of daily miles (round trip) travelled by each of the indicated 30 buses that are now transporting the innercity children to schools in the outlying areas to promote desegregation for the school year 1969-70. These innercity children are those who previously attended innercity schools that were closed pursuant to prior orders of the Court. Prior Orders of the Court identify these school children and the schools to which they are now being transported. The identity of the trip made by each of the buses

Response to Plaintiffs' Supplemental Exhibit of March 20, 1970

(and the specifics relating thereto) are shown on the principal's monthly bus reports which are already in evidence at the instance of the Plaintiffs, the same being the monthly reports for the period from December 1, 1969 through January 7, 1970. The routes, traffic conditions and travel time for these 30 buses are comparable to the transportation that will be necessary in connection with the paired schools, and forms a reliable basis for the estimates and projections regarding the transportation for the paired and clustered schools under the Court Plan. The specifics shown on the above-mentioned principals' monthly bus reports with reference to each of these 30 buses is included herein by reference.

4. Also attached hereto and made a part hereof is a correct summary of data relating to accidents involving the 30 school buses transporting the above-mentioned inner-city children.

5. The purported data and tabulations set forth in the Plaintiffs' March 20, 1970 Supplemental Exhibit are inaccurate and distorted. They are based upoon "crow-fly" ruler measurements of distances between the paired schools with an arbitrary add on of 25%. Although the 25% add on may sometimes be used as a rule of thumb for hasty measurement of map distances, it does not accurately reflect the bus route distances between two schools particularly as the distance relates to the streets and traffic arteries that must actually be travelled in order to transport the students from one school to another school. Further, the Plaintiffs' calculations completely ignored the bus distance involved in picking up students in outlying areas of an attendance zone in order to transport them first, for example, to Olde Providence, before resuming the journey to, for ex-

ample, First Ward. Using Olde Providence-First Ward pairing as an example, a 5th or 6th grade child who lives a mile from Olde Providence will require 20 minutes walking time to get to Olde Providence Elementary, will expend about 5 minutes boarding a bus at that location, 52 minutes in transit to First Ward and another 5 minutes getting off the bus at First Ward—a total of an estimated 82 minutes. Using the same example for a 5th or 6th grader who lives more than 1 mile from Olde Providence, such a child must be bussed into Olde Providence before resuming his journey to First Ward. The foregoing is a typical example of the time factors and problems which will be involved in transporting children to and from the paired schools. Of course, the same factors are involved in reverse with reference to, for example, the First Ward 1st through 4th graders who will be picked up and transported to the outlying schools.

6. The figures and tabulations set forth by the Plaintiffs in their Supplemental Exhibit of March 20, 1970, are solely and entirely their own, not those of the School Board or its staff.

/s/ J. D. Morgan
J. D. Morgan

/s/ John W. Harrison, Sr.
John W. Harrison, Sr.

Severally Sworn to and Subscribed before me this 21 day of March, 1970.

/s/ Vivian Kesta
Notary Public

My commission expires:
April 2, 1971.

Tabulation

March 20, 1970

Thirty buses that are serving innercity children to promote desegregation for 1969-70 school year travelled 1051.3 miles daily for an average of 35.0 miles daily per bus.

DESEGREGATION BUSES

BUS NO.	DAILY MILES
23	43.2
86	34.0
116	44.0
171	51.5
174	20.0
175	73.3
176	33.1
183	22.6
283	42.0
304	50.0
309	30.0
310	30.0
311	33.0
312	44.0
315	38.0
208	41.3
302	25.1
303	30.0
305	33.0
306	26.0
307	24.6
308	33.0
313	35.0
314	21.1

Tabulation (Continued)

BUS NO.	DAILY MILES
285	23.5
301	33.6
299	46.0
317	20.0
300	37.6
181	32.8
	1051.3

CHARLOTTE-MECKLENBURG SCHOOLS

TRANSPORTATION DEPARTMENT
March 20, 1970

DATA RELATED TO ACCIDENTS INVOLVING SCHOOL BUSES FOR THE 1969-70 SCHOOL YEAR THROUGH MARCH 18, 1970 FOR A TOTAL OF 126 SCHOOL DAYS

I. Thirty school buses transporting children from inner city to promote desegregation for the 1969-70 school year travelled an average of 1,051.3 miles daily for a total of 132,463.8 miles year to date. This same thirty buses have been involved in seventeen reportable accidents. This is an average of .57 accidents per bus, and an average of one accident per 7,792 miles travelled.

II. Two Hundred and Fifty-Five buses travelled an average of 9,635.8 miles daily for a total of 1,214,110.8 miles year to date. These same 255 buses have been involved in 57 reportable accidents. This is an average of .22 accidents per bus, and an average of one accident per 21,300 miles travelled.

JWH:rvc

Supplementary Findings of Fact dated March 21, 1970

Pursuant to the March 5, 1970 order of the Fourth Circuit Court of Appeals, the court makes the following supplemental findings of fact:

1. Paragraph seven of this court's order of February 5, 1970, as amended, reads:

> "7. That transportation be offered on a uniform non-racial basis to all children whose reassignment to any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance. Estimates of the number of children who may have to be transported have run as high as 10,000 or more. Since the cost to the local system is about $18 or 20 a year per pupil, and the cost to the state in those areas where the state provides transportation funds, is about another $18 or $20 a year per pupil, the average cost for transportation is apparently less than $40 per pupil per year. The local school budget is about $45,000,000 a year. It would appear that transporting 10,000 additional children, if that is necessary, and if the defendants had to pay it all, would add less than one per cent to the local cost of operating the schools. The significant point, however, is that cost is not a valid legal reason for continued denial of constitutional rights."

2. A bird's-eye picture of the indispensable position of the school bus in public education in North Carolina, and especially in the school life of grades one through six (elementary students) is contained in a summary by the de-

fendant Dr. Craig Phillips entitled "RIDING THE SCHOOL BUSES" (Plaintiffs' Exhibit 15), published January 1, 1970, which reads as follows:

"The average school bus transported 66 students each day during the 1968-69 school year; made 1.57 trips per day, 12.0 miles in length (one way); transported 48.5 students per bus trip, including students who were transported from elementary to high schools.

"During the 1968-69 school year:

610,760 pupils were transported to public schools by the State

54.9 percent of the total public school average daily attendance was transported

70.9 percent were elementary students

29.1 percent were high school students

3.5 students were loaded (average) each mile of bus travel

The total cost of school transportation was $14,293,-272.80, including replacement of buses: The average cost, including the replacement of buses, was $1,541.05 per bus for the school year—181 days; $8.51 per bus per day; $23.40 per student for the school year; $.1292 per student per day; and $.2243 per bus mile of operation." (Emphasis added.)

In Mecklenburg County, the average daily number of pupils currently transported on state school busses is approximately 23,600—plus another 5,000 whose fares are paid on the Charlotte City Coach Lines.

Supplemental Findings of Fact dated March 21, 1970

3. Separate bus systems for black students and white students were operated by the defendant Mecklenburg County Board of Education for many years up until 1961. Separate black and white bus systems were operated by the combined Charlotte-Mecklenburg Board from 1961 until 1966 (Defendants' answers to Plaintiffs' requests for admissions, Nos. 1 and 8, filed March 13, 1970).

4. Pertinent figures on the local school transportation system include these:

Number of busses	280
Pupils transported on school busses daily	23,600
Pupils whose fares are paid on Charlotte City Coach Lines, Inc.	5,000
Number of trips per bus daily	1.8
Average daily bus travel	40.8 miles
Average number of pupils carried daily, per bus	83.2
Annual per pupil transportation cost	$19—$20
Additional cost (1968-69) per pupil to state	$19.92
Total annual cost per pupil transported	$39.92
Daily transportation cost per pupil transported	$0.22

5. Information about North Carolina:

Population	4,974,000
1969-71 total state budget	$3,590,902,142

Supplemental Findings of Fact dated March 21, 1970

1969-71 total budgeted state funds for public schools	$1,163,310,993
1968-69 amount spent by state on transportation (including replacement busses)	$14,293,272.80
1969-71 appropriation for purchase of school busses	$6,870,142
Average number of pupils transported daily, 1968-69	610,760
Average number of pupils transported daily per bus—statewide	66

6. The 1969-70 budget of the Charlotte-Mecklenburg school system is $57,711,344, of which nearly $51,000,000 represents operational expense and between $6,000,000 and $7,000,000 represents capital outlay and debt service. These funds come from federal, state and county sources, as follows:

Federal	State	County	Total
$2,450,000	$29,937,044	$25,324,300	$57,711,344

The construction of school buildings is not included in these budget figures (see Plaintiffs' Exhibit 6).

7. State expenditures in the past ten years have usually not equalled appropriations. There has been a sizeable operating surplus in the state budget for every biennium since 1959-60 (State Budget, page 86).

8. The state superintendent of public instruction in his biennial report (Plaintiffs' Exhibit 12) for the years 1966-68 recommended that "city transportation should be pro-

vided on the same basis as transportation for rural children as a matter of equity."

9. The 1969 report of the Governor's Study Commission on the Public School System of North Carolina (Plaintiffs' Exhibit 13) recommended that transportation be provided for all school children, city as well as rural, on an equal basis. Signatory to that report was one of the present defendants, the state superintendent of public instruction.

10. The basic support for the public schools of the state comes from the State Legislature.

11. Some 5,000 children travel to and from school in Mecklenburg County each day in busses provided by contract carriers such as Charlotte City Coach Lines, Inc. (Morgan's deposition of February 25, 1970, page 36).

12. Upon the basis of data furnished by the school board and on the basis of statistics from the National Safety Council, it is found as a fact that travel by school bus is safer than walking or than riding in private vehicles.

13. Traffic is of course heavy all over the 540 square miles of the county. Motor vehicle registration for 1969 was 191,165 motor vehicles (161,678 automobiles and 29,487 trucks).

14. Many children eligible for transportation do not accept that transportation. Estimates have been made that this number of those who do not accept transportation is in the neighborhood of 50% of those who are eligible.

Supplemental Findings of Fact dated March 21, 1970

15. Approximately 5,000 children in the system attend school outside the school zone in which they reside. Although requested of the defendants by the court on March 7, 1970, information as to where these children go to school has not been forthcoming and the defendants have indicated that it is impossible to produce it.

16. As the state transportation regulations* are understood by the court, the state will bear its share (about half) of transportation costs for children who live more than 1½ miles from their school, as follows:

(a) All rural children, wherever they attend school;

(b) All perimeter children (those living in territory annexed by the city before 1957), wherever they attend school; and

(c) All inner city children assigned to schools in either the perimeter or the rural areas of the system.

17. The defendants submitted information on the number of children who live within 1½ miles of the schools which are to be desegregated by zoning. This information shows that East Mecklenburg, Independence, North Mecklenburg, Olympic, South Mecklenburg and West Mecklenburg high schools, and Quail Hollow and Alexander junior high schools, with total student populations of 12,184, have in the aggregate only 96 students who live within 1½ miles from the schools. Some 12,088 then are eligible for transportation. These same schools among them provide bus transportation for 5,349 students. This information illustrates the importance of the bus as one of the essential

* General Statutes of North Carolina, Chapter 115, §180-192.

elements in the whole plan of operation of the schools. It also shows the wide gap between those entitled to transportation and those who actually claim it. There is no black school in the system which depends very much upon the school bus to get the children to school. The total number of children transported in October, 1969, to schools identifiable as black was 541 out of total population in those black schools of over 17,000. Black schools, including the new black schools, have been located in black areas where busses would be unnecessary. Suburban schools, including the newest ones, have been located far away from black centers, and where they can not be reached by many students without transportation.

18. Bus travel in both urban and rural areas takes time. An analysis of the records of bus transportation, based upon the reports of school principals, is contained in the extensive exhibits bearing Plaintiffs' Exhibit numbers 22, 23, 24, 25, 26 and 27. For the month of October, 1969, by way of illustration, these principals' reports when analyzed show that out of some 279 busses carrying more than 23,000 children both ways each day:

The average one way trip is one hour and fourteen minutes;

80% of the busses require more than one hour for a one way trip;

75% of the busses make two or more trips each day; Average miles traveled by busses making one round trip per day is 34½; and

Average bus mileage per day for busses making two trips is 47.99.

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19. It was the testimony of Dr. Self and Dr. Finger, and the courts finds as a fact, that transportation provided by the school board's plans, which include narrow corridors several miles long and in places only one-half mile wide, proceeding in straight lines diagonally across streets and other obstacles, would be more expensive per capita than transportation under the satellite zone plan. The court plan calls for pick-ups to be made at a few points in each school district, as testified to by Dr. Self, and for non-stop runs to be made between satellite zones and principal zones. There will be no serious extra load on downtown traffic because there will be no pick-up and discharge of passengers in downtown traffic areas.

20. The court finds that from the standpoint of distance travelled, time en route and inconvenience, the children bussed pursuant to the court order will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported at state expense.

21. On July 29, 1969 (pursuant to the court's April 23, 1969 order that they frame a plan for desegregation and that school busses could be used as needed), the defendants proposed a plan for closing seven inner-city black schools and bussing 4,200 students to outlying schools. The plan was approved. It had some escape clauses in it, and the defendants in practice added some others; but *as presented,* and as approved by the court, the "freedom of choice" contemplated was very narrowly restricted; and bussing of several hundred students has taken place under that plan.

22. Evidence of property valuations produced by the defendants shows that the value of the seven school proper-

ties closed under the July 29, 1969 plan, and now for the most part standing idle, was over three million dollars.

23. The all-black or predominantly black elementary schools which the board plan would retain in the system are located in an almost exclusively Negro section of Charlotte, which is very roughly triangular in shape and measures about four or five miles on a side. Some are air-conditioned and most are modern. Virtually none of their patrons now ride busses; the schools were located where the black patrons were or were expected to be. These schools, their completion dates, and representative academic performances of their sixth grade graduating classes are shown in the following table:

The information shown in the first three columns below was taken from answers to interrogatories, Nos. 1-f, 1-g and 1-h, filed October 25, 1968.

GRADE 6 AVERAGE ACHIEVEMENT TEST SCORES, SHOWN IN GRADE EQUIVALENT (such as 6.2 = 6th grade, 2nd month), 1968-69.

YEAR BUILT	YEARS OF ADDITIONS	NO. OF MOBILE UNITS	WORD MEANING	PARAGRAPH MEANING	SPELLING	LANGUAGE	ACM (MATH)	ACN (MATH)	AACD (MATH
1968	--	0	4.1	4.1	4.7	4.1	4.0	4.7	4.1
1951	1953 1957 1959	0	4.3	4.4	4.8	4.1	4.5	4.8	4.1
1952	1955 1965	1	4.0	4.0	4.6	3.6	3.9	4.4	3.7
1960	1964	0	4.0	4.2	4.5	3.9	3.9	4.5	4.1
1912	1950 1961 1968	0	4.0	4.1	4.8	3.6	3.9	4.6	4.1
1956	1958	5	4.4	4.4	4.9	4.2	4.3	4.8	4.1
1964	--	0	4.4	4.5	5.2	4.7	4.5	4.9	4.4
1957	1958 1964	5	4.4	4.7	4.8	4.3	4.4	4.8	4.4
1912	1934 1937	3	4.3	4.4	4.7	3.6	4.4	4.7	4.2

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24. Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion.

25. In the court's order of April 23, 1969, a suggestion was made that the board seek consultation or assistance from the office of Health, Education and Welfare. The board refused to do this, and as far as the court knows has not sought help from HEW.

26. Some 600 or more pupils transfer from one school to another or register for the first time into the system during the course of each month of the typical school year. It is the assignment of these children which is the particular subject of the reference in paragraph 13 of the order to the manner of handling assignments within the school year.

27. No plan for the complete desegregation of the schools was available to the court until the appointment of Dr. John A. Finger, Jr. and the completion of his tactful and effective work with the school administrative staff in December 1969 and January 1970. Dr. Finger has a degree in science from Massachusetts Institute of Technology and a doctor's degree in education from Harvard University, and twenty years' experience in education and educational problems. He has worked in a number of school desegregation cases and has a rare capacity for perception and solution of educational problems. His work with the staff had

the catalytic effect of freeing and inducing the staff to work diligently in the preparation of plans that would accomplish the result required, and which would be cohesive and efficient from an educational point of view.

28. Hearings on the "Finger" plans and on the board's proposed plans were conducted on February 2 and February 5, 1970. These plans may best be understood if they are considered in four divisions:

29. *The plan for senior high schools.*—The plan ordered to be put into effect May 4, 1970 is the board's own plan for desegregation of the senior high schools in all particulars except that the order calls for the assignment to Independence High School of some 300 black children. The board contends the high school plans will call for additional transportation for 2,497 students and will require 69 busses. The court is unable to accept this view of the evidence. All transportation under both the board and the court plan is covered by state law.

30. *The plan for junior high schools.*—A plan for junior high schools was prepared by the board staff and Dr. Finger and was submitted to the court as Dr. Finger's plan. The board submitted a separate plan. Both plans used the technique of re-zoning. The school board's plan after all of their re-zoning had been done left Piedmont Junior High School 90% black and shifting towards 100% black. The plan designed by Dr. Finger with staff assistance included zoning in such a way as to desegregate all the schools. This zoning was aided by a technique of "satellite" districts. For example, black students from satellite districts in the central city area around Piedmont Courts will be assigned to Alexander Graham Junior High,

which is predominantly white. Black students from the area around Northwest Junior High School (all-black) will be similarly transferred to Wilson Junior High, northwest of the air port. These one-way transfers, essentially identical in nature to the board's July 29, 1969 plan, will result in the substantial desegregation of all the junior high schools, which are left under this plan with black student populations varying from 9% at J. H. Gunn to 33% at Alexander and Randolph.

The court order did not require the adoption of the Finger plan. In paragraph 19 of the order the board were given four choices of action to complete the process of desegregating the junior high schools. These choices were (1) Re-zoning; (2) Two-way transporting of pupils between Piedmont and white schools; (3) Closing Piedmont and assigning the black students to other junior high schools; or (4) Adoption of the Finger plan.

The board elected to adopt and did adopt the Finger plan by resolution on February 9, 1970.

The defendants have offered figures on the basis of which they ask the court to find that 4,359 students will have to be transported under the junior high school plan and that 84 busses will be required. The court is unable to find that these contentions are borne out by the statistics and other evidence offered.

Dr. Self, the school superintendent, and Dr. Finger, the court appointed expert, both testified that the transportation required to implement the plan for junior highs would be less expensive and easier to arrange than the transportation proposed under the board plan. The court finds this to be a fact.

Two schools may be used to illustrate this point. Smith Junior High under the board plan would have a contigu-

ous district six miles in length extending 4½ miles north from the school itself. The district throughout the greater portion of its length is one-half mile wide and all roads in its one-half mile width are diagonal to its borders. Eastway Junior High presents a shape somewhat like a large wooden pistol with a fat handle surrounding the school off Central Avenue in East Charlotte and with a corridor extending three miles north and then extending at right angles four miles west to draw students from the Double Oaks area in northwest Charlotte. Obviously picking up students in narrow corridors along which no major road runs presents a considerable transportation problem.

The Finger plan makes no unnecessary effort to maintain contiguous districts, but simply provides for the sending of busses from compact inner city attendance zones, non-stop, to the outlying white junior junior high schools, thereby minimizing transportation tie-ups and making the pick-up and delivery of children efficient and time-saving.

It also is apparent that if the board had sought the minimum departure from its own plan, such minimum result could have been achieved by accepting the alternative of transporting white children into and black children out of the Piedmont school until its racial characteristics had been eliminated.

In summary, as to junior high schools, the court finds that the plan chosen by the board and approved by the court places no greater logistic or personal burden upon students or administrators than the plan proposed by the school board; that the transportation called for by the approved plan is not substantially greater than the transportation called for by the board plan; that the approved plan will be more economical, efficient and cohesive and easier to administer and will fit in more nearly with the

transportation problems involved in desegregating elementary and senior high schools, and that the board made a correct administrative and educational choice in choosing this plan instead of one of the other three methods.

31. *The plan for elementary schools.*—The elementary school desegregation program is best understood by dividing it into two parts: (a) The 27 schools being desegregated by zoning; and (b) The 34 schools being desegregated by grouping, pairing and transportation between school zones.

32. *The re-zoned group.* Two plans were submitted to the court. The school board plan was prepared for the board by its staff. It relied entirely upon zoning with the aid of some computer data supplied by Mr. Weil, a board employed consultant. It did as much as could reasonably be accomplished by re-zoning school boundaries. It would leave nine elementary schools 83% to 100% black. (These schools now serve 6,462 students—over half the black elementary pupils.) It would leave approximately half the white elementary students attending schools which are 86% to 100% white. In short, it does not tackle the problem of the black elementary schools in northwest Charlotte.

The "Finger plan" was the result of nearly two months of detailed work and conference between Dr. Finger and the school administrative staff. Dr. Finger prepared several plans to deal with the problem within the guidelines set out in the December 1, 1969 order. Like the board plan, the Finger plan does as much by re-zoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black

students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.

The "Finger plan" itself in the form from which in principle the court approved on February 5, 1970, was prepared by the school staff and was filed with the court by representatives of the school board on February 2, 1970. It represents the combined thought of Dr. Finger and the school administrative staff as to a valid method for promptly desegregating the elementary schools, if such desegregation is required by law to be accomplished.

This plan was drafted by the staff and by Dr. Finger in such a way as to make possible immediate desegregation if it should be ordered by an appellate court in line with then current opinions of appellate courts.

The testimony of the school superintendent, Dr. Self, was, and the court finds as a fact, that the zoning portion of the plan can be implemented by April 1, 1970 along educationally sound lines and that the transportation problems presented by the zoning portion of the plan can be solved with available resources.

The court has reviewed the statistics supplied to it by the original defendants with regard to elementary schools to be desegregated by re-zoning. These schools have been zoned with compact attendance areas and with a few exceptions they have no children beyond 1½ miles distance from the school to which they are assigned. Although some transportation will be required, the amount is not considerable when weighed against the already existing capacity of the system. The court specifically finds that not more than 1,300 students will require transportation under this portion of the program and that the bus trips would be so

short and multiple bus runs so highly practical that 10 school busses or less will be adequate.

33. *The pairing and grouping of 34 elementary schools.*—This part of the plan as previously described would group an inner city black school with two or more outlying white schools and assign children back and forth between the two so that desegregated fifth and sixth grades would be established in the presently black schools and desegregated grades one through four would be established in the presently white schools. The estimate of Dr. Finger and Dr. Self, the superintendent, was that this program would require transporting roughly 5,000 white pupils of fifth and sixth grade levels into inner city schools. The board in its latest estimate puts the total figure at 10,206. Just what is the net additional number of students to be transported who are not already receiving transportation is open to considerable question.

34. *The Discount Factors.*—The court accepts at face value, for the most part, the defendants' evidence of matters of independent fact, but is unable to agree with the opinions or factual conclusions urged by counsel as to the numbers of additional children to be transported, and as to the cost and difficulty of school bus transportation. The defendants in their presentation have interpreted the facts to suggest inconvenient and expensive and burdensome views of the court's order. Their figures must be discounted in light of various factors, all shown by the evidence, as follows:

(a) Some 5,000 children daily are provided transportation on City Coach Lines, in addition to the

23,600 and more who ride school busses. These have not been considered in the defendants' calculations.

(b) Not all students eligible for transportation actually accept it. The board's estimates of transportation, however, assume that transportation must be provided daily for all eligible students.

(c) Not all registered students attend all schools every day. The board's figures appear to assume they do. Statewide, average daily attendance is less than 94% of initial registration.

(d) The present average number of students transported round trip, to and from school, per bus, per day, is more than 83. The board's estimates, however, are based on the assumption that they can transport only 44 or 46 pupils, round trip, per bus, per day when the bus serves a desegregation role.

(e) Busses now being used make an average of 1.8 trips per day. Board estimates to implement the desegregation plan contemplate only one trip per bus per day!

(f) The average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. The average length of the one-way trips required under the court approved plan for elementary students is less than seven miles, and would appear to require not over 35 minutes at the most, because no stops will be necessary between schools.

(g) The board's figures do not contemplate using busses for more than one load of passengers morning or afternoon. Round trips instead of one-way trips morning and afternoon could cut the bus requirements sharply.

(h) The number of busses required can be reduced 35% to 50% by staggering the opening and closing hours of schools so that multiple bus trips can be made. This method is not considered in the board's estimates, according to testimony of J. D. Morgan, bus superintendent.

(i) Substantial economies may reasonably be expected when all phases of the bussing operation have been coordinated instead of being considered separately.

(j) In estimating how many children live more than a mile and a half from schools, and therefore are entitled to transportation, the board's transportation people have used some very short measurements. As the court measures the maps, very few of the students in the re-zoned elementary schools, for example, live more than 1½ miles from their assigned schools. If the board wants to transport children who live less than 1½ miles away they may, but if they do, it is because of a board decision rather than because of the court's order.

(k) Transportation requirements could be reduced by raising the walking distance temporarily from 1½ to perhaps 1¾ miles. This has apparently not been taken into account.

(l) Testimony of J. D. Morgan shows that busses can be operated at a 25% overload. Thus a 60-passenger bus (the average size) can if necessary transport 75 children. Some busses in use today transport far more.

35. *Findings of Fact as to Required Transportation.*— After many days of detailed study of maps, exhibits and

statistics, and after taking into account all the evidence, including the "discount factors" mentioned above, the court finds as facts that the maximum number of additional children who may conceivably require transportation under the court ordered plans, and the maximum numbers of additional busses needed are as follows:

	Net Additional Transportees	*Number of Busses Needed*
Senior Highs	1,500	20
Junior Highs	2,500	28
Elementaries:		
Re-zoned	1,300	10
Paired and Grouped	8,000	80
Totals	13,300	138

36. These children (all but a few hundred at Hawthorne, Piedmont, Alexander Graham, Myers Park High School, Eastover, West Charlotte and a few other places), *if assigned to the designated schools, are entitled to transportation under existing state law, independent of and regardless of this court's order respecting bussing.*

37. The court also finds that the plan proposed by the board would have required transportation for at least 5,000 students in addition to those now being transported.

38. *Separability.—Each of the four parts of the desegregation plan is separable from the other.* The re-zoning of elementaries can proceed independent of the pairing and grouping. The pairing and grouping can take place independent of all other steps. *The implementation of the*

pairing and grouping plan itself can be done piecemeal, one group or several groups at a time, as transportation becomes available. It was planned that way.

39. *The Time Table.*—The February 5, 1970 order followed the time table requested by the defendants. At the February 2 hearing, the school board attorney requested until April 1, 1970 to desegregate the elementary schools (T. 20); he requested that high school seniors be allowed to graduate where they are (T. 21); he proposed continuing junior high students and grades 10 and 11 in their present schools until the third week before the end of school (T. 21). The request of Dr. Self, the school superintendent, was identical as to elementaries and 12th graders; he preferred to transfer 10th and 11th graders about two weeks before school was over (T. 95). Availability of transportation was the only caveat voiced at the hearing.

40. The February 5 order expressly provided that "racial balance" was not required. The percentage of black students in the various parts of the plans approved vary from 3% black at Bain to 41% black at Cornelius.

41. *Cost.*—Busses cost around $5,400.00 each, varying according to size and equipment. Total cost of 138 busses, if that many are needed, would therefore be about $745,200.00. That is much less than one week's portion of the Mecklenburg school budget. Busses last 10 to 15 years. The state replaces them when worn out.

Some additional employees will be needed if the transportation system is enlarged.

Defendants have offered various estimates of large increased costs for administration, parking, maintenance, driver education and other items. If they choose to incur

excess costs, the court can not prevent it. However, the evidence shows that school bus systems in Charlotte and other urban North Carolina counties tend to operate at lower costs per student than rural systems. Adding a larger number of short-range capacity loads should not tend to increase the present overall per capita cost of $40 a year.

It is the opinion and finding of the court that the annual transportation cost per student, including amortization of the purchase price of the busses, will be at or close to $40.00, and that the total annual cost, which is paid about half by the state and half by the county, of implementing this order, will not exceed the following:

For zoned Elementaries	(1,300)	$ 52,000
For paired Elementaries	(8,000)	320,000
For Junior Highs	(2,500)	100,000
For Senior Highs	(1,500)	60,000
		$532,000*

41. *Availability.*—The evidence shows that the defendant North Carolina Board of Education has approximately 400 brand new school busses and 375 used busses in storage, awaiting orders from school boards. None had been sold at last report. The state is unwilling to sell any of them to Mecklenburg because of the "anti-bussing" law. No orders for busses have been placed by the school board.

If orders to manufacturers had been placed in early February, delivery in 60 or 90 days could have been anticipated. The problem is not one of availability of busses

* The local system's share of this figure would be $266,000.00, which at current rates is only slightly more than the annual interest or the value of the $3,000,000.00 worth of school properties closed in 1969.

but of unwillingness of Mecklenburg to buy them and of the state to furnish or make them available until final decision of this case.

This the 21 day of March, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Supplemental Memorandum dated March 21, 1970

Pursuant to the order of the Fourth Circuit Court of Appeals, filed March 5, 1970, this memorandum is issued.

Previous orders cover more than one hundred pages. The motions and exhibits and pleadings and evidence number thousands of pages, and the evidence is several feet thick. It may be useful to reviewing authorities to have a brief summary of the case in addition to the supplemental facts on the questions of transportation.

Before 1954, the schools in Charlotte and Mecklenburg County were segregated by state law. The General Assembly, in response to Brown v. Board of Education, adopted the Pupil Assignment Act of 1955-56, North Carolina General Statutes, §115-176, which was quoted in the April 23, 1969 order and which is still the law of North Carolina. It provides that school boards have full and final authority to assign children to schools and that no child can be enrolled in nor attend a school to which he has not been so assigned.

"Freedom of choice" to pick a school has never been a right of North Carolina public school students. It has been a courtesy offered in recent years by some school boards, and its chief effect has been to preserve segregation.

Slight token desegregation of the schools occurred in the years following *Brown*. The Mecklenburg County and the Charlotte City units were merged in 1961.

This suit was filed in 1965, and an order was entered in 1965 approving the school board's then plan for desegregation, which was substantially a freedom of choice plan coupled with the closing of some all-black schools.

There was no further court action until 1968, when a motion was filed requesting further desegregation. Most

white students still attended "white" schools and most black students still attended "black" schools. The figures on this subject were analyzed in this court's opinion of April 23, 1969 (300 F.Supp. 1358 (1969)), in which the background and history of local segregation and its continuing discriminatory nature were analyzed at length. In that order the court ruled that substantial progress had been made and that many of the alleged acts of discrimination were not proved.

However, certain significant findings and conclusions were made which have been of record without appeal for eleven months. These include the following:

1. The schools were found to be unconstitutionally segregated.

2. Freedom of choice had failed; no white child had chosen to attend any black school, and freedom of choice promoted rather than reduced segregation.

3. The concentration of black population in northwest Charlotte and the school segregation which accompanied it were primarily the result of discriminatory laws and governmental practices rather than of natural "neighborhood" forces. (This finding was reaffirmed in the order of November 7, 1969.)

4. The board had located and controlled the size and population of schools so as to maintain segregation.

5. The plan approved and put into effect in 1965 had not eliminated unlawful segregation.

6. The defendants operate a sizeable fleet of busses, serving over 23,000 children at an average annual cost (to state and local governments combined) of not more than $40 per year per pupil.

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7. Transportation by bus is a legitimate tool for school boards to use to desegregate schools.

8. Faculties were segregated, and should be desegregated.

9. Under *Green* v. *New Kent County School Board*, 391 U.S. 430 (1968), there was now an active duty to eliminate segregation.

The board was directed to submit a plan to desegregate the schools.

The order produced a great outcry from school board members and others. It also produced a plan which called for the closing of Second Ward, the only black high school located near a white neighborhood; and it produced no rezoning, no elimination of gerrymandering, and only minor changes in the pupil assignment plan. It did produce an undertaking to desegregate the faculties. The plan was reviewed in the court order of June 20, 1969, in which the court approved the provision for offering transportation to children transferring from majority to minority situations and directed the preparation of a plan for pupil desegregation.

The court also specifically found that gerrymandering had been taking place; and several schools were cited as illustrations of gerrymandering to promote or preserve segregation.

In June of 1969, pursuant to the hue and cry which had been raised about "bussing," Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called "anti-bussing" statute, N.C. G.S. 115-176.1. That statute reads as follows:

"§115-176.1. Assignment of pupils based on race, creed, color or national origin prohibited. —No person shall be refused admission into or be excluded from any public school in this State on account of

race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creed, colors or national origins from the community.

"Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

"*The provisions of this article shall not apply* to a temporary assignment due to the unsuitability of a school for its intended purpose nor *to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment* .

"The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible

to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit. (1969, c. 1274.)"

The board's next plan was filed July 29, 1969, and was approved for 1969-70 by the order of August 15, 1969. The August 15 order contained the following paragraph:

"The most obvious and constructive element in the plan is that the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members 'at the earliest possible date.' It has recognized that where people live should not control where they go to school nor the quality of their education, and that transportation may be necessary to comply with the law. It has recognized that easy methods will not do the job; that rezoning of school lines, perhaps wholesale; pairing, grouping or clustering of schools; use of computer technology and all available modern business methods can and must be considered in the discharge of the Board's constitutional duty. This court does not take lightly the Board's promises and the Board's undertaking of its affirmative duty under the Constitution and accepts these assurances at face value. They are, in fact, the conclusions which necessarily follow when any group of women and men of good faith seriously study this problem *with knowledge of the facts of this school system and in light of the law of the land.*"

The essential action of the board's July 29, 1969 plan was to close seven inner-city black schools and to re-assign their pupils to designated white suburban schools, and to

transport these children by bus to these suburban schools. In addition, it was proposed to re-assign 1,245 students from named black schools to named suburban white schools and provide them transportation.

The total of this one-way transportation of black students only to white schools under this plan was stated to be 4,245 children.

No problem of transportation or other resources was raised or suggested.

The evidence of the defendants is that the property value of the schools thus closed exceeds $3,000,000. For the most part, that property stands idle today.

The "anti-bussing" law was not found by the board to interfere with this proposed wholesale re-assignment and "massive bussing," of black children only, for purposes of desegregation.

The plan, by order of August 15, 1969, was approved on a one-year basis only, and the board was directed to prepare and file by November 17, 1969, a plan for complete desegregation of all schools, to the maximum extent possible, by September 1, 1970.

The defendants filed a motion asking that the deadline to prepare a plan be extended from November 17, 1969, to February 1, 1970. The court called for a report on the results of the July 29, 1969 plan. Those results were outlined in this court's order of November 7, 1969. In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board. (See defendants'

Supplemental Memorandum dated March 21, 1970

March 13, 1970 response to plaintiffs' requests for admissions.)

The meager results of eight months of planning were further set out in this court's November 7, 1969 order, as follows:

"THE SITUATION TODAY

"The following table illustrates the racial distribution of the present school population:

SCHOOLS READILY IDENTIFIABLE AS WHITE

% WHITE	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
100%	9	6,605	2	6,607
98–99%	9	4,801	49	4,850
95–97%	12	10,836	505	11,341
90–94%	17	14,070	1,243	15,313
86–89%	10	8,700	1,169	9,869
	57	45,012	2,968	47,980

SCHOOLS READILY IDENTIFIABLE AS BLACK

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
100%	11	2	9,216	9,218
98–99%	5	41	3,432	3,473
90–97%	3	121	1,297	1,418
56–89%	6	989	2,252	3,241
	25	1,153	16,197	17,350

SCHOOLS NOT READILY IDENTIFIABLE BY RACE

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
32–49%	10	4,320	2,868	7,188
17–20%	8	5,363	1,230	6,593
22–29%	6	3,980	1,451	5,431
	24	13,663	5,549	19,212
TOTALS:	106	59,828	24,714	84,542

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Some of the data from the table, re-stated, is as follows:

Number of schools	106
Number of white pupils	59,828
Number of black pupils	24,714
Total pupils	84,542
Per cent of white pupils	71%
Per cent of black pupils	29%
Number of "white" schools	57
Number of white pupils in those schools	45,012
Number of "black" schools	25
Number of black pupils in those schools	16,197
Number of schools not readily identifiable by race	24
Number of pupils in those schools	19,212
Number of schools 98-100% black	16
Negro pupils in those schools	12,648
Number of schools 98-100% white	18
White pupils in those schools	11,406

"Of the 24,714 Negroes in the schools, something above 8,500 are attending 'white' schools or schools not readily identifiable by race. *More than 16,000, however, are obviously still in all-black or predominantly black schools.* The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

"The schools are still in major part segregated or 'dual' rather than desegregated or 'unitary.'

"The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts

respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *'de facto,'* and the resulting schools are not 'unitary' or desegregated.

"FREEDOM OF CHOICE

"Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

"As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the 'black' schools.*

"Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in *Green* v. *New Kent County,* 391 U. S. 430 (1968):

"'* * * If there are reasonably available other ways, such for illustration as zoning, promising speedier and

more effective conversion to a unitary, nonracial school ysstem, "freedom of choice" must be held unacceptable.'

"Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason."

(The information on the two previous pages essentially describes the condition in the Charlotte-Mecklenberg schools today.)

Meanwhile, on October 29, 1969, the Supreme Court in *Alexander* v. *Holmes County,* 396 U. S. 19 (1969), ordered thirty Mississippi school districts desegregated immediately and said that the Court of Appeals

"... *should have denied all motions for additional time* because continued operation of *segregated schools* under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. *Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin* v. *School Board,* 377 U.S. 218, 234 (1964); *Green* v. *School Board of New Kent County,* 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)

Because of this action and decision of the Supreme Court, this court did not feel that it had discretion to grant the requested time extension, and it did not do so.

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The board then filed a further desegregation plan on November 17, 1969. The plan was reviewed in the order of December 1, 1969. It was not approved because it rejected the goal of desegregating all the schools or even all the black schools. It proposed to concentrate on methods such as rezoning and freedom of choice and to discard any consideration of pairing, grouping, clustering and transporting or other methods. It proposed to retain numerous all-black schools.

The performance results, set out in previous orders, show that the all-black schools lag far behind white schools or desegregated schools.

The court, in an order dated December 1, 1969, reviewed the recent decisions of courts and laid out specific guidelines for the preparation of a plan which would desegregate the schools. A consultant, Dr. John A. Finger, Jr., was appointed to draft a plan for the desegregation of the schools for use of the court in preparing a final order. The school board was authorized and encouraged to prepare another plan of its own if it wished.

Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans. When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report. The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.

The detailed work on both final plans was done by the school board staff.

The high school plan prepared by the board was recommended by Dr. Finger to the court with one minor change.

This change involved transporting three hundred inner city black children to Independence High School. As to high school students, then, the plan which was ordered by the court to take effect on May 4, 1970 is the school board's plan, with transportation added for three hundred students. The proportion of black children in the high schools varies from 17% to 36% under this plan.

For junior high schools, separate plans were prepared by Dr. Finger and by the board. The board plan would have used zoning to desegregate all the black junior high schools except Piedmont, which it would have left 90% black. The Finger plan employed re-zoning as far as appeared feasible, and then provided for transportation between inner city black zones and outlying white schools to desegregate all the schools, including Piedmont.

The court offered the school board the options of (1) rezoning, or (2) closing Piedmont, or (3) two-way transport of students between Piedmont and other schools, or (4) accepting the Finger plan which desegregates all junior high schools.

The board met and elected to adopt the Finger plan rather than close Piedmont or rearrange their own plan. The Finger plan may require the transportation of more students than the board plan would have required, but it handles the transportation more economically and efficiently, and does the job of desegregating the junior high schools. The percentage of black students in the junior high schools thus constituted will vary from 9% to 33%.

The transportation of junior high students called for in the plan thus adopted by the board pursuant to the court order of February 5, 1970, is essentially the same sort that was adopted without hesitation for 4,245 black children when the seven black inner city schools were closed in 1969.

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For elementary schools the problem is more complicated. Dr. Finger prepared several plans to desegregate the elementary schools and reviewed them with the school staff. It was apparent that even the gerrymandering considered by the board could not desegregate all the elementary schools, and that without transportation there is no way by which in the immediate future the continuing effects of state imposed segregation can be removed. Dr. Finger prepared a plan which proposed re-zoning of as many schools as could be desegregated by re-zoning and which then proposed pairing or grouping of schools. By pairing or grouping, a black school and one or more white schools could be desegregated by having grades one through four, black and white, attend the white schools, and by having grades five and six, black and white, attend the black school, and by providing transportation where needed to accomplish this.

The original Finger plan proposed to group black inner city schools with white schools mostly in the south and southeast perimeter of the district.

The school staff drafted a plan which went as far as they could go with re-zoning and stopped there, leaving half the black elementary children in black schools and half the white elementary children in white schools.

In other words, both the plan eventually proposed by the school board and the plan proposed by Dr. Finger went as far as was thought practical to go with re-zoning. The distinction is that the Finger plan goes ahead and does the job of desegregating the black elementary schools, whereas the board plan stops half way through the job.

In its original form the Finger plan for elementary schools would have required somewhat less transportation than its final form, but would have been more difficult to

put into effect rapidly. The pressure of time imposed by decisions of the Supreme Court and other appellate courts had become such that there was concern lest there be an order from one of the appellate courts for immediate February or March desegregation of the entire system. The school staff therefore, based on Finger's guidelines, prepared a final draft of his plan incorporating pairing, grouping and transporting on a basis which would better allow for early implementation with a minimum of administrative complications, in lieu of his original plan.

The result is that the plan for elementary schools which is known as the "Finger plan" was prepared in detail by the school staff and incorporates the thought and work of the staff on the most efficient method to desegregate the elementary schools.

The time table originally adopted by this court in April of 1969 was one calling for substantial progress in 1969 and complete desegregation by September 1970. However, on October 29, 1969, in *Alexander* v. *Holmes County*, the Supreme Court ordered immediate desegregation of several Deep South school systems and said that the Court of Appeals *"should have denied all motions for additional time."* The Supreme Court adhered to that attitude in all decisions prior to this court's order of February 5, 1970. In *Carter* v. *West Feliciana Parish*, —— U. S. —— (January 14, 1970), they reversed actions of the Fifth Circuit Court of Appeals which had extended time for desegregating hundreds of thousands of Deep South children beyond February 1, 1970. In *Nesbit* v. *Statesville, et al.*, 418 F.2d 1040, the Fourth Circuit Court of Appeals on December 2, 1969, ordered the desegregation by January 1, 1970, of schools in Statesville, Reidsville and Durham, North Carolina. Referring to the *Alexander* v. *Holmes County* decision, the Fourth Circuit said:

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"The clear mandate of the Court is immediacy. *Further delays will not be tolerated in this circuit.*" (Emphasis added.)

In that opinion the Court directed this district court to adopt a plan on December 19, 1969, for the City of Statesville, effective January 1, 1970, which *"must provide for the elimination of the racial characteristics of Morningside School by pairing, zoning or consolidation. . . ."* As to Durham and Halifax, Virginia, courts were ordered to accomplish the necessary purpose by methods including pairing, zoning, reassignment or *"any other method that may be expected to work."*

In *Whittenburg* v. *Greenville County, South Carolina*, —— F.2d —— (January 1970), the Fourth Circuit Court of Appeals, citing *Holmes County* and *Carter* v. *West Feliciana Parish*, said:

"More importantly the Supreme Court said emphatically it meant precisely what it said in *Alexander* that general reorganization of school systems is requisite now, that *the requirement is not restricted to the school districts before the Supreme Court in Alexander, and that Courts of Appeals are not to authorize the postponement of general reorganization until September 1970.*" (Emphasis added.)

As to *Greenville*, in a case involving 58,000 children, the Court said that

"The plan for *Greenville* may be based upon the revised plan submitted by the school board *or upon any other plan that will create a unitary school system.*" (Emphasis added.)

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The Court further said:

> *"The District Court's order shall not be stayed pending any appeal which may be taken to this court,* but, in the event of an appeal, modification of the order may be sought in this court by a motion accompanied by a request for immediate consideration."

Upon rehearing the Fourth Circuit Court of Appeals said on January 26, 1970:

> *"The proper functioning of our judicial system requires that subordinate courts and public officials faithfully execute the orders and directions of the Supreme Court.* Any other course would be fraught with consequences, both disastrous and of great magnitude. *If there are appropritae exceptions,* if the District Courts and the Courts of Appeals are to have some discretion to permit school systems to finish the current 1969-1970 school year under current methods of operation, *the Supreme Court may declare them, but no member of this court can read the opinions in* CARTER *as leaving any room for the exercise by this court in this case of any discretion* in considering a request for postponement of the reassignment of children and teachers until the opening of the next school year.
>
> "For these reasons the petition for rehearing and for a stay of our order must be denied." (Emphasis added.)

The above orders of the Supreme Court and the Fourth Circuit Court of Appeals are the mandates under which this court had to make a decision concerning the plan to be adopted and the time when the plan should be implemented.

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This court conducted hearings on February 2 and February 5, 1970, upon the content and the effective date of the plans for desegregation of the Charlotte-Mecklenburg schools. On February 2nd, Mr. Waggoner, the attorney for the school board, requested the court to adopt a time table under which the elementary schools would be desegregated immediately after Easter (about April 1st) and the junior highs and senior highs would be desegregated in May, about the third week before the end of school. Dr. Self, the school superintendent, requested essentially the same time table.

Dr. Self testified that the job could be done as to all students in the times requested if transportation could be arranged; and he and Mr. Waggoner indicated that by staggering hours of school and by effective use of busses the transportation problem might be solved.

The Supreme Court in *Griffin* v. *Prince Edward County*, 377 U. S. 218 (1964), had held that a school board could and should validly be required by a district court to reopen a whole county school system rather than keep it closed to avoid desegregation, even though levying taxes and borrowing money might be necessary.

In view of the decisions above mentioned and the facts before the court, it appeared to this court that the undoubted difficulties and inconveniences and expense caused by transferring children in mid-year to schools they did not choose would have to be outweighed by the mandates of the Supreme Court and the Fourth Circuit Court of Appeals and that this court had and has a duty to require action now.

On February 5, 1970, therefore, a few days after the second *Greenville* opinion, this court entered its order for desegregation of the schools.

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The time table set in the February 5, 1970 order is precisely the time table suggested by Mr. Waggoner, the attorney for the defendants, in the record of the February 2, 1970 hearing.

Paragraph 16 of the February 5, 1970 order reads:

> "The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*"

The above summary is an outline only of the most significant steps which have brought this case to its present position. Details of all the developments mentioned in this summary appear in previous orders and in the lengthy evidence.

Pursuant to the direction of the Circuit Court, this court has made and is filing contemporaneously herewith supplemental detailed findings of fact bearing on the transportation question.

This the 21st day of March, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Objections and Exceptions to Supplementary Findings of Fact of March 21, 1970, and Motion for Modification and Clarification Thereof

The defendants, the Charlotte-Mecklenburg Board of Education and the individual Board members, object and except to certain supplementary findings of fact entered by the Court on March 21, 1970, and further move for amendment and clarification thereof.

The findings objected and excepted to and for which clarification is needed are set out below with paragraph numbers corresponding to those of the supplementary findings of fact.

1. The Court's order of February 5, 1970, contains a finding that is not supported in the record. The Court finds that the average cost for transportation per year per pupil is approximately $40 per year with local funds and state funds bearing approximately half the cost. This is at variance with the evidence in this matter. This finding should be amended to reflect that the approximate annual cost of transporting a pupil, without regard to depreciation or certain administrative costs, is slightly in excess of $20 per year for which the local school system receives almost total reimbursement from the state which receives a portion of its funds from the taxpayers of Mecklenburg County.

2. This finding relating to transportation to public schools by the state during the 1968-1969 school year reflects that 70.9 per cent elementary and 29.1 per cent high school students account for all transportation. The record is silent with reference to junior high schools and it is submitted that grades 7 and 8 are also included with the elementary students. In other words, the reporting in plain-

tiffs' Exhibit 15 is based on an 8-4 school system whereas the Mecklenburg system is based on a 6-3-3 system. It would therefore appear that of the 55 per cent of the average daily attendance in public schools transported, approximately 50 per cent would represent grades 1 through 6.

The finding "—plus another 5,000, whose fares are paid on the Charlotte City Coach Lines." leaves the impression that the public school system reimburses students riding on buses operated by the Charlotte City Coach Lines. There is no evidence to support this finding and it is not true in fact.

4. The statement "pupils whose fares are paid on Charlotte City Coach Lines, Inc.—5,000" is inaccurate for the reasons stated in Paragraph 2 above.

The line "additional costs (1968-1969) per pupil to state —$19.92" should be changed to "reimbursement to school system (1968-1969) per pupil by state—$19.92."

The line "total annual cost per pupil transported—$39.92" should be changed by amending the figure to approximately $20.00.

6. The Court makes the finding with reference to the 1969-70 budget of the Charlotte-Mecklenburg school system, but fails to further find that all funds are fully committed to fixed line items of the budget and that the school system has no surplus; in fact, the budgetary request was substantially reduced by the County Commissioners. (Report to the Court with reference to compensatory education requests). Furthermore, that upon official request of the Board of Education for additional funds with which to acquire transportation equipment, the Board of County Com-

missioners of Mecklenburg County has advised the Board of Education that no additional funds will be available for the operation of schools during the current fiscal year which expires on June 30, 1970, and therefore, approximately five-sixths of the budget had been expended at this time.

7. This paragraph leaves the implication that state funds could be used for capital outlay. To clear up this implication, the Court should find that state law requires local school boards to pay for additional school buses required and that the state will replace them upon obsolescence some twelve to fourteen years later, and further that the state will pay approximately $20 per year toward transportation of each child eligible under state law.

11. The finding of the Court with reference to transportation of 5,000 children by contract carriers is erroneous. Mr. Morgan in his deposition of February 25, 1970, on page 36, plainly stated that students were being transported on Charlotte City Coach Lines at a reduced fare. Mr. Morgan then inquired of Deaton that in the event a contract could be entered for transportation of students, would Charlotte City Coach Lines transport on the same reduced fare, to which Mr. Deaton replied in the negative. See also affidavit of Robert L. Deaton, Assistant General Manager of Charlotte City Coach Lines, Inc. dated February 10, 1970.

16. This paragraph should be amended to reflect that the state will bear approximately $20 of the annual transportation cost of each student eligible for transportation under state regulations.

Objections and Exceptions to Supplementary Findings of Fact of March 21, 1970, and Motion for Modification and Clarification Thereof

18. The clause "80 per cent of the buses require more than one hour of a one-way trip;" should be amended to 77 per cent.

The clause "75 per cent of the buses make two or more trips each day;" should be amended to reflect 62 per cent of such buses.

The clause "average miles traveled by buses making one round trip per day is 34.5;" should be amended to reflect such average miles of 29.8 per day.

The clause "average bus mileage per day for buses making two trips is 47.99" should be amended to reflect such average bus mileage at 43.5 miles per day.

For clarity, this paragraph should contain an explanation that each morning and afternoon mileage would represent one-half of the round trip mileage.

19. Clarification is requested with respect to the following sentence in Paragraph 19: "The Court plan calls for pick-ups to be made at a few points in each school district, as testified to by Dr. Self, and for non-stop runs to be made between satellite zones and principal zones." It was the understanding of the defendants that the method of pick-up and delivery of students would be left to their discretion. Clarification is requested to determine whether or not this is a specific directive of the Court amending its prior orders.

The Court should further clarify Paragraph 19 to find that in accordance with the affidavit of Mr. Herman Hoose dated February 24, 1970, that school buses will materially add to the congestion and safety of the traveling public on congested city streets.

Objections and Exceptions to Supplementary Findings of Fact of March 21, 1970, and Motion for Modification and Clarification Thereof

20. This finding should be amended to reflect that only 23,000 children are being transported at state expense at the present time. It should further reflect that although the distance of travel is not substantially greater for the children to be transported under the Court-ordered plan, their transportation will occur in congested city traffic which will require substantially longer time than transportation in the outlying rural transportation system now principally employed by the school system.

21. This paragraph should be amended to reflect the true facts as follows: "On July 29, 1969, (pursuant to the Court's April 23, 1969, order that they frame a plan for desegregation and that school buses could be used as needed), the defendants proposed a plan for closing seven inner-city black schools and transferring students from overcrowded schools and assigning them totaling some 4,200 students to outlying schools. Students not wishing to attend the outlying schools were permitted to attend surrounding schools (transcript August 5, 1969, page 21) and Irwin Avenue Elementary (amendment to plan of July 29, 1969). The plan was approved and has resulted in the transportation of approximately 1,300 inner-city students to outlying schools which required the utilization of 30 buses. Transportation time for these 30 buses requires approximately one hour and fifteen minutes one way.

26. Clarification is requested of the sentence "It is the assignment of these children which is the particular subject of the reference in Paragraph 13 of the order to the manner of handling assignments within the school year." Does the

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Court direct the Board to utilize these students in making assignments for the conscious purpose of maintaining each school in a condition of desegregation? Shall such students be assigned to schools only where assignment of their race would improve or maintain a condition of desegregation in the school to which assignment is made?

27. Clarification is requested with reference to the credence and reliability the Court attributes to the efforts of the school staff in developing the plans for desegregation.

28. The term "hearings" should be amplified to reflect that the Court repeatedly stated that evidence regarding transportation costs and other transportation data was irrelevant. (Transcript of hearing, February 5, 1970, pages 112-114, 128-130, 134, 150 and 151.)

29. Clarification is requested with reference to the sentence "All transportation under both the Board and the Court plan is covered by state law." Does the Court by this sentence amend its order of February 5, 1970, as amended by order of March 3, 1970, to the extent that the Board will not be required to furnish transportation to students who have been reassigned and whose attendance is necessary for the desegregation of the school of their attendance where they would not be furnished transportation under the applicable state law at state expense?

30. The sentence, "These one-way transfers, essentially identical in nature to the Board's July 29, 1969 plan, will result in the substantial desegregation of all the junior

high schools, which are left under this plan with black student populations varying from 9 per cent at J. H. Gunn to 33 per cent at Alexander and Randolph." As pointed out above, the Board in its July 29, 1969, plan as explained by Dr. Self (transcript, August 5, 1969, pages 21 and 22) provided one-way transfers only to those students who accepted and did not elect to go to surrounding schools or Irwin Avenue Elementary.

The Court should acknowledge that the four choices given to the School Board were, in reality, not choices at all. The Board had explored choice #1, rezoning, and found that Piedmont Junior High School could not be converted from a predominantly black school by such method; two-way involuntary transportation of pupils between Piedmont and white schools contravenes the Board's idea of what the Constitution requires; alternative #3 relating to closing of Piedmont was rejected by the Board among other reasons for the reason that the junior high schools are substantially overcrowded; the remaining alternative for the adoption of the Finger plan kept open the option of the Board to seek an appellate determination with respect to involuntary transportation of students out of their school district. The Board did not adopt the Finger plan, rather it was imposed by default in not electing alternatives #1, #2 and #3.

32. The sentence "It would leave nine elementary schools 83 per cent to 100 per cent black" should be clarified to indicate that there are white students who will be assigned to each of these nine elementary schools, leaving no all black schools.

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The sentence "In short, it does not tackle the problem of the black elementary schools in Northwest Charlotte" should be clarified to point out that although rezoning accomplished substantial desegregation in some predominantly black elementary schools in northwest Charlotte, nine schools remained which were 83 to 99 per cent black.

The portion of the sentence appearing at the top of page 16, ". . . the transportation problems presented by the zoning portion of the plan can be solved with available resources" is unsupported in the record. The defendants specifically object to the finding of the Court contained in the last paragraph of Paragraph 32 as there are many thousands of students who reside beyond one and one-half miles distant from the school to which they are assigned with respect to rezoned schools. The finding of the Court with reference to transportation requirements of 1,300 elementary students requiring ten buses is wholly unsupported by the record.

33. The sentence "The estimate of Dr. Finger and Dr. Self, the Superintendent, was that this program would require transporting roughly 5,000 white pupils of fifth and sixth grade levels into the inner-city schools" should be amended to reflect that conversely, roughly 5,000 inner-city blacks would be transported to the outlying suburban schools.

The sentence "The Board in its latest estimate puts the total figure at 10,206," should be amended to reflect that this figure represents approximately 5,000 white and 5,000 black students.

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The sentence "Just what is the net additional number of students to be transported who are not already receiving transportation is open to considerable question" is unsupported in the record. Both plaintiffs' evidence through Dr. Finger and the Board through Mr. Morgan and Dr. Self are the only evidence in the record relating to this information and there is no dispute about the approximate number of students to be transported in the paired and grouped schools under the cross-busing feature.

34. Subparagraph A again carries the implication that some 5,000 children daily are provided transportation on City Coach Lines by the school system. This is erroneous as these children provide their own transportation and funds on City Coach Lines which offers a student discount.

Subparagraph B is erroneous to the extent that it assumes a substantial discount of students accepting transportation. The record clearly discloses that the elementary paired schools are so remote that transportation can be expected to be almost 100 per cent. This likewise holds true for transportation of students who live in the satellite districts. This leaves approximately 6,000 students who live in rezoned areas and even if substantially discounted would not materially affect the transportation requirements of the Court order.

Subparagraph C leaves the implication that transportation should be afforded based on average daily attendance. This overlooks the fact that transportation space must be available for all students entitled to transportation as all eligible students may or may not desire transportation on a given day.

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Subparagraph D relating to number of students transported round trip per day per bus is more than 83 students. This overlooks utilization of each bus on 1.8 trips per day, thereby resulting in bus loading of approximately 44 to 46 students per trip. This further overlooks the fact that larger buses may be employed in the county than proposed under the transportation of students in smaller buses in congested traffic.

Subparagraph E relating to the one trip per bus per day under the Board estimate clearly recognizes that buses may be utilized with respect to the paired schools for only one trip unless operational costs are increased 40 to 60 per cent by resorting to adult drivers. The same holds true with reference to satellite schools. With reference to rezoned areas containing some 6,000 students, double utilization of some of the buses would not appreciably affect the Board estimates.

Subparagraph F. The average one-way trips required under the Court plan are estimated at less than seven miles. It is submitted that this is unsupported in the record as the Court completely ignores lines of travel routes upon the streets as they exist and further ignores the actual experience of the school system as reflected on the principals reports with respect to the buses identified in the affidavit of Mr. J. D. Morgan and John W. Harrison, Sr. dated March 21, 1970. The actual time being reflected by the record for transportation is approximately one hour and fifteen minutes.

Subparagraph G relating to staggering of school opening and closing, particularly with reference to zoned and paired schools, would reflect the following type schedule.

The first bus would begin picking children up at 6:45 a.m., deliver the students to the first school at 8:00, then begin picking up students for the second school, deliver them to school at 9:15, then the driver would prior to 2:30 return to the first school to pick up the children to return them home and they would reach home by 3:45. The bus then would go to the second school and pick up children and would get them home at approximately 5:00. Obviously, the school administration would have to go to adult drivers who would increase the operational cost by 40 to 60 per cent (J.D. Morgan depositions and affidavit).

Subparagraph J reflects a misunderstanding with respect to the requirements of North Carolina law for furnishing transportation. Students who reside more than one and one-half miles by the nearest convenient travel route and live in eligible areas are furnished transportation. By running a series of samples, the school administration determined that a radius of one and one-quarter miles would average out to the nearest line of travel being one and one-half miles (J. D. Morgan affidavit and deposition).

Subparagraph K relating to increasing the walking distance would contravene state law with respect to furnishing transportation and would not appreciably reduce the number of students eligible for transportation.

Subparagraph L relating to overload is possible under present transportation circumstances. Only those students near the end of the bus run are permitted to stand and ride a relatively short distance. Standing in congested city traffic over long distances would be most unsafe in operating the transportation system.

Objections and Exceptions to Supplementary Findings of Fact of March 21, 1970, and Motion for Modification and Clarification Thereof

35. Transportation estimates of the Court are unsupported in the record and reflect utilization of discount factors in Paragraph 34 which are not valid. The Board estimates were prepared from demographic charts reflecting the location of students to be transported and the record in this cause contains no such chart for the use of the Court in reaching its estimate. Furthermore, the busing estimates contravene the only reliable evidence in the record, the experience of the transportation system.

36. Finding of the Court that the transportation will be provided under state law is irrelevant as the taxpayers of this county contribute their tax dollars to Raleigh in support of public education. State funds are merely a return of a portion of the funds they have paid to the state for public education.

38. The four parts of the desegregation plan are not separable. There is some overlapping between elementaries which are paired or rezoned which will require assignment of children on one basis or possibly both bases if the total plan is implemented.

The February 5, 1970, order, directs total and complete implementation of all elementary school desegregation as ordered at one time. The Board seeks clarification with respect to whether or not it was contemplated that pairing and grouping should be implemented piecemeal as suggested by this paragraph.

39. This finding is an erroneous characterization of statements of counsel for the defendants and also the

Superintendent. A transcript of the hearing held on February 2, 1970, at page 20 states:

> "Assuming that the Finger plan must be implemented, it is believed that within the next six to eight weeks, *we could begin phasing* in elementary schools into the new zones and perhaps provide *some* of the pairing and groupings that Dr. Finger proposes. We would propose that the junior and senior high schools be deferred until the last three weeks of school and high school senior complete the school year at the school of their present attendance."

(Transcript February 2, 1970, page 21, line 23)

> "One problem that this time table overlooks is that we do not have the means for transporting the students nor is there likelihood that it will be available before the end of this school year."

40. Although the February 5 order provided that "racial balance" was not required, it was the effect of the order. Otherwise, the results of the Court ordered plan would not have achieved approximate "optimal" ratios in all but a handful of schools in the system.

41. The cost estimate of the Court overlooks the undisputed testimony that the bus cost is being increased by approximately $400. Furthermore, the number of buses and the total reached by the Court are based upon an erroneous assumption as indicated above.

The Court fails to address itself to the very substantial problem of obtaining drivers for these buses.

Objections and Exceptions to Supplementary Findings of Fact of March 21, 1970, and Motion for Modification and Clarification Thereof

The cost referred to by the Court as "excess costs" are not out of any desire on the part of the Board of Education to increase costs; rather, they are the direct and proximate result of the order of the Court.

Again, attention is called to the fact that the Court has overstated per capita costs by approximately $20.

The annual transportation cost per student, including amortization, is based upon erroneous premises and overlooks substantial factors, such as the actual number of students to be transported (19,285), the number of buses (422, costing $2,369,000), cost of parking areas ($285,000), cost of operation (annual recurring $587,000), additional personnel expense (annual recurring $166,000), all of which is carefully documented in submission to the Court on March 17, 1970, for a total initial first-year expense of $3,407,000, excluding depreciation or amortization.

42. The Court overlooks testimony of local and state officials, which is uncontradicted that the maximum number of buses to be made available to Mecklenburg County would be 30 buses to replace ancient equipment (12 to 15 years old) now being operated and scheduled for removal from service, plus 40 additional buses which would cost approximately $200,000, which funds the Board of Education does not have and has been informed by the County Commissioners is not forthcoming.

Furthermore, the Court should find that the 375 used buses in storage as indicated in the record are unsafe and inadequate for transporting children served by this system.

The finding should further reflect that although no order has been placed, the Board of Education has been advised

of the number of buses available from the state, namely 75, provided funds are available. Furthermore, under state law, school systems are not permitted to purchase equipment on credit. G.S. 115-52.

The finding with reference to delivery of buses in sixty to ninety days is erroneous. The record clearly discloses that the first chassis would be available in approximately ninety days and a substantial period of time would be required to fabricate and attach the body of the bus to the chassis for ultimate delivery.

It is quite apparent from the foregoing that the Court has given credence to most information submitted by the Board of Education and for some reason rejects transportation information prepared by a staff thoroughly familiar with the transportation requirements of our system, which staff has many years of experience with the special needs of our Charlotte-Mecklenburg school system. It is noteworthy that the Court's estimates closely parallel those of Dr. John Finger who admittedly spent very little time preparing his estimates. (Finger deposition dated March 11, 1970, pages 74 and 75)

WHEREFORE, the original defendants request the Court to amend its supplementary findings of fact dated March 21, 1970, to conform to the record in this matter as more particularly set forth above.

Objections and Exceptions to Supplementary Findings of Fact of March 21, 1970, and Motion for Modification and Clarification Thereof

Respectfully submitted this 25th day of March, 1970.

/s/ William J. Waggoner
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Attorneys for Defendants

Order dated March 25, 1970

In the original order of April 23, 1969, and in the order of August 15, 1969, the projected time for completion of desegregation of the schools was set for September 1970. The court did not then consider and never has at any time considered that wholesale mid-year or mid-term transfers of pupils or teachers were desirable. Furthermore, it was contemplated by all parties that this time table would allow time for orderly development of plans as well as for appeal by all who might wish to appeal.

On October 29, 1960, in *Alexander* v. *Holmes County*, the Supreme Court ordered the immediate desegregation of schools involving many thousands of Mississippi school children. In *Carter* v. *West Feliciana Parish*, —— U. S. —— (January 14, 1970), the Supreme Court reversed the Fifth Circuit Court of Appeals and set a February 1, 1970 deadline to desegregate schools in Gulf Coast states involving many thousands of children. In *Nesbit* v. *Statesville*, 418 F.2d 1040, on December 2, 1969, the Fourth Circuit read *Alexander* as follows:

> "The clear mandate of the Court is immediacy. Further delays will not be tolerated in this circuit."

In *Whittenburg* v. *Greenville County, South Carolina*, —— F.2d ——(January 1970), the Fourth Circuit Court of Appeals read *Alexander* to say that

> ". . . general reorganization of school systems is requisite now, that the requirement is not restricted to the school districts before the Supreme Court in *Alexander*, and that Courts of Appeals are not to authorize the postponement of general reorganization until September 1970.

• • •

Order dated March 25, 1970

> "*The District Court's order shall not be stayed pending any appeal which may be taken to this court,* . . . (Emphasis added.)

On January 26, 1970, on re-hearing, the Fourth Circuit Court of Appeals said:

> "The proper functioning of our judicial system requires that subordinate courts and public officials faithfully execute the orders and directions of the Supreme Court. . . . no member of this court can read the opinions in *Carter* as leaving any room for the exercise by this court in this case of any discretion in considering a request for postponement of the reassignment of children and teachers until the opening of the next school year."

The petition of Greenville for a stay of the order was again denied, and the Greenville schools were desegregated as of February 16, 1970.

The last *Greenville* decision was ten days old at the time of this court's order of February 5, 1970. These were the mandates under which it was ordered that the Charlotte-Mecklenburg schools should be desegregated before the end of the spring term, and that the mandate should not be stayed pending appeal.

Since that time, several suits have been filed in state court seeking to prevent implementation of the February 5, 1970 order, and decision by the three-judge court now considering the constitutionality of the "anti-bussing" law, North Carolina General Statutes, §115-176.1, does not appear likely before April 1, 1970. The appeal of the defendants in the *Swann* case to the Fourth Circuit Court of Appeals is not scheduled to be heard until April 9,

1970, and there is no way to predict when a decision on that appeal will be rendered. There is also no way to predict when a final decision by the Supreme Court will be made on any of these issues, nor what the final decision may be.

Furthermore, notwithstanding the *Holmes County, Greenville, Carter* and *Statesville* decisions, the Fourth Circuit Court of Appeals has now rendered a stay as to certain portions of the February 5, 1970 order, and a petition to vacate that stay has been denied by the Supreme Court. The Fourth Circuit Court of Appeals and the Supreme Court have now demonstrated an interest in the cost and inconvenience and disruption that the order might produce—factors which, though bussing was not specifically mentioned, appear not to have been of particular interest to either the Fourth Circuit Court or the Supreme Court when *Holmes County, Carter, Greenville* and *Statesville* were decided.

The only reason this court entered an order requiring mid-semester transfer of children was its belief that the language of the Supreme Court and the Fourth Circuit above quoted in this order, given its reasonable interpretation, required district courts to direct desegregation before the end of this school year.

The urgency of "desegregation now" has now been in part dispelled by the same courts which ordered it, and the court still holds its original view that major desegregation moves should not take place during school terms nor piecemeal if they can be avoided.

Thereforefore, IT IS ORDERED, that the time table for implementation of this court's order of February 5, 1970 be, and it is hereby modified so that the implementation of the various parts of the desegregation order will not be

required until September 1, 1970, subject, however, to any different decisions that may be rendered by appellate courts and with the proviso that the school board may if they wish proceed upon any earlier dates they may elect with any part or parts of the plan.

This is the 25th day of March, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Further Findings of Fact on Matters Raised by the March 26, 1970, Motions of Defendants dated April 3, 1970

On March 26, 1970, the defendant school board filed "OBJECTIONS AND EXCEPTIONS TO SUPPLEMENTARY FINDINGS OF FACT OF MARCH 21, 1970, AND MOTION FOR MODIFICATION AND CLARIFICATION THEREOF." The court has reviewed the questions raised in that document and makes further findings of fact with reference to certain of its numbered paragraphs as follows:

¶¶ 1, 4, 16, 40. The annual school bus cost per pupil transported, including everything except the original cost of the bus, parking arrangements and certain local administrative costs, for the 1968-69 year, was $19.92. The state reimburses the Charlotte-Mecklenburg school system approximately this $19.92 per pupil. The April 23, 1969, and February 5, 1970, findings of fact estimated the original cost and periodic replacement of the busses themselves at $18 to $20 per pupil per year, which, added to the $19.92, resulted in the estimate of $40 as the total annual per pupil transportation cost. That estimate assumed that the local schools would have to pay for periodic *replacement* of busses as well as for their original purchase. Since it is now clear from the deposition of D. J. Dark that the replacement of worn out or obsolescent busses is *included* in the $19.92 figure, the overall estimate of $40 per pupil per year is far too high. Instead of a *continuing* annual local per pupil cost of $18 or $20 to supply and replace busses, as the court originally understood, the local board will have to bear only administrative and parking expenses, plus the original, one-time purchase of the busses. This cuts the annual cost of bus transportation from nearly $40 per pupil per year as originally estimated, to a figure closer

Further Findings of Fact on Matters Raised by the March 26, 1970, Motions of Defendants dated April 3, 1970

to $20 per pupil per year, and reduces the capital outlay required of the local board to the one-time purchase of about 138 busses at a cost of about $745,200.00, plus whatever may prove to be actually required in the way of additional parking facilities. Paragraphs 1, 4, 16 and 40 of the supplemental findings of fact are amended accordingly.

¶¶ 2, 4, 11, 34. Although the evidence concerning the 5,000 children currently transported by City Coach Lines lacks clarity, the court agrees with the defendant that it should not be inferred that they are the source of payment for this transportation, and the court specifically corrects the previous finding so as to delete any reference to the source of payment for this transportation.

¶ 21. The school board's July 29, 1969 plan (see pages 457-459 of the record on appeal) proposed the transfer and transportation of over 4,200 black children. The court on November 7, 1969, on the basis of the then evidence, found that the number actually transferred was 1,315. The affidavit of J. D. Morgan dated February 13, 1970 (paragraph 4, page 770 of the record on appeal), indicated that the number of these students being transported was 738, requiring 13 busses. The findings of fact proposed by the defendants gave the number as "over 700." The J. D. Morgan affidavit of March 21, 1970, indicated that the number of busses was 30 instead of 13. From this conflicting evidence the court concluded that "several hundred" was as accurate as could be found under the circumstances.

¶ 33. Paragraph 33 is amended as requested by adding after the word "schools" in the eleventh line of the paragraph:

Further Findings of Fact on Matters Raised by the March 26, 1970, Motions of Defendants dated April 3, 1970

"—and about 5,000 black children, grades one through four, to outlying white schools."

¶ 34(f). The average *straight line* mileage between the elementary schools paired or grouped under the "cross-bussing" plan is approximately 5½ miles. The average bus *trip* mileage of about seven miles which was found in paragraph 34(f) was arrived at by the method which J. D. Morgan, the county school bus superintendent, testified he uses for such estimates—taking straight line mileage and adding 25%.

As to the other items in the document, the court has analyzed them carefully and finds that they do not justify any further changes in the facts previously found.

This the 3rd day of April, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Opinions of Court of Appeals dated May 26, 1970

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,517

No. 14,518

JAMES E. SWANN, *et al.*,

Appellees and Cross-Appellants,

—versus—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Appellants and Cross-Appellees.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

(Argued April 9, 1970. Decided May 26, 1970.)

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, and BUTZNER, Circuit Judges, sitting en banc.*

BUTZNER, Circuit Judge:

The Charlotte-Mecklenburg School District appealed from an order of the district court requiring the faculty and student body of every school in the system to be racially mixed. We approve the provisions of the order deal-

* Judge Craven disqualified himself for reasons stated in his separate opinion.

ing with the faculties of all schools[1] and the assignment of pupils to high schools and junior high schools, but we vacate the order and remand the case for further consideration of the assignment of pupils attending elementary schools. We recognize, of course, that a change in the elementary schools may require some modification of the junior and senior high school plans, and our remand is not intended to preclude this.

I.

The Charlotte-Mecklenburg school system serves a population of over 600,000 people in a combined city and county area of 550 square miles. With 84,500 pupils attending 106 schools, it ranks as the nation's 43rd largest school district. In *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 369 F.2d 29 (4th Cir. 1966), we approved a desegregation plan based on geographic zoning with a free transfer provision. However, this plan did not eliminate the dual system of schools. The district court found that during the 1969-70 school year, some 16,000 black pupils, out of a total of 24,700, were attending 25 predominantly black schools, that faculties had not been integrated, and that other administrative practices, including a free transfer plan, tended to perpetuate segregation.

Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was impermissibly operating a dual system of schools in the

[1] The board's plan provides: "The faculties of all schools will be assigned so that the ratio of black teachers to white teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system." We have directed other school boards to desegregate their faculties in this manner. See Nesbit v. Statesville City Bd. of Ed., 418 F.2d 1040, 1042 (4th Cir. 1969); cf., United States v. Montgomery County Bd. of Ed., 395 U.S. 225, 232 (1969).

light of subsequent decisions of the Supreme Court, *Green* v. *School Bd. of New Kent County*, 391 U.S. 430, 435 (1968), *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450 (1968), and *Alexander* v. *Holmes County Bd. of Ed.*, 396 U.S. 19 (1969).

The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state, and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property[2] until *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage. The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accommodate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result. The interplay of these policies on both residential and educational segregation previously has been recognized by this and other courts.[3] The fact that similar forces operate in cities

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[2] E.g., Phillips v. Wearn, 226 N.C. 290, 37 S.E.2d 895 (1946).

[3] E.g., Henry v. Clarksdale Munic. Separate School Dist., 409 F.2d 682, 689 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); United States v. School Dist. 151 of Cook County, 404 F.2d 1125, 1130

throughout the nation under the mask of *de facto* segregation provides no justification for allowing us to ignore the part that government plays in creating segregated neighborhood schools.

The disparity in the number of black and white pupils the Charlotte-Mecklenburg School Board busses to predominantly black and white schools illustrates how coupling residential patterns with the location of schools creates segregated schools. All pupils are eligible to ride school buses if they live farther than 1½ miles from the schools to which they are assigned. Overall statistics show that about one-half of the pupils entitled to transportation ride school buses. Only 541 pupils were bussed in October 1969 to predominantly black schools, which had a total enrollment of over 17,000. In contrast, 8 schools located outside the black residential area have in the aggregate only 96 students living within 1½ miles. These schools have a total enrollment of about 12,184 pupils, of whom 5,349 ride school buses.

II.

The school board on its own initiative, or at the direction of the district court, undertook or proposed a number of reforms in an effort to create a unitary school system. It closed 7 schools and reassigned the pupils primarily to increase racial mixing. It drastically gerrymandered school

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(7th Cir. 1968), *aff'g* 286 F. Supp. 786, 798 (N.D. Ill. 1968); Brewer v. School Bd. of City of Norfolk, 397 F.2d 37, 41 (4th Cir. 1968); Keyes v. School Dist. No. One, Denver, 303 F.Supp. 279 and 289 (D. Colo.), *stay pending appeal granted*, —— F.2d —— (10th Cir.), *stay vacated*, 396 U.S. 1215 (1969); Dowell v. School Bd. of Oklahoma City, 244 F.Supp. 971, 975 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967). See generally Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965). But see, Deal v. Cincinnati Bd. of Ed., 419 F.2d 1387 (6th Cir. 1969).

zones to promote desegregation. It created a single athletic league without distinction between white and black schools or athletes, and at its urging, black and white PTA councils were merged into a single organization. It eliminated a school bus system that operated on a racial basis, and established nondiscriminatory practices in other facets of the school system. It modified its free transfer plan to prevent resegregation, and it provided for integration of the faculty and administrative staff.

The district court, after a painstaking analysis of the board's proposals and the relevant authorities, disapproved the board's final plan, primarily because it left ten schools nearly all black. In reaching this decision, the district court held that the board must integrate the student body of every school to convert from a dual system of schools, which had been established by state action, to a unitary system.

The necessity of dealing with segregation that exists because governmental policies foster segregated neighborhood schools is not confined to the Charlotte-Mecklenburg School District. Similar segregation occurs in many other cities throughout the nation, and constitutional principles dealing with it should be applied nationally. The solution is not free from difficulty. It is now well settled that school boards operating dual systems have an affirmative duty "to convert to a unitary school system in which racial discrimination would be eliminated root and branch." Green v. School Bd. of New Kent County, 391 U. S. 430, 437 (1968). Recently the Supreme Court defined a unitary school system as one "within which no person is to be effectively excluded from any school because of race or color." Alexander v. Holmes County Bd. of Ed., 396 U. S. 19, 20 (1969). This definition, as the Chief Justice noted in Northcross v. Board of Ed. of Memphis, 90 S.Ct. 891, 893

(1970), leaves open practical problems, "including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."

Several of these issues arise in this case. To resolve them, we hold: first, that not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race. Special classes, functions, and programs on an integrated basis should be made available to pupils in the black schools. The board should freely allow majority to minority transfers and provide transportation by bus or common carrier so individual students can leave the black schools. And pupils who are assigned to black schools for a portion of their school careers should be assigned to integrated schools as they progress from one school to another.

We adopted the test of reasonableness—instead of one that calls for absolutes—because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides a test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering, or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettos so large that integra-

tion of every school is an improbable, if not an unattainable, goal. Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary school system. Ellis v. Board of Public Instruc. of Orange County, No. 29124, Feb. 17, 1970 —— F.2d —— (5th Cir.)

III.

The school board's plan proposes that pupils will be assigned to the system's ten high schools according to geographic zones. A typical zone is generally fan shaped and extends from the center of the city to the suburban and rural areas of the county. In this manner the board was able to integrate nine of the high schools with a percentage of black students ranging from 17% to 36%. The projected black attendance at the tenth school, Independence, which has a maximum of 1400 pupils, is 2%.

The court approved the board's high school plan with one modification. It required that an additional 300 pupils should be transported from the black residential area of the city to Independence School.

The school board proposed to rezone the 21 junior high school areas so that black attendance would range from 0% to 90% with only one school in excess of 38%. This school, Piedmont, in the heart of the black residential area, has an enrollment of 840 pupils, 90% of whom are black. The district court disapproved the board's plan because it maintained Piedmont as a predominantly black school. The court gave the board four options to desegregate all the junior high schools: (1) rezoning; (2) two-way transportation of pupils between Piedmont and white schools; (3) closing Piedmont and reassigning its pupils and (4)

adopting a plan proposed by Dr. John A. Finger, Jr., a consultant appointed by the court, which combined zoning with satellite districts. The board, expressing a preference for its own plan, reluctantly adopted the plan proposed by the court's consultant.

Approximately 31,000 white and 13,000 black pupils are enrolled in 76 elementary schools. The board's plan for desegregating these schools is based entirely upon geographic zoning. Its proposal left more than half the black elementary pupils in nine schools that remained 86% to 100% black, and assigned about half of the white elementary pupils to schools that are 86% to 100% white. In place of the board's plan, the court approved a plan based on zoning, pairing, and grouping, devised by Dr. Finger, that resulted in student bodies that ranged from 9% to 38% black.

The court estimated that the overall plan which it approved would require this additional transportation:

	No. of pupils	No. of buses	Operating costs
Senior High	1,500	20	$ 30,000
Junior High	2,500	28	$ 50,000
Elementary	9,300	90	$186,000
TOTAL	13,300	138	$266,000

In addition, the court found that a new bus cost about $5,400, making a total outlay for equipment of $745,200. The total expenditure for the first year would be about $1,011,200.

The school board computed the additional transportation requirements under the court approved plan to be:

	No. of pupils	No. of buses	Operating costs
Senior High	2,497	69	$ 96,000
Junior High	4,359	84	$116,800
Elementary	12,429	269	$374,000
TOTAL	19,285	422	$586,000

In addition to the annual operating cost, the school board projected the following expenditures:

Cost of buses	$2,369,100
Cost of parking areas	284,800
Cost of additional personnel	166,200

Based on these figures, the school board computed the total expenditures for the first year would be $3,406,700 under the court approved plan.[4]

[4] The school board computed transportation requirements under the plan it submitted to be:

	No. of pupils	No. of buses	Operating cost
Senior High	1,202	30	$ 41,700
Junior High	1,388	33	$ 45,900
Elementary	2,345	41	$ 57,000
TOTAL	4,935	104	$144,600

The board estimated that the breakdown of costs for the first year of operation under its plan would be:

Cost of buses		$589,900
Cost of parking areas		56,200
Operating expenses of	$144,600	
Plus depreciation allowance of	31,000	
		175,600
Cost of additional personnel		43,000

The estimated total first-year costs are $864,700.

Both the findings of the district court and the evidence submitted by the board are based on estimates that rest on many variables. Past practice has shown that a large percentage of students eligible for bus transportation prefer to provide their own transportation. However, it is difficult to accurately predict how many eligible students will accept transportation on the new routes and schedules. The number of students that a bus can carry each day depends in part on the number of trips the bus can make. Scheduling two trips for a bus generally reduces costs. But student drivers may not be able to spend the time required for two trips, so that adult drivers will have to be hired at substantially higher salaries. It is difficult to accurately forecast how traffic delays will affect the time needed for each trip, for large numbers of school buses themselves generate traffic problems that only experience can measure.

The board based its projections on each 54-passenger bus carrying about 40 high school pupils or 54 junior high and elementary pupils for one roundtrip a day. Using this formula, it arrived at a need of 422 additional buses for transporting 19,285 additional pupils. This appears to be a less efficient operation than the present system which transports 23,600 pupils with 280 buses, but the board's witnesses suggest that prospects of heavier traffic justify the difference. The board also envisioned parking that seems to be more elaborate than that currently used at some schools.

In making its findings, the district court applied factors derived from present bus operation, such as the annual operating cost per student, the average number of trips each bus makes, the capacity of the buses—including permissible overloads, and the percentage of eligible pupils who use other forms of transportation. The district court also found no need for expensive parking facilities or for

additional personnel whose costs could not be absorbed by the amount allocated for operating expenses. While we recognize that no estimate—whether submitted by the board or made by the court—can be absolutely correct, we accept as not clearly erroneous the findings of the district court.

Opposition to the assignment of pupils under both the board's plan and the plan the court approved centered on bussing, which numbers among its critics both black and white parents. This criticism, however, cannot justify the maintenance of a dual system of schools. Cooper v. Aaron, 358 U.S. 1 (1958). Bussing is neither new nor unusual. It has been used for years to transport pupils to consolidated schools in both racially dual and unitary school systems. Figures compiled by the National Education Association show that nationally the number of pupils bussed increased from 12 million in the 1958-59 school year to 17 million a decade later. In North Carolina 54.9% of all pupils are bussed. There the average daily roundtrip is 24 miles, and the annual cost is over $14,000,000. The Charlotte-Mecklenburg School District presently busses about 23,600 pupils and another 5,000 ride common carriers.

Bussing is a permissible tool for achieving integration, but it is not a panacea. In determining who should be bussed and where they should be bussed, a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources. The board should view bussing for integration in the light that it views bussing for other legitimate improvements, such as school consolidation and the location of new schools. In short, the board should draw on its experience with bussing in general—the benefits and the defects—so that it may intelligently plan the part that bussing will play in a unitary school system.

Viewing the plan the district court approved for junior and senior high schools against these principles and the background of national, state, and local transportation policies, we conclude that it provides a reasonable way of elminating all segregation in these schools. The estimated increase in the number of junior and senior high school students who must be bussed is about 17% of all pupils now being bussed. The additional pupils are in the upper grades and for the most part they will be going to schools already served by busses from other sections of the district. Moreover, the routes they must travel do not vary appreciably in length from the average route of the system's buses. The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools.[5]

We find no merit in other criticism of the plan for junior and senior high schools. The use of satellite school zones[6]

[5] These 300 students will be bussed a straight-line distance of some 10 miles. The actual bus routes will be somewhat longer, depending upon the route chosen. A reasonable estimate of the bus route distance is 12 to 13 miles. The principal's monthly bus reports for Independence High School for the month from January 10, 1970 to February 10, 1970 shows the average one-way length of a bus route at Independence is presently 16.7 miles for the first trip. Buses that make two trips usually have a shorter second trip. The average one-way bus route, including both first and second trips, is 11.7 miles. Thus the distance the 300 pupils will have to be bussed is nearly the same as the average one-way bus route of the students presently attending Independence, and it is substantially shorter than the system's average one-way bus trip of 17 miles.

[6] Satellite school zones are non-contiguous geographical zones. Typically, areas in the black core of the city are coupled—but not geographically linked—with an area in white suburbia.

as a means of achieving desegregation is not improper. District Courts have been directed to shape remedies that are characterized by the "practical flexibility" that is a hallmark of equity. See Brown v. Board of Ed., 349 U.S. 294, 300 (1955). Similarly, the pairing and clustering of schools has been approved. Green v. County School Bd. of New Kent County, 391 U.S. 430, 442 n. 6 (1968); Hall v. St. Helena Parish School Bd., 417 F.2d 801, 809 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969).

The school board also asserts that §§ 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000c(b) and -6(a)(2)] forbid the bussing ordered by the district court.[7] But this argument misreads the legislative history of the statute. Those provisions are not limitations on the power of school boards or courts to remedy unconstitutional segregation. They were designed to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the question of whether school boards were obligated to overcome *de facto* segregation. See generally, United States v. School District 151, 404

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[7] Title 42 U.S.C. § 2000c(b) provides that as used in the subchapter on Public Education of the Civil Rights Act of 1964:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Title 42 § 2000c-6(a)(2) states in part:

> "[P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

F.2d 1125, 1130 (7th Cir. 1968); United States v. Jefferson County Board of Ed., 372 F.2d 836, 880 (5th Cir. 1966), *aff'd on rehearing en banc* 380 F.2d 385 (5th Cir.), *cert. denied, sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Keyes v. School Dist. No. One, Denver, 303 F.Supp. 289, 298 (D. Colo.), *stay pending appeal granted,* —— F.2d —— (10th Cir.); *stay vacated,* 396 U.S. 1215 (1969). Nor does North Carolina's anti-bussing law present an obstacle to the plan, for those provisions of the statute in conflict with the plan have been declared unconstitutional. Swann v. Charlotte-Mecklenburg Bd. of Ed., —— F. Supp. —— (W.D.N.C. 1970).[8]

The district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated. Part of the difficulty concerning the elementary schools results from the board's refusal to accept the district court's suggestion that it consult experts from the Department of Health, Education, and Welfare. The consultants that the board employed were undoubtedly competent, but the board limited their choice of remedies by maintaining each school's grade structure. This, in effect, restricted the means of overcoming segregation to only geographical zoning, and as a further restriction the board insisted on contiguous zones. The board rejected such legitimate techniques as

[8] The unconstitutional provisions are:

"No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing." N.C. Gen. Stat. § 115-176.1 (Supp. 1969).

pairing, grouping, clustering, and satellite zoning. Moreover, the board sought to impose a ratio in each school of not less than 60% white students. While a 60%-40% ratio of white to black pupils might be desirable under some circumstances, rigid adherence to this formula in every school should not be allowed to defeat integration.

On the other hand, the Finger plan, which the district court approved, will require transporting 9,300 pupils in 90 additional buses. The greatest portion of the proposed transportation involves cross-bussing to paired schools—that is, black pupils in grades one through four would be carried to predominantly white schools, and white pupils in the fifth and sixth grades would be transported to the black schools. The average daily roundtrip approximates 15 miles through central city and suburban traffic.

The additional elementary pupils who must be bussed represent an increase of 39% over all pupils presently being bussed, and their transportation will require an increase of about 32% in the present fleet of buses. When the additional bussing for elementary pupils is coupled with the additional requirements for junior and senior high schools, which we have approved, the total percentages of increase are: pupils, 56%, and buses, 49%. The board, we believe, should not be required to undertake such extensive additional bussing to discharge its obligation to create a unitary school system.

IV.

Both parties oppose a remand. Each side is adamant that its position is correct—the school board seeks total approval of its plan and the plaintiffs insist on implementation of the Finger plan. We are favorably impressed, however, by the suggestion of the United States, which at

our invitation filed a brief as amicus curiae, that the school board should consider alternative plans, particularly for the elementary schools. We, therefore, will vacate the judgment of the district court and remand the case for reconsideration of the assignment of pupils in the elementary schools, and for adjustments, if any, that this may require in plans for the junior and senior high schools.

On remand, we suggest that the district court should direct the school board to consult experts from the Office of Education of the Department of Health, Education, and Welfare, and to explore every method of desegregation, including rezoning with or without satellites, pairing, grouping, and school consolidation. Undoubtedly some transportation will be necessary to supplement these techniques. Indeed, the school board's plan proposed transporting 2,300 elementary pupils, and our remand should not be interpreted to prohibit all bussing. Furthermore, in devising a new plan, the board should not perpetuate segregation by rigid adherence to the 60% white-40% black racial ratio it favors.

If, despite all reasonable efforts to integrate every school, some remain segregated because of residential patterns, the school board must take further steps along the lines we previously mentioned, including a majority to minority transfer plan,[9] to assure that no pupil is excluded from an integrated school on the basis of race.

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[9] The board's plan provides:

"Any black student will be permitted to transfer only if the school to which he is originally assigned has more than 30 per cent of his race and if the school he is requesting to attend has less than 30 per cent of his race and has available space. Any white student will be permitted to transfer only if the school to which he is originally assigned has more than 70 per cent of his race and if the school he is requesting to

Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969), and Carter v. West Feliciana School Bd., 396 U.S. 290 (1970), emphasize that school boards must forthwith convert from dual to unitary systems. In Nesbit v. Statesville City Bd. of Ed., 418 F.2d 1040 (4th Cir. 1969), and Whittenberg v. School Dist. of Greenville County, —— F.2d —— (4th Cir. 1970), we reiterated that immediate reform is imperative. We adhere to these principles, and district courts in this circuit should not consider the stays which were allowed because of the exceptional nature of this case to be precedent for departing from the directions stated in *Alexander, Carter, Nesbit,* and *Whittenberg.*

Prompt action is also essential for the solution of the remaining difficulties in this case. The school board should immediately consult with experts from HEW and file its new plan by June 30, 1970. The plaintiffs should file their exceptions, if any, within 7 days, and the district court should promptly conduct all necessary hearings so that the plan may take effect with the opening of school next fall. Since time is pressing, the district court's order approving a new plan shall remain in full force and effect unless it is modified by an order of this court. After a plan has been approved, the district court may hear additional objections or proposed amendments, but the parties shall comply with the approved plan in all respects while the

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attend has less than 70 per cent of his race and has available space."

This clause, which was designed to prevent tipping or resegregation, would be suitable if all schools in the system were integrated. But since the board envisions some elementary schools will remain nearly all black, it unduly restricts the schools to which pupils in these schools can transfer. It should be amended to allow these elementary pupils to transfer to any school in which their race is a minority if space is available.

district court considers the suggested modifications. Cf. Nesbit v. Statesville City Bd. of Ed., 418 F.2d 1040, 1043 (4th Cir. 1969).

Finally, we approve the district court's inclusion of Dr. Finger's consultant fee in the costs taxed against the board. See In the Matter of Peterson, 253 U.S. 300, 312 (1920). We caution, however, that when a court needs an expert, it should avoid appointing a person who has appeared as a witness for one of the parties. But the evidence discloses that Dr. Finger was well qualified, and his dual role did not cause him to be faithless to the trust the court imposed on him. Therefore, the error, if any, in his selection, was harmless.

We find no merit in the other objections raised by the appellants or in the appellees' motion to dismiss the appeal. The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

SOBELOFF, Circuit Judge, with whom WINTER, Circuit Judge, joins, concurring in part and dissenting in part:

Insofar as the court today affirms the District Court's order in respect to the senior and junior high schools, I concur. I dissent from the failure to affirm the portion of the order pertaining to the elementary schools.

I

THE BASIC LAW AND THE PARTICULAR FACTS

All uncertainty about the constitutional mandate of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), was put to rest when in *Green* v. *County School Board of New Kent County* the Supreme Court spelled out a school board's "affirmative duty to take

whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," 391 U.S. 430, 437-438 (1968). "Disestablish[ment of] state-imposed segregation" (at 439) entailed "steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools" (at 442). If there could still be doubts they were answered this past year. In *Alexander* v. *Holmes County Board of Education*, the Court held that "[u]nder explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools," 396 U.S. 19, 20 (1969). The command was once more reaffirmed in *Carter* v. *West Feliciana School Board*, 396 U.S. 290 (1970), requiring "relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system." (Harlan, J., concurring at 292).

We face in this case a school district divided along racial lines. This is not a fortuity. It is the result, as the majority has recognized, of government fostered residential patterns, school planning, placement, and, as the District Court found, gerrymandering. These factors have interacted on each other so that by this date the black and white populations, in school and at home, are virtually entirely separate.

As of November 7, 1969, out of 106 schools in the system, 57 were racially identifiable as white, 25 were racially identifiable as black.[1] Of these, nine were all white schools and eleven all black. Of 24,714 black students in the system, 16,000 were in entirely or predominantly black schools.

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[1] In the entire system, 71% of the pupils are white, 29% of the pupils are black. The District Judge deemed a school having 86% or greater white population identifiable as white, one with 56% or greater black population identifiable as black.

There are 76 elementary schools with over 44,000 pupils. In November 1969, 43 were identifiable as white, 16 as black, with 13 of the latter 98% or more black, and none less than 65%. For the future the Board proposes little improvement. There would still be 25 identifiably white elementary schools and approximately half of the white elementary students would attend schools 86 to 100% white. Nine schools would remain 83 to 100% black, serving 6,432 students or over half the black elementary pupils.

To call either the past or the proposed distribution a "unitary system" would be to embrace an illusion.[2] And the majority does not contend that the system is unitary, for it holds that "the district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated." The Board's duty then is plain and unarguable: to convert to a unitary system. The duty is absolute. It is not to be tempered or watered down. It must be done, and done now.

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[2] In its application to us for a stay pending appeal, counsel for the School Board relied heavily on Northcross v. Board of Education of Memphis, — —F.2d —— (6th Cir. 1970), as a judicial ruling that school assignments based on residence are constitutionally immune. The defendant tendered us a statistical comparison of pupil enrollment by school with pupil population by attendance area for the Memphis school system.

Since then the Supreme Court in *Northcross* has ruled that the Court of Appeals erred insofar as it held that the Memphis board "is not now operating a 'dual school system' * * *." 38 L.W. 4219.

II

The Court-Ordered Plan

A. *The Necessity of the Court-Ordered Plan*

The plan ordered by the District Court works. It does the job of desegregating the schools completely. This "places a heavy burden upon the board to explain its preference for an apparently less effective method." *Green, supra* at 439.

The most significant fact about the District Court's plan is that it—or one like it—is the only one that can work. Obviously, when the black students are all on one side of town, the whites on the other, only transportation will bring them together. The District Judge is quite explicit:

> Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (and continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion.

The point has been perceived by the counsel for the Board, who have candily informed us that if the job must be done then the Finger plan is the way to do it.

The only suggestion that there is a possible alternative middle course came from the United States, participating as amicus curiae. Its brief was prefaced by the following revealing confession:

> We understand that the record in the case is voluminous, and we would note at the outset that we have been unable to analyze the record as a whole. Although we have carefully examined the district court's various opinions and orders, the school board's plan, and those pleadings readily available to us, we feel that we are not conversant with all of the factual considerations which may prove determinative of this appeal. Accordingly, we here attempt, not to deal extensively with factual matters, but rather to set forth some legal considerations which may be helpful to the Court.

Nowithstanding this disclaimer, the Government went on to imply in oral argument—and has apparently impressed on this court—that HEW could do better. No concrete solution is suggested but the Government does advert to the possibility of pairing and grouping of schools. Two points stand out. First, pairing and grouping are precisely what the Finger plan, adopted by the District Court, does. Second, in the circumstances of this case, these methods necessarily entail bussing.

I am not "favorably impressed" by the Government's performance. Its vague and noncommital representations do little but obscure the real issues, introduce uncertainty and fail to meet the "heavy burden" necessary to overturn the District Court's effective plan.[3]

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[3] A federal judge is not required to consult with the Department of Health, Education and Welfare on legal issues. What is the constitutional objective of a plan, and whether a unitary system has been or will be achieved, are questions for the court. HEW's interpretation of the constitutional command does not bind the courts.

> [W]hile administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards

B. *The Feasibility of the Plan*

Of course it goes without saying that school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished. There is no genuine dispute on this point. The plan is simple and quite efficient. A bus will make one pickup in the vicinity of the children's residences, say in the white residential area. It then will make an express trip to the inner-city school. Because of the non-stop feature, time can be considerably shortened and a bus could make a return trip to pick up black students in the inner city and to convey them to the outlying school. There is no evidence of insurmountable traffic problems due to the increased

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controlling the actions of states and their subdivisions is peculiarly a judicial function.

Bowman v. County School Board of Charles City County, 382 F.2d 326 (1967).

Although the definition of goals is for the court, HEW may be able to provide technical assistance in overcoming the logistical impediments to the desegregation of a school system. Thus it was quite understandable that at the outset of this case the District Court invited the Board to consult with HEW. Desegregation of this large educational system was likely to be a complex and administratively difficult task, in which the expertise of the federal agency might be of help. However, after a substantial period of time and the beginning of a new school year, it became clear that the Board had no intention of devising a meaningful plan, much less seeking advice on how to do so. At that point (December 1969) with the need for speed in mind, the Judge appointed an expert already familiar with the school system to work with the school staff in developing a plan.

Whether to utilize the assistance of HEW is ordinarily up to the district judge. Consultation in formulating the mechanics of a plan is not obligatory. The method used by the Judge in this case was certainly sufficient. Moreover, now that a plan has been created and it appears that there are no real alternatives, a remand for HEW's advice seems an exercise in futility.

bussing.[4] Indeed, straight line bussing promises to be quicker. The present average one-way trip is over 15 miles and takes one hour and fourteen minutes; under the plan the average one-way trip for elementary students will be less than seven miles and 35 minutes. The cost of all of the additional bussing will be less than one week's operating budget.[5]

C. *The Standard of Review*

In *Brown* II, the Supreme Court charged the district courts with the enforcement of the dictates of *Brown* I.

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[4] The only indication I have encountered that a serious traffic problem will be occasioned by the additional bussing is found in an affidavit by the City Director of Traffic Engineering. His statement is based on the exaggerated bus estimate prepared by the Board and rejected by the District Court. See note 5, *infra*. Moreover, he appears to have relied to a large extent on the erroneous assumption that under the plan busses would pick up and discharge passengers along busy thoroughfares, thus causing "stop-and-go" traffic of slow moving school busses in congested traffic."

A later affidavit of the same official, filed at the request of the District Court, affords more substantial data. It reveals that the total estimated number of automobile trips per day in Charlotte and Mecklenburg County (not including internal truck trips) is 869,604. That the 138 additional busses would gravely aggravate the congestion is dubious, to say the least.

[5] The District Judge rejected the Board's inflated claims, and found that altogether the Finger plan would bus 13,300 new students in 138 additional busses. The Board had estimated that 19,285 additional pupils would have to be transported, requiring 422 additional busses. This estimate is disproportionate on its face, for presently 23,600 pupils are transported in 280 busses. As indicated above, the direct bus routes envisioned by the Finger plan should accomplish increased, not diminished, efficiency. The court below, after close analysis, discounted the Board's estimate for other reasons as well, including the "very short measurements" used by the Board in determining who would have to be bussed, the failure of the Board to account for round-trips, staggering of opening and closing hours, and overloads.

The lower courts were to have "a practical flexibility in shaping • • • remedies." 349 U.S. at 300. Thus, in subsuming these cases under traditional equity principles, the Supreme Court brought the desegregation decree within the rule that to be overturned it "must [be] demonstrate[d] that there was no reasonable basis for the District Judge's decision." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 634 (1953). This court has paid homage to this maxim of appellate review when, in the past, a district Judge has ordered less than comprehensive relief. *Bradley* v. *School Board of the City of Richmond*, 345 F.2d 310, 320 (1965), *rev'd*, 382 U.S. 103 (1965). What is called for here is similar deference to an order that would finally inter the dual system and not preserve a nettlesome residue. As the Supreme Court made clear in *Green, supra*, those who would challenge an effective course of action bear a "heavy burden." The Finger plan is a remarkably economical scheme when viewed in the light of what it accomplishes. There has been no showing that it can be improved or replaced by better or more palatable means. It should, then, be sustained.

III

Objections Raised Against the Court-Ordered Plan

A. *The "Illegal" Objective of the Plan*

My Brother Bryan expresses concern about the plan, regardless of cost, because it undertakes, in his view, an illegal objective: "achieving racial balance." Whatever might be said for this view abstractly or in another context, it is not pertinent here. We are confronted in this case with no question of bussing for mere balance unrelated to

a mandatory constitutional goal. What the District Court has ordered is compliance with the constitutional imperative to disestablish the existing segregation. Unless we are to palter with words, desegregation necessarily entails integration, that is to say integration in some substantial degree. The dictum to the contrary in *Briggs* v. *Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955), was rejected by necessary implication by the Supreme Court in *Green, supra,* and explicitly by this court in *Walker* v. *County School Board of Brunswick Co.*, 413 F.2d 53, 54 n.2 (4th Cir. 1969).

As my Brother Winter shows, there is no more suitable way of achieving this task than by setting, at least initially, a ratio roughly approximating that of the racial population in the school system. The District Judge adopted this *ad hoc* measurement as a starting guide, expressed a willingness to accept a degree of modification,[6] and departed from it where circumstances required.

B. *The "Unreasonableness" of the Plan*

The majority does not quarrel with the plan's objective, nor, accepting the findings of the District Court, does it really dispute that the plan can be achieved. Rather, we are told, the plan is an unreasonable burden.

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[6] The District Judge wrote in his December 1 order that

> Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

This notion must be emphatically rejected. At bottom it is no more than an abstract, unexplicated judgment—a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price. This is a conclusion neither we nor school boards are permitted to make.

In making policy decisions that are not constitutionally dictated, state authorities are free to decide in their discretion that a proposed measure is worth the cost involved or that the cost is unreasonable, and accordingly they may adopt or reject the proposal. This is not such a case. Vindication of the plaintiffs' constitutional right does not rest in the school board's discretion, as the Supreme Court authoritatively decided sixteen years ago and has repeated with increasing emphasis. It is not for the Board or this court to say that the cost of compliance with *Brown* is "unreasonable."

That a subjective assessment is the operational part of the new "reasonableness" doctrine is highlighted by a study of the factors the majority bids school boards take into account in making bussing determinations. "[A] school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources." But, as we have seen, distance and time will be comparatively short, the effect on traffic is undemonstrated, the incremental cost is marginal. As far as age is concerned, it has never prevented the bussing of pupils in Charlotte-Mecklenburg, or in North Carolina generally, where 70.9% of all bussed students are elementary pupils.

If the transportation of elementary pupils were a novelty sought to be introduced by the District Court, I could understand my brethren's reluctance. But, as is conceded,

bussing of children of elementary school age is an established tradition. Bussing has long been used to perpetuate dual systems.[7] More importantly, bussing is a recognized educational tool in Charlotte-Mecklenburg and North Carolina. And as the National Education Association has admirably demonstrated in its brief, bussing has played a crucial role in the evolution from the one-room schoolhouse in this nation. Since the majority accepts the legitimacy of bussing, today's decision totally baffles me.

In the final analysis, the elementary pupil phase of the Finger plan is disapproved because the percentage increase in bussing is somehow determined to be too onerous.[8] Why this is so we are not told. The Board plan itself would bus 5,000 additional pupils. The fact remains that in North Carolina 55% of all pupils are now being bussed. Under the Finger plan approximately 47% of the Charlotte-Mecklenburg student population would be bussed. This is well within the existing percentage throughout the state.

The majority's proposal is inherently ambiguous. The

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[7] For some extreme examples, see: School Board of Warren County v. Kelly, 259 F.2d 497 (4th Cir. 1958); Corbin v. County School Bd. of Pulaski County, 117 F.2d 924 (4th Cir. 1949); Griffith v. Bd. of Educ. of Yancey County, 186 F. Supp. 511 (W.D.N.C. 1960); Gains v. County School Bd. of Grayson County, 186 F. Supp. 753 (W.D.a. 1960), *stay denied*, 282 F.2d 343 (4th Cir. 1960). *See also*, Chambers v. Iredell Co., —— F.2d —— (4th Cir. 1970) (dissenting opinion).

[8] The majority calculates the elementary school portion of the plan to mean a 39% increase in bussed pupils, 32% increase in busses; the whole package, it is said, would require a 56% pupil increase and 49% bus increase.

These figures are accurate but do not tell the whole story. If one includes within the number of students presently being transported those that are bussed on commercial lines (5000), the increase in pupils transported would not appear to be as large. Thus the plan for elementary schools would entail a 33% bussed pupil increment, the whole Finger plan, 47%.

court-ordered plan is said to be unreasonable. Yet the School Board's own plan has also been disapproved. Does the decision—that the Finger plan is unreasonable—depend on the premise that an intermediate course is available? Would the amount of segregation retained in the School Board's plan be avowedly sanctioned if it were recognized that nothing short of the steps delineated in the District Court's plan will suffice to eliminate it? Since there is no practicable alternative, must we assume that the majority is willing to tolerate the deficiencies in the Board plan?

These questions remain unresolved and thus the ultimate meaning of the "reasonableness" doctrine is undefined. Suffice it to say that this case is not an appropriate one in which to grapple with the theoretical issue whether the law can endure a slight but irreducible remnant of segregated schools. This record presents no such problem. The remnant of racially identifiable elementary schools, to which the District Court addressed itself, encompasses over half the elementary population. This large fraction cannot be called slight; nor, as the Finger plan demonstrates, is it irreducible.

I am even more convinced of the unwisdom of reaching out to fashion a new "rule of reason," when this record is far from requiring it, because of the serious consequences it would portend for the general course of school desegregation. Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and

deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome.

Moreover, the opinion catapults us back to the time, thought passed, when it was the fashion to contend that the inquiry was not how much progress had been made but the presence or absence of good faith on the part of the board. Whether an "intractable remnant of segregation" can be allowed to persist, apparently will now depend in large measure on a slippery test: an estimate of whether the Board has made "every reasonable effort to integrate the pupils under its control."[9]

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[9] Both in its characterization of the facts and in its treatment of the case the majority implies that the actions of this Board have been exemplary. I feel constrained to register my dissent from this view although on no account do I subscribe to the proposition that the disposition of the case depends on this issue.

On April 23, 1969 the District Judge declared the Charlotte-Mecklenburg School District illegally segregated. He found it unnecessary at that time to decide whether the Board had deliberately gerrymandered to perpetuate the dual system since he believed that the court order to follow would promote substantial changes. The Board was given until May 15 to devise a plan eliminating faculty and student segregation.

A majority of the Board voted not to take an immediate appeal and the school superintendent was directed to prepare a plan. His mandate was hazy. According to the court below—

> No express guidelines were given the superintendent. However, the views of many members expressed at the meeting were so opposed to serious and substantial desegregation that everyone including the superintendent could reasonably have concluded, as the court does, that a "minimal" plan was what was called for, and that the "plan" was essentially a prelude to anticipated disapproval and appeal.
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> * * * * *
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> The staff were never directed to do any serious work on redrawing of school zone lines, pairing of schools, combining zones, grouping of schools, conferences with the Department of Health, Education and Welfare, nor any of the other

The Supreme Court having barred further delay by its insistent emphasis on an immediate remedy, we should not lend ourselves to the creation of a new loophole by attenuating the substance of desegregation.

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possible methods of making real progress towards desegregation.

The superintendent's plan was submitted to the Board on May 8. It was quite modest in its undertaking. Nevertheless, the Board "struck out virtually all the effective provisions of the superintendent's plan." The plan ultimately filed by the Board on May 28 was "the plan previously found racially discriminatory with the addition of one element—the provision of transportation for [majority to minority transfers.]" The Board also added a rule making a student who transfers to a new high school ineligible for athletics for a year. As the District Judge found,

> [t]he effect of the athletic penalty is obvious—it discriminates against black students who may want to transfer and take part in sports, and is no penalty on white students who show no desire for such transfers.

In the meantime the Board for the first time refused to accept a recommendation of the superintendent for the promotion of a teacher to principal. The reason avowed was that the teacher, who was black and a plaintiff in the suit, had publicly expressed his agreement with the District Court order. The job was withheld until the prospective appointee signed a "loyalty oath."

The District Judge held a hearing on June 16 and ruled on June 20. He declined to find the Board in contempt but did note that "[t]he board does not admit nor claim that it has any positive duty to promote desegregation." The Judge also returned to the issue of gerrymandering and found "a long standing policy of control over the makeup of school population which scarcely fits any true 'neighborhood school philosophy.'"

On July 29, the Board returned with a new plan. The District Judge was pleased to learn that "the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members 'at the earliest possible date.'" In view of this declaration and of the late date, the court "reluctantly" approved for one year only a plan whereby seven all black inner-city schools would be closed and a total of 4245 black children bussed to outlying white schools.

Opinions of Court of Appeals dated May 26, 1970

Albert V. Bryan, Circuit Judge, dissenting in part:

The Court commands the Charlotte-Mecklenburg Board of Education to provide bussing of pupils to its public schools for "achieving *integration*". (Accent added.) "[A]chieving *integration*" is the phraseology used, but actually, achieving racial *balance* is the objective. Bussing

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The Board was directed to file a plan for complete dsegregation in November.

By November, the District Judge was able to survey the results achieved under the plan adopted for the year. He found that "only 1315 instead of the promised 4245 black pupils" had been transferred. (Later information revealed that the number was only 767.) Furthermore, he found that

> The Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they intend not to do it effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance.

On November 17, the Board filed a plan. It "discarded further consideration of pairing, grouping, clustering and transporting." Ostensibly "to avoid 'tipping,'" the plan provided that white students would not be assigned schools where they would find themselves with less than 60% whites. This was, as the District Court found, a one-way street in view of the fact that the plan contemplated no effort to desegregate schools with greater than 40% blacks. The plan also dropped the earlier provision of transportation for students transferring out of segregated situations. Thus the Board nullified the one improvement it had made in its May 8 plan. It also left those black students who had transferred to outlying schools pursuant to the July 29 plan without transportation. Understandably, the court labeled this "re-segregation."

In the face of this total lack of cooperation on the part of the Board, the court was compelled to appoint an expert to devise a plan for desegregation. The Finger plan was the result.

It appears from the record that on most issues the Board was sharply divided. Of course I mean to cast no aspersions on those members—and there were some—who urged the Board forthrightly to shoulder its duty. But the above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making "every reasonable effort" to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn.

to prevent racial imbalance is not as yet a Constitutional obligation. Therefore, no matter the prior or present utilization of bussing for this or other reasons, and regardless of cost considerations or duplication of the bus routes, I think the injunction cannot stand.

Without Constitutional origin, no power exists in the Federal courts to order the Board to do or not to do anything. I read no authority in the Constitution, or in the implications of Brown v. Board of Education, 347 US 483 (1954), and its derivatives, requiring the authorities to endeavor to apportion the school bodies in the racial ratio of the whole school system.

The majority opinion presupposes this racial balance, and also bussing to achieve it, as Constitutional imperatives, but the Chief Justice of the United States has recently suggested inquiry on whether "any particular racial balance must be achieved in the schools; . . . [and] to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." See his memorandum appended to Northcross v. Board of Education of the Memphis, Tennessee, City Schools, —— US ——, 38 USLW 4219, 4220 (March 9, 1970).*

Even construed as only incidental to the 1964 Civil Rights Act, this legislation in 42 United States Code § 2000c-6 is necessarily revealing of Congress' hostile attitude toward the concept of achieving racial balance by bussing. It unequivocally decried in this enactment "any order [of a Federal court] seeking to achieve a racial balance in any

* On remand the District Court in *Northcross* has held there was no Constitutional obligation to transport pupils to overcome a racial imbalance. Northcross v. Board of Education of the Memphis City Schools, —— FS —— (W.D.Tenn., May 1, 1970) (per McRae, J.). In the same Circuit, see, too, Deal v. Cincinnati Board of Education, 419 F2d 1387 (6 Cir. 1969).

school by requiring the transportation of pupils or students from one school to another . . . to achieve such racial balance . . . ."

I would not, as the majority does, lay upon Charlotte-Mecklenburg this so doubtfully Constitutional ukase.

WINTER, Circuit Judge, concurring in part and dissenting in part:

I would affirm the order of the district court in its entirety.*

In a school district in which freedom of choice has patently failed to overcome past state policy of segregation and to achieve a unitary system, the district court found the reasons for failure. They included resort to a desegregation plan based on geographical zoning with a free transfer provision, rather than a more positive method of achieving the constitutional objective, the failure to integrate faculties, the existence of segregated racial patterns partially as a result of federal, state and local governmental action and the use of a neighborhood concept for the location of schools superimposed upon a segregated residential pattern. Correctly the majority accepts these findings under established principles of appellate review. To illustrate how government-encouraged residential segregation, coupled with the discriminatory location and design of schools, resulted in a dual system, the majority demonstrates that in this locality busing has been employed as a tool to perpetuate segregated schools.

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* Certainly, if the district court's order with respect to high schools and junior high schools is affirmed, the district court should not be invited to reconsider its order with respect to them. The jurisdiction of the district court is continuing and it may always modify its previous orders with respect to any school upon application and for good cause shown.

In complete compliance with *Carter* v. *West Feliciana School Board*, —— U. S. —— (1970); *Alexander* v. *Holmes County Bd. of Ed.*, —— U. S. —— (1969); *Green* v. *School Bd. of New Kent County*, 391 U. S. 430 (1968), and *Monroe* v. *Bd. of Comm'rs.*, 391 U. S. 450 (1968), the majority concludes that the existing high school and junior high school system must be dismantled and that the constitutional mandate can be met by the use of geographical assignment, including satellite districts and busing.

The majority thus holds that the Constitution requires that this dual system be dismantled. It indicates its recognition of the need to overcome the discriminatory educational effect of such factors as residential segregation. It also approves the use of zones, satellite districts and resultant busing for the achievement of a unitary system at the high school and junior high school levels. Nevertheless, the majority disapproves a similar plan for the desegregation of the elementary schools on the ground that the busing involved is too onerous. I believe that this ground is insubstantial and untenable.

At the outset, it is well to remember the seminal declaration in *Brown* v. *Board of Education (Brown II)*, 349 U. S. 294, 300 (1955), that in cases of this nature trial courts are to "be guided by equitable principles" in "fashioning and effectuating decrees." Since *Brown II* the course of decision has not departed from the underlying premise that this is an equitable proceeding, and that the district court is invested with broad discretion to frame a remedy for the wrongful acts which the majority agrees have been committed. In *Green* v. *School Board of New Kent County*, 391 U. S. at 438, the Supreme Court held that the district courts not only have the "power" but the "duty to render a decree which will, so far as possible, eliminate the dis-

criminatory effects of the past, as well as bar like discrimination in the future." District courts were directed to "retain jurisdiction until it is clear that disestablishment has been achieved." *Raney* v. *Board of Education*, 391 U. S. 443, 449 (1968). Where it is necessary district courts may even require local authorities "to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Griffin* v. *School Board*, 377 U. S. 218, 233 (1964). Thus, the Supreme Court has made it abundantly clear that the district courts have the power, and the duty as well, to fashion equitable remedies designed to extirpate racial segregation in the public schools. And in fashioning equitable relief, the decree of a district court must be sustained unless it constitutes a clear abuse of discretion. *United States* v. *W. T. Grant Co.*, 345 U. S. 619 (1953).

Busing is among the panoply of devices which a court of equity may employ in fashioning an equitable remedy in a case of this type. The district court's order required that "transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about reduction of segregation, and who lives farther from the school to which they are assigned than the Board determines to be walking distance." It found as a fact, and I accept its finding, that "there is no way" to desegregate the Charlotte schools in the heart of the black community without providing such transportation.

The district court's order is neither a substantial advance nor extension of present policy, nor on this record does it constitute an abuse of discretion. This school system, like many others, is now actively engaged in the business of transporting students to school. Indeed, busing is a widespread practice in the United States. U. S. Commission on

Civil Rights, *Racial Isolation in the Public Schools* 180 (1967). Between 1954 and 1967 the number of pupils using school transportation has increased from 9,509,699 to 17,271,718. National Education Association, National Commission on Safety Education, *1967-68 Statistics on Pupil Transportation* 3.

Given its widespread adoption in American education, it is not surprising that busing has been held an acceptable tool for dismantling a dual school system. In *United States* v. *Jefferson County Board of Education,* 380 F.2d 385, 392 (5 Cir.) (en banc), *cert. den.* sub. nom. *Caddo Parrish School Bd.* v. *United States,* 389 U. S. 840 (1967), the court ordered that bus service which was "generally provided" must be routed so as to transport every student "to the school to which he is assigned" provided that the school "is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules." Similarly, in *United States* v. *School Dist. 151,* 286 F. S. 786, 799 (N.D. Ill. 1968), *aff'd.,* 404 F.2d 1125 (7 Cir. 1968), the court said that remedying the effects of past discrimination required giving consideration to "racial factors" in such matters as "assigning students" and providing transportation of pupils. In addition, the Eighth Circuit in *Kemp* v. *Beasley,* —— F.2d —— (8 Cir. 1970), recognized that busing is "one possible tool in the implementation of unitary schools." And, finally, *Griffin* v. *School Board, supra,* makes it clear that the added cost of necessary transportation does not render a plan objectionable.

I turn, then, to the extent and effect of busing of elementary school students as ordered by the district court.

Presently, 23,600 students—21% of the total school population—are bused, excluding some 5,000 pupils who travel to and from school by public transportation. The school

board operates 280 buses. The average cost of busing students is $39.92 per student, of which one-half is borne by the state and one-half by the board. Thus, the average annual cost to the board is about $20.00 per student. The total annual cost to the board for busing is approximately $500,000.00 out of a total operating budget of $51,000,000.00. The cost of busing is thus less than 1% of the total operating budget and an even smaller percentage of the $57,700,000.00 which this school district expends on the aggregate of operations, capital outlay and debt service and this cost also represents less than 2% of the local funds which together with state and federal money constitute the revenue available annually to the school board.

The total number of elementary school pupils presently bused does not appear, but under the district court's order an additional 9,300 elementary school pupils would be bused. The additional operating cost of busing them would not exceed $186,000.00 per year. They would require not more than 90 additional buses, and the buses would require an additional capital outlay of $486,000.00. The increased operating cost of the additional elementary school pupils required to be bused amounts to less than 1% of the board's school budget, and the one-time capital outlays for additional buses amounts to less than 1% of the board's total budget. The combined operational and capital cost represents less than 1.2% of the board's total budget. I am, therefore, unable to see how the majority could consider the additional cost unbearable.

Perhaps more importantly, the tender years of elementary school students requires a consideration of the impact of the district court's order on the average student. While this board transports 21% of the total school population, it is providing transportation to a far lower per-

centage of pupils than the average North Carolina school board. In North Carolina 54.9% of the average daily attendance in the public schools was transported by bus during the 1968-69 school year.

The average distance traveled by elementary school pupils presently bused does not appear, but the district court found overall with respect to the children required to be bused by its order that they "will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported * * *." While the district court did not make separate findings with regard to the average length of travel for the additional elementary school pupils required to be bused, it did find that the average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. In contrast, the court found that under its plan the average one-way trip for elementary school students would be less than 7 miles and would require not over thirty-five minutes.

When I consider that busing has been widely used in this system to perpetuate segregation, that some busing was proposed even under the unacceptable board plans, that the cost of additional busing to the system as required by the court's order, both in absolute terms and in relation to its total expenditures is so minimal, and that the impact on the elementary school pupils is so slight, I discern no basis for concluding that the district court abused its discretion with respect to the elementary school.

Two other aspects of the majority's opinion require my comment.

First, the majority attempts to answer the query of the Chief Justice in his separate opinion in *Northcross* v. *Board*

of Ed. of Memphis, —— U. S. —— (1970), as to whether "any particular racial balance must be achieved in the schools" by holding "that not every school in a unitary school system need be integrated * * *." To me, the holding is premature and unwise. There is not in this case either the intractable problem of a vast urban ghetto in a large city or any substantial basis on which it may be said that the cost or the impact on the system or on the pupils of dismantling the dual system is insupportable.

The district court wisely attempted to remedy the present dual system by requiring that pupil assignment be based "as nearly as practicable" on the racial composition of the school system, 71% white and 29% black. The plan ordered fell short of complete realization of this remedial goal. While individual schools will vary in racial composition from 3% to 41% black, most schools will be clustered around the entire system's overall racial ratio. It would seem to follow from *United States* v. *Montgomery Board of Education*, 395 U. S. 225, 232 (1968), that the district court's utilization of racial ratios to dismantle this dual system and remedy the effects of segregation was at least well within the range of its discretion. There the Supreme Court approved as a requirement of faculty integration that "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system." It did so recognizing that it had previously said in *New Kent County*, 391 U. S. at 439, "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." If in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason

why the same should not be true to achieve pupil integration, especially where, as here, some wide deviations from the overall ratio have been permitted to accommodate circumstances with respect to particular schools.

In addition to *Montgomery*, the same conclusion can be deduced from the mandate of *West Feliciana* and *Holmes County* to dismantle immediately a dual system. Schools cease to be black or white when each reflects the overall pupil racial balance of the entire system. What imbalances may be justified after a unitary system has once been established, and what departures from an overall pupil racial balance may be permitted to accommodate special circumstances in the establishment of a unitary system, should be developed on a case-by-case basis and the facts of record which each case presents.

The other aspect of the majority's opinion which troubles me greatly is its establishment of the test of reasonableness. My objections to this test do not spring from any desire to impose *un*reasonable, irrational or onerous solutions on school systems; I, too, seek "reasonable" means with which to achieve the constitutionally required objective of a unitary system.

My objections are two-fold.

First, this is an inappropriate case in which to establish the test. On this record it cannot be said that the board acted reasonably or that there is any viable solution to the dismantling of the dual system other than the one fashioned by the district court. Neither the board nor HEW has suggested one. So that, again, I think the majority is premature in its pronouncement and I would find no occasion to discuss reasonableness when there is no choice of remedies.

Second, the majority sets forth no standards by which to judge reasonableness or unreasonableness. The majority

approves the district court's plan as to high schools and junior high schools, yet disapproves as to elementary schools. The only differences are increased busing with attendant increased cost, time and distance. The majority subjectively concludes that these costs are too great to permit the enforcement of the constitutional right to a unitary system. I would find them neither prohibitive nor relatively disproportionate. But, with the absence of standards, how are the school boards or courts to know what plans are reasonable? The conscientious board cannot determine when it is in compliance. The dilatory board receives an open invitation to further litigation and delay.

Finally, I call attention to the fact that "reasonableness" has more than faint resemblance to the good faith test of *Brown II*. The 13 years between *Brown II* and *New Kent County* amply demonstrate that this test did not work. Ultimately it was required to be rejected and to have substituted for it the absolute of "now" and "at once." The majority ignores this lesson of history. If a constitutional right exists, it should be enforced. On this record the constitutional rights of elementary school pupils should be enforced in the manner prescribed by the district court, because it is clear that the district court did not abuse its discretion.

Judge Sobeloff authorizes me to say that he joins in these views.

Judgment of Court of Appeals dated May 26, 1970

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED that the judgment of the District Court appealed from, in this case, be, and the same is hereby, vacated; and the case is remanded to the United States District Court for the Western District of North Carolina, at Charlotte, for further proceedings.

Judge Bryan joins Haynsworth, C.J. and Boreman, J. in voting to vacate the judgment of the District Court, and to remand the case in accordance with the opinion written by Butzner, J. He does so for the sake of creating a clear majority for the decision to remand. It is his hope that upon reexamination the District Court will find it unnecessary to contravene the principle stated in Judge Bryan's dissent herein, to which he still adheres. Screws v. United States, 325 US 91, 135 (1945).

By direction of the Court.

SAMUEL W. PHILLIPS
Clerk

Order of Three-Judge District Court dated April 29, 1970

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 1974

JAMES E. SWANN, *et al.*,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM MCNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. MCLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Order of Three-Judge District Court dated April 29, 1970

Civil No. 2631

MRS. ROBERT LEE MOORE, *et al.*,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the antibussing law, on this suit brought to desegregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to de-

segregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al.* v. *William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education,* in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the constitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al.* v. *Charlotte-*

[1] On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring bussing of students pending appeal to the higher court.

[2] There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 21, 1970.

Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools, was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested, and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidtaed for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.
>
> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a

specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g.*, *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968). In

support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23, 1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegregation tools except non-gerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and fredom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation

to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute only apply to prevent a school board from doing more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegregate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a)(2) (1964)[3]

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[3] § 2000c:

As used in this subchapter—

* * * * *

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown* v. *Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), and (3) that N. C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United States* v. *School Dist. 151 of Cook Co.*, 404 F.2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can be interpreted so as not

to conflict with the federal Constitution. But to read the statute as innocuously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegregate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner* v. *City of Memphis*, 369 U.S. 350 (1962); *Bailey* v. *Patterson*, 369 U.S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green* v. *County School Bd. of New Kent Co.*, 391 U.S. 430 (1968), the Supreme Court declared that a school board must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the circumstances existing in New Kent County, it appeared that the school board could achieve a unitary system either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U.S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross* v. *Bd. of Ed. of the Memphis City Schools*, —— U.S. ——, 38 L.W. 4219 (1970); *Alexander* v. *Holmes*

Co. Bd. of Ed., 396 U.S. 19 (1969). Plans that do not produce a unitary system are unacceptable.[4]

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's perfor-

---

[4] The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

Northcross v. Bd. of Ed. of the Memphis City Schools, —— U.S. ——, 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

mance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown* v. *Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I).

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board noninvidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis

> of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students

in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green* v. *School Bd. of New Kent Co.*, 391 U.S. 430 (1968), *Brown* v. *Bd. of Ed. of Topeka*, 349 U.S. 294 (1955) (*Brown* II), and *Brown* v. *Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction

that boards must take steps adequate to abolish dual systems. See *Green* v. *School Bd. of Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking affirmative steps to desegregate its systems, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross* v. *Bd. of Ed. of the Memphis City Schools*, —— U.S. ——, 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green* v. *School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article 2 of the Constitution).

V

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statute.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.

Order Granting Certiorari

June 29, 1970

The motion of the National Education Association for leave to file a brief, as *amicus curiae,* is granted. The motion of the United Negro College Fund, Inc., et al., for leave to file a brief, as *amici curiae,* is granted. The petition for a writ of certiorari is granted, provided that th nt of the Court of Appeals is left undisturbed i remands the case to the district court for furt ings, which further proceedings are authoriz district court's judgment is reinstated and sha effect pending those proceedings. The decision tions to expedite is deferred. Mr. Justice Bla from the Court's order which reinstates the dist judgment. He would grant the motion to expedi this Court and set the case for hearing at the e sible date.

Supreme Court of the United States

No. 1713 ---- , *October Term, 19* 69

James E. Swann, et al.,

Petitioners,

v.

Charlotte-Mecklenburg Board of Education, et al.

ORDER ALLOWING CERTIORARI. Filed June 29 ---------- , 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth ----------. Circuit is granted, provided that the judgment of the Court of Appeals is left undisturbed insofar as it remands the case to the district court for further proceedings, which further proceedings are authorized, and the district court's judgment is reinstated and shall remain in effect pending these proceedings. The decision on the motions to expedite is deferred.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black dissents from the Court's order which reinstates the district court's judgment. He would grant the motion to expedite action in this Court and set the case for hearing at the earliest possible date.

Supreme Court of the United States

No. 349 ------, *October Term, 19* 70

Charlotte-Mecklenburg Board of Education, et al.,

Petitioners,

v.

James E. Swann, et al.

ORDER ALLOWING CERTIORARI. Filed October 6 ---------- , 19 70.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth ---------- Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
JUN 18 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. ~~1713~~ 281

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION TO ADVANCE AND FOR *PENDENTE LITE* RELIEF

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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*

MOTION TO ADVANCE AND FOR *PENDENTE LITE* RELIEF

Petitioners respectfully move that the Court advance its consideration and disposition of this case. It presents issues of national importance which require prompt resolution by this Court for the reasons stated in the annexed petition for a writ of certiorari. It would be desirable for the issues to be decided before the beginning of the next school term in September 1970 in order to guide the many courts and school boards now making plans for the coming year and to reduce somewhat the possible necessity for reorganizations of systems after the 1970-71 school term is underway.

Wherefore, petitioners pray that the Court:

1. Advance consideration of the petition for writ of certiorari and any cross-petition[1] or other response thereto

[1] On June 8, 1970, the Charlotte-Mecklenburg Board of Education voted in a public meeting to file a petition for certiorari seeking review of the decision below. We believe the board also desires expeditious consideration of its views.

during the current term, or if need be during the Court's vacation or such special or extended term as may be convenient;

2. If the Court determines to grant the petition for certiorari, arrange such procedures as will permit prompt decision on the merits as the Court may deem appropriate, including either summary disposition without argument[2] or a special term for argument.[3] If the Court decides to hear argument, it is suggested that the Court consider the case on the original record without printing or alternatively to permit reproduction of the appendix record used in the court of appeals by other than standard typographic means.

Petitioners also seek *pendente lite* relief pending disposition of the petition for certiorari comparable to that granted by the Court in *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 226 (1969), and companion cases, namely, an order providing in substance that:

(1) The respondents shall take such preliminary steps as may be necessary to prepare for the complete and timely implementation of the district court's order of February 5, 1970, as amended by the district court, in the event this Court should uphold the district court order on the merits; and

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[2] Comparable issues have been decided without the necessity for argument in such cases as *Bradley* v. *School Board*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Dowell* v. *Board of Education*, 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970); *Northcross* v. *Board of Education*, 397 U.S. 232 (1970).

[3] In 1957 the Court extended its term to hear arguments during July. *Wilson* v. *Girard*, 354 U.S. 524 (1957). Special terms were convened to consider *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Rosenberg* v. *United States*, 346 U.S. 273 (1953); and *Ex parte Quirin*, 317 U.S. 1 (1942).

(2) The respondents shall take no steps which are inconsistent with or will tend to prejudice or delay full implementation of the February 5 order as amended at the beginning of the next school term.

Such an order is obviously necessary to avoid the possibility that the passage of time while the case is being reviewed here will unnecessarily prejudice the substantive rights of petitioners to attend a unitary system "at once". *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 26, 1970.

Opinions Below

The opinions of the courts below directly preceding this petition[1] are as follows:

1. Opinion and order of April 23, 1969, reported at 300 F. Supp. 1358 (Appendix hereto 1a).[2]

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[1] Earlier proceedings in the same case are reported as *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (W.D.N.C. 1965), affirmed 369 F.2d 29 (4th Cir. 1966).

[2] The appendix of opinions below is printed in a separate volume because it is voluminous.

2. Order dated June 3, 1969, unreported (40a).

3. Order adding parties, June 3, 1969, unreported (44a).

4. Opinion order of June 20, 1969, reported at 300 F. Supp. 1381 (46a).

5. Supplemental Findings of Fact, June 24, 1969, 300 F. Supp. 1386 (57a).

6. Order dated August 15, 1969, reported at 306 F. Supp. 1291 (58a).

7. Order dated August 29, 1969, unreported (72a).

8. Order dated October 10, 1969, unreported (75a).

9. Order dated November 7, 1969, reported at 306 F. Supp. 1299 (80a).

10. Memorandum Opinion dated November 7, 1969, reported at 306 F. Supp. 1301 (82a).

11. Opinion and Order dated December 1, 1969, reported at 306 F. Supp. 1306 (93a).

12. Order dated December 2, 1969, unreported (112a).

13. Order dated February 5, 1970, unreported (113a).

14. Amendment, Correction, or Clarification of Order of February 5, 1970, dated March 3, 1970, unreported (134a).

15. Court of Appeals Order Granting Stay, dated March 5, 1970, unreported (135a).

16. Supplementary Findings of Fact dated March 21, 1970, unreported (136a).

17. Supplemental Memorandum dated March 21, 1970, unreported (159a).

18. Order dated March 25, 1970, unreported (177a).

19. Further Findings of Fact on Matters raised by Motions of Defendants dated April 3, 1970, unreported (181a).

20. The opinions of the Court of Appeals filed May 26, 1970, not yet reported, are as follows:

    a. Opinion for the Court by Judge Butzner (184a).

    b. Opinion of Judge Sobeloff (joined by Judge Winter) concurring in part and dissenting in part (201a).

    c. Opinion of Judge Bryan dissenting in part (215a).

    d. Opinion of Judge Winter (joined by Judge Sobeloff) concurring in part and dissenting in part (217a).

21. The judgment of the Court of Appeals appears at 226a.

22. The opinion of a three-judge district court in an ancillary proceeding in this case dated April 29, 1970, not yet reported, appears at 227a.

Jurisdiction

The judgment of the Court of Appeals was entered on May 26, 1970 (226a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the trial judge correctly decided he was required to formulate a remedy that would actually integrate each of the all-black schools in the northwest quadrant of Charlotte immediately, where he found that

government authorities had created black schools in black neighborhoods by promoting school segregation and housing segregation.

2. Whether, where a district court has made meticulous findings that a desegregation plan is practical, feasible and comparatively convenient, which are not found to be clearly erroneous, and the plan will concededly establish a unitary system, and no other acceptable plan has been formulated despite lengthy litigation, the Court of Appeals has discretion to set aside the plan on the general ground that it imposes an unreasonable burden on the school board.

Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

1. Introduction

Petitioners are here seeking review of an *en banc*[3] decision of the United States Court of Appeals for the Fourth Circuit setting aside certain portions of an order of District Judge James B. McMillan of the Western District of North Carolina which had required the complete desegregation of the Charlotte-Mecklenburg County public school system. Three members of the court, in a plurality opinion written by Judge Butzner, agreed with the lower court that the school board had an affirmative duty to employ a variety

[3] One judge did not participate. Prior to argument, Judge Craven entered an order disqualifying himself. He had sat and decided the case as a district judge when it first came to trial in 1965 (243 F. Supp. 667) and was of the opinion that this previous participation barred him from hearing the case as a circuit judge. 28 U.S.C. § 47.

of available methods, including busing, to disestablish its dual school system, but thought that the extent of busing required by the district court to desegregate the elementary schools was unreasonable (184a). Judges Sobeloff and Winter viewed Judge McMillan's decision as appropriate and would have affirmed (201a, 217a). Judge Bryan who would have reversed the entire order expressed disapproval of busing to achieve racial balance which he found the order to require for junior and senior high school students as well as elementary.

2. Proceedings Below

Black parents and students brought this action in 1965 to desegregate the consolidated school district of Charlotte City and Mecklenburg County, North Carolina pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The North Carolina Teachers Association, a black professional organization intervened seeking desegregation on behalf of the black teachers in the school system. This current phase[4]

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[4] The case was first tried in the summer of 1965. (243 F. Supp. 667 (1965)) The plaintiffs challenged an assignment plan where initial assignments were made pursuant to geographic zones from which students could transfer to schools of their choice. Plaintiffs complained that many of the zones were gerrymandered and that the zones of ten rural and concededly inferior black schools which the board claimed would be abandoned within a year or two overlapped white school zones. They also attacked the free transfer policy which had resulted in the transfer of every white child initially assigned to black schools as had the previous minority to majority transfer policy. Underlying plaintiffs' specific grievances was their general assertion that the Constitution required the school board to take active, affirmative steps to integrate the schools. Also under attack was the board's policy looking to the "eventual" non-racial employment and assignment of teachers.

The district court approved the assignment plan but required "immediate" non-racial faculty practices.

The court of appeals affirmed. (369 F.2d 29 (1966)) The decision noted that the 10 black schools had in fact been closed. The court held, as it did the following year in *Bowman* v. *The School Board of Charles City County*, 382 F.2d 326 (1967), *rev'd sub nom. Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), that the school board had no affirmative duty to disestablish the dual system.

of the litigation began in 1968 when the plaintiffs, relying upon the *Green* trilogy,[5] again sought the desegregation of the schools.

District Judge James B. McMillan first heard testimony in March, 1969 and entered his initial opinion the following month (300 F. Supp. 1358; 1a) judging the school system to be illegally segregated and requiring the board to submit a plan for desegregation. Extensive proceedings followed over the next twelve months.[6] He rejected the first plan submitted and called for another, found the second plan inadequate but accepted it as an interim measure for the 1969-70 school year, again required a new plan which after review was also found unacceptable.[7] On December 1, 1969,

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[5] *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); and *Raney* v. *Board of Education*, 391 U.S. 443 (1968).

[6] Judge McMillan has provided an excellent summary of the proceedings in the district court in his Supplemental Memorandum of March 21, 1970 (159a).

[7] The first plan was rejected on June 20, 1969 (46a). The court found that the board had sought from the staff a "minimal" and inadequate plan, that the staff produced such a plan and the board thereupon eliminated its only effective provisions before submitting it to the court.

The second plan was found inadequate on August 15, 1969 (58a) but was accepted for the 1969-70 school year only because it promised some measure of desegregation and the court felt there was not sufficient time prior to the opening of the new school term for the development and implementation of a more effective plan. The failure of the board to accomplish what the plan had promised was determined on November 7, 1969 (82a).

The third plan was not a plan at all, but simply a statement of guidelines as to how the board intended to produce a plan. The guidelines promised no particular results and were thus rejected on December 1, 1970 (93a).

Judge Sobeloff traces this history in an extensive footnote (213a, n. 9). He concludes "[T]he above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making 'every reasonable effort' to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn."

following the court's patient but unavailing efforts to secure from the board an acceptable desegregation plan, the failure of the board to carry out its minimal interim plan for 1969-70 which had been "reluctantly" accepted by the Court in August of 1969 and the mandate of *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, that schools are to be desegregated "at once", Judge McMillan decided to seek assistance from an outside educational consultant to assist him in devising a unitary system (93a). The following day the court appointed Dr. John A. Finger, Jr., a Professor of Education at Rhode Island College who was directed to work with the administrative staff to prepare a plan for the court's consideration (112a). The board was invited again to submit another plan (93a).

On January 20, 1970, plaintiffs requested that Dr. Finger bring in his plan so that the schools could be desegregated "at once".[8] The Finger plan and a fourth board plan were filed with the court in early February. Judge McMillan held further hearings and entered an order on February 5

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[8] Plaintiffs' request followed the controlling decisions in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970); and *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969).

This was not the first request by plaintiffs for immediate relief. In September of 1969 the plaintiffs' motion for a finding of contempt and for immediate desegregation had led to the court's finding in November that the board had not accomplished, during the 1969-70 school year, what it had been ordered to do (80a).

The plaintiffs were required to file a variety of other motions as well, such as motions for contempt, objections to patently defective plans, motions enjoining school construction, motions to vacate state court orders, motions to add new defendants and motions to enjoin state officials from interfering with orders of the court. Despite these and other efforts in the district court, the court of appeals and this Court, the schools are no more desegregated now than in September 1968 when this round of litigation commenced.

directing the desegregation of the students and teachers of the elementary schools by April 1, 1970, and of the junior and senior high schools by May 4, 1970 (113a).[9] The order was based upon the plan submitted by the board and Dr. Finger.

The school board appealed and sought a stay in the court of appeals. On March 5, 1970, the court of appeals stayed a portion of the order relating to the elementary schools and directed that the district court make additional findings concerning the cost and extent of the busing required by the February 5 Order (135a). The plaintiffs applied to this Court to have the partial stay rescinded; the application was denied.

The district court received additional evidence pursuant to the directives of the court of appeals and entered a supplemental Memorandum (159a) and Supplemental Findings of Fact (136a) on March 21, 1970.[10]

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[9] The order was slightly modified on March 3, 1970 (134a).

[10] The supplemental findings were amended in certain respects on April 3, 1970, in response to a motion by defendants (181a).

During this period there were also proceedings concerning the North Carolina anti-busing law:

> "In June of 1969, pursuant to the hue and cry which had been raised about 'bussing,' Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called 'anti-bussing' statute, N.C.G.S. 115-176.1 [supp. 1969]" (161a).

Plaintiffs were granted leave to file a supplemental complaint in July, 1969 and to add the State Board of Education and State Superintendent of Public Instruction as defendants to attack the statute. At that time the statute did not appear to the court to be a barrier to school desegregation (see 58a, 64a).

However, in the spring of 1970, the Governor and other state officials directed that no public funds were to be expended for the transportation of students pursuant to the district court order of February 5 and several state judges issued *ex parte* orders of similar effect acting under color of the state statute. (See 277a, 229a-230a.) (Continued on p. 9)

The opinions and judgment of the court of appeals were filed on May 26, 1970. The court decided by a vote of 4 to 2 to vacate and remand the judgment of the district court for further proceedings. A majority for the judgment was created by the vote of Judge Bryan joining with the three members of the court subscribing to the plurality opinion written by Judge Butzner, although Judge Bryan dissented from the views expressed in the plurality opinion.[11]

3. The Charlotte-Mecklenburg County School System in 1968-69

The plaintiffs presented to the district court detailed evidence about the school system, such as the number and location of the schools, the grades served, the kinds of programs offered, the achievement of the students in the different schools, the racial distribution of students and faculties in the system, and the changes which had occurred over the years. The plaintiffs also showed by expert

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At the plaintiff's request Judge McMillan added the Governor, other state officials and one group of state court plaintiffs as defendants and determined at that point that the constitutionality of the state statute was at issue. He therefore requested and the Chief Circuit Judge appointed a three-judge court. The court convened in Charlotte on March 24 and on April 29, 1970, the court entered its decision (227a) declaring unconstitutional the portions of the statute prohibiting the assignment of any student "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins," the "involuntary bussing of students in contravention of [the statute]" and the use of "public funds . . . for any such bussing." The court, however, denied plaintiffs' prayer for injunctions.

[11] The judgment was vacated in its entirety. Judge Butzner's reason for this action was to give greater flexibility to the development of a new elementary plan. Judges Winter and Sobeloff thought it was improper to invite the reconsideration of the portions of the plan already found acceptable. The judgment expressed Judge Bryan's hope that "upon re-examination the District Court will find it unnecessary to contravene the principle stated . . ." in his dissent.

testimony the rigid racial segregation of the population in Charlotte and in Mecklenburg County and its causes.

The court carefully analyzed the voluminous evidence before it. Over the course of the litigation below, the district court made extensive findings of fact.[12] Each succeeding order reflects a comprehensive analysis of new submissions of evidence by the parties and the cumulative evidence already before the court. The court of appeals has accepted the district court's findings (184a).

Judge McMillan's first opinion on April 23, 1969, gave a detailed description of the school system, the community which it serves and the extent of racial segregation within the schools (1a). We only summarize here some of the salient facts contained in the April opinion.

During the 1968-69 school year, students were assigned to the schools under the same plan as approved by the district court in 1965—initial assignments by geographic zones with freedom of transfer restricted only by school capacities.

The Charlotte-Mecklenburg school system serves more than 84,000 pupils residing in the city of Charlotte and Mecklenburg County. In April, 1969, there were 107 schools, including 76 elementary schools (grades 1-6), 20 junior high schools (grades 7-9) and 11 senior high schools (grades 10-12). The system employed approximately 4,000 teachers and nearly 2,000 other employees. The racial composition of the students in the system was approximately 71% white

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[12] Signicant findings are contained in eight of the orders leading to this appeal: Opinion and Order, April 23, 1969 (1a); Opinion and Order, June 20, 1969 (46a); Order, June 24, 1969 (57a); Order, August 15, 1969 (58a); Memorandum Opinion, November 7, 1969 (82a); Opinion and Order, December 1, 1969 (93a); Order, February 5, 1970 (113a); Supplemental Findings of Fact, March 21, 1970 (136a); and Further Findings, etc. (181a).

and 29% black. The residential patterns of the county were sufficiently integrated so that most of the county school zones included both black and white students. No all-black schools remained in the County. In the City, however, the residential areas were and are generally segregated by race,[13] and most schools were racially identifiable.

The court found that 14,000 of the 24,000 black students in the system were attending schools which were at least 99% black. The court further found that most of the desegregated city schools were in transition from a previously all-white enrollment to all-black.[14]

The school system had been growing at approximately 3,000 students per year, requiring an on-going school construction program. With few exceptions, the size and placement of the recently constructed schools produced either all-white or all-black new schools.[15]

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[13] Most of the evidence concerning residential segregation was produced at the March 1969 hearings. The April order describes the housing patterns and some of the forces which created them. The matter was examined again in subsequent orders, particularly the Order of November 7, 1969 (82a). The court's conclusion was that housing segregation in Charlotte has been substantially determined by governmental action.

[14] In June, after further analysis of the data, the court concluded that approximately 21,000 of the 24,000 black students in the system lived within the city of Charlotte and that nearly 17,000 of them were attending black or nearly all-black schools. The figure is even greater if the black students attending schools which are rapidly becoming all-black are included. 11 schools served 5,502 white pupils and no black pupils in 1954, served 5,010 pupils of which 35% were black in 1965 and in 1968 served 5,757 students, 81% of whom were black. The court also found that nearly 19,000 of the more than 31,000 white elementary students attended schools which were nearly all-white. (There are only 150 black students attending these schools.) More than one-half of the 14,741 white junior high school students attend schools with a total black population of 193 (50a).

[15] The new black schools were generally "walk-in" schools while the white schools were placed some distance from the areas which they serve (141a; 142a).

The court found faculties segregated. The great majority of the 900 black teachers were teaching in black schools. There was less than one white teacher per black elementary school. The two black high schools had teaching staffs more than 90% black.

The court concluded that the board's policies of zoning, free transfer and its school placement had contributed to and continued an unlawfully segregated public school system. It also concluded that the faculties had not been desegregated as required by the 1965 order. The board was directed to produce plans for the active desegregation of the pupils and faculties by May 15, 1969.

On appeal, Judge Butzner agreed that the system was unlawfully segregated in April of 1969:

> "Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was operating a dual system of schools in the light of subsequent decisions of the Supreme Court . . ." (184a, 185a-186a).[16]

The district court further found that the impact of segregation on black students in the system had resulted in the denial of equal educational opportunities. Comparative test results showed a wide disparity in achievement between students attending all-black schools and students attending white and integrated schools (58a, 65-a-68a, 93a, 97a-99a, 136a, 144a-145a).

The court also found that the residential segregation was far from benign or *de facto*. The school board by gerrymandering zone lines (53a-54a) and other practices, together with the activities of other governmental agencies, had a significant impact upon the creation of Charlotte's

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[16] Both Judges Sobeloff and Winter concurred in this conclusion (201a, 217a).

ghetto. Again, the three circuit judges subscribing to the plurality opinion and Judges Sobeloff and Winter concurred in these findings. As Judge Butzner summarized:

> The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state, and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property [footnote omitted] until *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage.
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> The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accommodate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result (186a).[17]

[17] In addition to the activities of the governmental agencies producing the discriminatory zoning (13a, 167a) and the urban renewal program (13a, 167a) mentioned by Judge Butzner, there was substantial evidence showing that long range planning by the City Council projects present segregation into the future (167a), that public housing officials had overtly discriminated until recent years and has reenforced racial segregation by its site selection (167a) and that those officials responsible for planning and building streets and highways have created racial barriers.

4. The Schools Today

During the 1969-70 school year the schools were operated under a desegregation plan submitted to the court in July 1969. The plan provided for the transportation of 4,245 inner-city black students to outlying white schools. Of these children 3,000 were to come from 7 schools which were being closed and 1,245 from overcrowded black schools. The plan proposed some further faculty desegregation but would retain all other racially discriminatory features of the school system. The board did propose, however, to study its building programs and such measures as altering attendance lines, pairing, clustering and other techniques in order to develop a comprehensive desegregation proposal for the future.

The plaintiffs objected to the plan on the grounds that it left many schools segregated for yet another year and placed the full burden of desegregation upon black children.

The court, in an order entered on August 15, 1969 (58a), approved the proposed pupil reassignments for the 1969-70 school year "only (1) with great reluctance, (2) as a one year temporary arrangement and (3) with the distinct reservation that 'one-way bussing' plans for the years after 1969-70 will not be acceptable." The board was ordered to file a third plan by November 17, 1969, "making full use of zoning, pairing, grouping, clustering, transportation and other techniques . . . having in mind as its goal for 1970-71 the complete desegregation of the entire system to the maximum extent possible." [18]

Upon application of defendants, the court modified the August 15 order on August 29 to allow for the reopening

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[18] The board explicitly refused to follow these directives. Each of the next two plans submitted by the board rejected the techniques of "pairing, grouping [and] clustering". See n. 20, *infra*.

of a black inner-city school to serve up to 600 inner-city children who chose not to be transported to suburban white schools (72a).

The plan did not accomplish what was expected. The court later found that "the 'performance gap' is wide" (84a).

> In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now [March 21, 1970] only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board (164a).

In the November, 1969 Memorandum Opinion the court set out in detail the racial characteristics of the school system during the 1969-70 school year (82a, 83a-88a). The court concluded that there had been no real improvement from the segregated situation found during the previous school year.

> Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.
>
> The schools are still in major part segregated or "dual" rather than desegregated or "unitary." (86a).

Analyzing the same figures in a later order, the court pointed out that "Nine-tenths of the faculties are still

obviously 'black' or 'white.' Over 45,000 of the 59,000 white students still attend schools which are obviously white." (93a, 97a).

The court also determined that the free transfer provision in the board's plan negated any progress which the July plan might have produced.[19] It also found that attempts to desegregate the schools by altering attendance lines would continue to fail as long as students could exercise a freedom of choice (87a-88a).

The court of appeals shared Judge McMillan's view that the system was still segregated during the 1969-70 school year (188a).

5. The Plan Ordered by the District Court

In the decision of December 1, 1969, in which the court announced than an educational consultant would be appointed, 19 principles were stated for his guidance (93a, 103a-108a). Dr. Finger's instructions included: "all the black and predominantly black schools in the system are illegally segregated . . ." (106a); "efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but . . . variations from that norm may be unavoidable" (105a); "bus transportation to eliminate segregation [and the] results of discrimination may

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[19] The court had made similar findings in June:

> Freedom of transfer increases rather than decreases segregation. The School Superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished. (51a-52a)

Moreover, during the choice period prior to the 1969-70 school year, just two white students out of 59,000 elected to transfer to black schools and only 330 black students out of 24,000 chose to transfer to white schools (*Id.*)

validly be employed" (109a); and "pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools" (107a).

Dr. Finger's work is described in the Supplemental Memorandum of March 21, 1970:

> Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans. When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report.[20] The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.
>
> The detailed work on both final plans was done by the school board staff. (169a)

Both plans were presented to the court.[21]

a. *High Schools*—The school staff had developed a plan which produced a white majority of at least 64% in each

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[20] The board's two most significant limiting factors were: (1) Rezoning was the only method to be employed; the board rejected such techniques as pairing, grouping and clustering; (2) a school sought to be desegregated would be at least 60% white; thus, the board's plan for elementary schools produced some schools between 57% and 70% white, eight schools 1% to 17% white, two schools 0% white and no schools between 18% and 58% white (126a-128a). The court of appeals found as the district court had that these limiting factors were improper (197a-198a).

[21] Description of the plans are found in several of the decisions below. See, Order, February 5, 1970 (113a, 119a-121a) and tables (123a-133a); Supplemental Findings, March 21, 1970 (136a, 146a-152a); Supplemental Memorandum, March 21, 1970 (159a, 169a-172a); Opinion of Court of Appeals (184a, 190a-191a).

of the ten high schools including the presently all-black West Charlotte (see Exhibit B, 123a). The board accomplished this result by restructuring attendance lines. Dr. Finger's proposal used the board's new zones and assigned an additional 300 pupils from a black residential area to Independence High School which would have had only 23 black students under the board's plan. Judge McMillan adopted the Finger modification. This portion of the plan was approved on appeal. Judge Butzner wrote:

> The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent tipping or resegregation of other schools. (195a)

b. *Junior High Schools*—During the 1969-70 school year the board operated 19 junior high schools. Five were all or predominantly black; eight were more than 90% white. (See Exhibit D, 124a.) The board, by rezoning eliminated several of the black schools. One school, however, Piedmont, remained 90% black. Additionally, four schools would be more than 90% white.[22]

Dr. Finger devised a plan which would integrate all the junior high schools. Twenty of the schools would have white populations ranging from 67% to 79% and the remaining school would be 91% white. The plan employed rezoning and satellite zones.[23]

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[22] Two new junior high schools are scheduled to open in the 1970-71 school year. Both proposed plans contemplate assigning students to these new schools. It is significant that under the board plan one of the schools would be 100% white and the other 91% white (124a).

[23] A "satellite zone" is an area which is not contiguous with the primary zone.

The district court approved of the board's plan except as to Piedmont, and gave the board four options: (1) rezoning to eliminate the racial identity of the remaining black school, (2) two-way transportation of pupils between Piedmont and white schools, (3) closing Piedmont, or (4) adopting the Finger Plan. The board reluctantly chose to employ the Finger Plan.

Judge Butzner found the plans for junior and senior high schools by use of satellite zones together with transportation "a reasonable way of eliminating all segregation in these schools" (195a).

c. *Elementary Schools*—The board in restructuring attendance lines for the 76 elementary schools was unable to affect a majority of the students attending racially identifiable schools. As the court of appeals observed, "Its proposal left more than half the black elementary pupils in nine schools that remained 86% to 100% black, and assigned about half of the white elementary pupils to schools that are 86% to 100% white." (191a; see Exhibit H, 126a-128a.)

The Finger Plan also employed rezoning: 27 schools were rezoned, and 34 schools were desegregated by grouping, pairing and transportation between zones.[24] Judge McMillan described the plan:

> Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of

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[24] The designated clusters are shown in Exhibit K (132a-133a). The zones of ten schools remained substantially unchanged.

> grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.
>
> The "Finger Plan" itself . . . was prepared by the school staff . . . . It represents the combined thought of Dr. Finger and the school administrative staff as to a valid method for promptly desegregating the elementary schools . . .". (150a-151a)

Under the plan the elementary schools would be from 60% to 97% white with most of the schools about 70% white. (See Exhibit J, 129a-131a.)

Judge McMillan found the board plan to be inadequate and directed that the Finger Plan or some other plan which would accomplish similar results be implemented.

The court of appeals agreed that the board plan was unacceptable. "The district court properly disapproved the school board's elementary school proposal because it left about one-half of both black and white elementary pupils in schools that were nearly completely segregated" (197a). The court of appeals, however, decided that the extent of transportation required by the Finger Plan was unreasonable and directed further proceedings for the development of another plan.

d. *Transportation*—The district court's order required additional transportation to be provided. The plurality opinion approved of the increments of transportation to accomplish the junior and senior high assignments but determined that the elementary school busing was excessive.

During the 1969-70 school year, the board operated 280 school buses transporting 23,600 of its 84,000 students.[25] Another 5,000 students rode public transportation at a reduced fare. The principal's monthly bus reports show that between 10,000 and 11,000 of those riding school buses were elementary students. The average annual cost per child was about $20.00 or about $472,000.00 out of a total budget of about 57 million dollars, almost all of which was reimbursed by the state.[26] The buses average 1.8 one-way trips per day carrying an average of 83.2 students, averaging 40.8 miles (136a, 138a).[27]

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[25] Judge McMillan made detailed and elaborate findings concerning the extent and cost of busing in the Charlotte system, the state and the county, in his Supplemental Findings of March 21, 1970 (135a). (See also Further Findings, etc. of April 3, 1970.) The court had examined the transportation system in previous decisions as well (1a, 22a-23a, 40a, 47a-48a, 113a, 116a-117a).

[26] See Further Findings, etc., April 3, 1970 (181a-182a). The district court had originally understood the average cost to be about $40.00 per pupil (1a, 22a-23a, 136a, 138a). The state reimburses local school boards for operating expenses for transportation for those students who are eligible under state law. The original cost of the bus is borne by the local board but the state replaces worn out buses (181a-182a).

Pupils eligible for transportation are those children who live more than 1½ miles from school and who live either in the county or in portions of the city which have been annexed since 1957. Additionally, the state pays the transportation costs for children who live within the pre-1957 city limits who attend schools outside of the pre-1957 limits (136a, 141a).

All but a few hundred of the children to be bused under the court approved plan would be eligible for transportation at state, rather than local expense (155a).

[27] The overall figures for the state show a higher percentage of students riding buses than in Charlotte. During the 1968-69 school year about 55% of all students in North Carolina rode buses to school; 70.9% were elementary students. (Elementary students are defined by the state for these purposes as students in grades 1 through 8.)

Judge McMillan's Findings as accepted by the court of appeals show the added transportation under the plan ordered on February 5 to be:

	No. of Pupils	*No. of Buses*	*Operating Costs*
Senior High	1,500	20	$ 30,000
Junior High	2,500	28	50,000
Elementary	9,300	90	186,000
Total	13,300	138	$266,000[28]

The initial one-time[29] capital outlay for the buses would be $745,200.[30]

The board itself had proposed the busing of 4,200 black inner-city children for the 1969-70 school year to outlying suburban schools as a desegregation measure (58a, 63a-65a). The board's February 2 plan proposes to bus approximately 5,000 additional students, about half of whom are elementary pupils. A major portion of this busing is within the City (155a, 192a). Moreover, there is nothing novel

[28] These are the figures determined by the court of appeals (191a) by applying the district court's Further Findings, etc. of April 3, 1970 (181a) to its Supplemental Findings of March 21, 1970 (136a). The board had claimed much greater increases in the extent and cost of additional busing, but the district court, after carefully analyzing the data, found the board's figures to be exaggerated (see "Discount Factors," 136a, 152a-154a). The court's findings are also consistent with the transportation requirements projected by the board for its plan to transport 3,000 Negro children to the suburbs for the 1969-70 year. (See Report filed in summer of 1969, Volume II, Item 18 of printed Appendix filed in Court of Appeals.)

[29] Obsolete buses are replaced by the state. See note 24, *supra*.

[30] The district court observed that there was at least 3 million dollars worth of vacant school property which had been abandoned pursuant to the 1969-70 desegregation plan (157a) and which, as the board had pointed out in its report in the summer of 1969, could be disposed of to produce necessary "desegregation" funds. (See Volume II, Item 18 of printed Appendix filed in Court of Appeals.)

about city children riding school buses. Children living in the city but outside of the 1957 city limits are bused. Many city boards of education, such as Greensboro, provide transportation for city children with local funds. The present state superintendent of public instruction, his predecessor and the prestigious 1969 Report of the Governor's Study Commission on the Public School System of North Carolina have all recommended that transportation be provided for children, city as well as rural, on an equal basis (136a-140a).

The bus trips required for the paired elementary schools would be straight-line non-stop trips (143a), would be shorter and would take less time than the average bus trip in the system or in the state (137a).

34. . . .

(f) The average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. The average length of the one-way trips required under the court approved plan for elementary students is less than seven miles, and would appear to require not over 35 minutes at the most, because no stops will be necessary between schools (153a).[31]

Busing was a technique employed by the board to maintain its dual system as recently as 1966 (138a); even today, school buses transport white students to outlying white schools while Negro students walk to their all-black schools (141a, 142a).

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[31] The court later explained how these figures were developed:

The average *straight line* mileage between the elementary schools paired or grouped under the "cross-bussing" plan is approximately 5½ miles. The average bus *trip* mileage of about seven miles which was found in paragraph 34(f) was arrived at by the method which J. D. Morgan, the county school bus superintendent, testified he uses for such estimates—taking straight line mileage and adding 25%. (Emphasis in original; 153a.)

REASONS FOR GRANTING THE WRIT

Introduction

This case merits review on certiorari because it involves important legal questions about implementing *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955), and because it will have important practical consequences with respect to school desegregation. In petitioners' view the major questions presented are the related issues about the proper formulation of specific desegregation goals and the proper standard for appellate review of a decision on the feasibility of a desegregation plan.

In Part I, *infra*, we submit that on this record the district judge was correct in his specific formulation of the goal of eliminating each predominantly black and all-black school. We believe the court of appeals erred by substituting a less concrete and complete goal requiring "all reasonable means to integrate the schools" but that not every school "need be integrated."

The decision below announces a legal rule of great consequence. The court below, by a narrow vote (actually three members of the court), has explicitly announced a new rule of law to govern all school desegregation cases. The new legal principle requires that in each case a court must decide whether the goal of complete desegregation of all schools is a reasonable goal. Thus we have not merely an issue about the reasonableness of methods of desegregation but rather an issue about the reasonableness of the goal of desegregation—whether the court thinks desegregation is worthwhile given the circumstances of the district.

As Judge Sobeloff has stated so clearly in dissent, the new rule portends serious consequences for the general course of school desegregation:

> . . . Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome." (212a-213a)

As thus framed, the issue of appropriate goals for desegregation plan is one which merits this Court's expeditious attention. The struggle to implement *Brown* may founder on the new rule that segregation must be ended only where it is "reasonable" to end "black" and "white" schools. This Court's decision in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), may be of little effect if a kind of reasonableness test on desegregation timing is replaced by a similar test for deciding the goal.

In Part II, *infra*, we urge that the court of appeals applied an inappropriate standard for appellate review of an equitable remedy in setting aside the district court's elementary school plan as "unreasonable." Where no equally expeditious and effective plan is available, we think it contrary to this Court's decisions for an appeals court to strike down an effective plan which has been reliably found to be feasible and workable. Moreover, the appellate court's view that the remedy was too onerous was influenced by its erroneous determination that it was unnecessary to integrate every school in Charlotte, as discussed in Part I.

In addition to these clear legal issues, the case should also be reviewed because the ultimate decision in this case will have enormous practical impact on the future of public school desegregation. The case is singular in a number of respects. The decision of the district judge on February 5, 1970, which has now been set aside in important part, immediately assumed national significance and became the focus of much public attention because it promised the complete desegregation of every school in an urban school system. There was this promise of complete desegregation, notwithstanding the complexity of a system with 106 schools and more than 84,000 pupils, the recalcitrance of the locally elected school board, and the concentration of most Negro residences in one area where a number of all-black schools were maintained. Recent years have seen considerable school desegregation progress in smaller towns and rural areas of the South. This is partly because available remedies are more obvious in small school systems. But most often Negro plaintiffs have been unable to accomplish anything more than partial desegregation in urban systems.

Judge McMillan's decision in the Charlotte case finds a way to break the pattern and integrate every school in North Carolina's largest school district. The Fourth Circuit's decision reversing the plan for elementary school desegregation blots out the rays of hope that complete school desegregation will be accomplished in urban schools. The result on this appeal clearly signals to every district judge and school board that a cautious "go-slow" approach to using busing to eliminate all-black schools is in order. Judge McMillan's decisions signaled that substantial desegregation can be accomplished; the reversal signals that it will not be accomplished. So the result of the case has assumed transcending importance. What the Fourth Circuit did speaks as loudly as what it said. What the court

did, of course, was overturn one of the first desegregation orders that ever required complete urban school desegregation in the circuit.

We hasten to add, particularly in view of our request for expedition and our suggestion that summary disposition might be appropriate, that the case may well be controlled by settled decisions. Although the opinion below raises the new legal issues we have discussed, they need not necessarily be decided in the terms in which the court of appeals posed the issues. Given the findings of the district judge, which are not clearly erroneous, the desegregation plan for Charlotte may be ordered implemented in September without breaking any new legal ground. The district court's decision is supported by a complete record proving that the existing school system is unconstitutional and that a feasible remedy is at hand. The meticulous and painstaking decisions of the district court are ample support for a decision that the plan should be implemented as scheduled.

I.

This Court's School Desegregation Decisions Support the District Court's Holding That the All-Black and Predominantly Black Schools in Charlotte Are Illegally Segregated and Should Be Reorganized So That No Predominantly Black Schools Remain. The Court of Appeals Erred in Substituting a Less Specific Desegregation Goal.

A. *The Remedial Goals Set by the Courts Below.*

This case involves whether it was proper, on the record and findings made, for the district judge to require that the racially segregated dual system in Charlotte-Mecklenburg be thoroughly reorganized so that each of 25 remain-

ing all-black or predominantly black schools in the system will be integrated. Understanding of the issue is aided if we analyze the particular facts of the Charlotte case as well as the general legal principles which apply in school segregation cases.

On December 1, 1969, nearly five years after this suit was filed by Negro plaintiffs seeking desegregation, District Judge McMillan held that:

> On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated . . . (106a).

Thereafter, on February 5, 1950, when a concrete plan had been designed by the court's expert consultant after working for two months with the local school superintendent and his staff, it was apparent to Judge McMillan that there was a feasible way to eliminate the black schools he had found to be illegal. He thus ordered that "no school be operated with an all-black or predominantly black student body" (116a), and the plan was ordered under which the percentage of black students would vary in individual schools from a high of 41% black to a low of 3% black (156a). Thus the district court first found the black schools illegal, and then found that their continuation was needless and that there was an available remedy for the unconstitutional situation.

This seemingly straight-forward sequence of events has been nullified and the mandate of the appeals court now requires that desegregation planning for Charlotte's 76 elementary schools begin anew. Petitioners believe that the court of appeals has not stated the goal of desegregation planning in suitably specific terms to satisfy the consti-

tutional requirement and that the district court's formulation was proper, at least for the Charlotte-Mecklenburg system.

The court of appeals ruling, in the practical context of the case, requires that some indefinite number of elementary pupils will remain in predominantly black and perhaps all-black schools. The opinion for three members of the court, by Judge Butzner, states that "not every school in a unitary system need be integrated" and that while boards "must use all reasonable means to integrate the schools" sometimes "black residential areas are so large that not all schools can be integrated by using reasonable means" (189a). This view acknowledges that the black schools are the product of illegal segregation practices, but suggests that the problem is essentially intractable and that there is in effect a wrong without a remedy. The wrong is not remedied if you discount as we do, the three alternatives to integrating the black schools mentioned by Judge Butzner, *e.g.*, providing an integrated school for each child in later years, relying on the black pupils' use of a free transfer right to leave the black schools, and establishing special integrated programs at the all-black schools. None of these suggestions represents a complete substitute for the constitutional right to attend school in a system where racial identification of the schools has been removed and there are "just schools." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 442 (1958). The first method merely postpones the right and does not grant it "now and hereafter" (*Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969)). The second method—free transfers for blacks—has proven illusory and only a partial answer in Charlotte-Mecklenburg. *Green, supra*, and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1958). The third method by its own terms is limited to peripheral activities not central to the daily classroom experience

of grade school children, and fails to remove the racial identifiability of the schools.

We believe that Judge McMillan was correct, and that the court below was in error, in defining an appropriate specific desegregation goal for Charlotte. Judge McMillan's findings and conclusions that the all black schools and predominantly black schools in Charlotte-Mecklenburg are unconstitutionally segregated were accepted by all members of the court below except Judge Bryan, who wrote a separate dissenting opinion. Fortunately, this case contains an unusually detailed and extensive factual record, and meticulous findings which explain how racial segregation was created in the Charlotte system. The detailed record showing how the dual system was created makes the case an appropriate one to consider the important questions relating to remedial measures. We set out in detail in the next subsection the findings about the causes of school segregation, the related findings about the governmental responsibility for housing segregation in Charlotte, and the particular findings about the effects of the denial of equal educational opportunity on black children in this locality. In a succeeding subsection we discuss the governing legal principles which support Judge McMillan's statement of the desegregation goal.

B. *The Dimensions, Causes, and Results of the Dual System in Charlotte—The Nature of the Constitutional Violation.*

Judge McMillan found that governmental authorities had created black schools in black neighborhoods in Charlotte by promoting school segregation and housing segregation. The board "gerrymandered" or manipulated school attendance areas to promote segregation, selected sites and the sizes of schools to promote segregation, and used the school transportation system to promote segregation. The court

found that the extensive residential segregation which concentrated 95% of the city's Negroes in Northwest Charlotte was promoted by public authorities, including school practices and those of other government agencies.

Judge McMillan summarized the results by noting that although the slightly more than 24,000 Negroes in the system were but 29% of the total school population, more than 16,000 Negroes were in 25 all-black or predominantly black schools, including more than 9,000 in 11 100% black schools (165a). He concluded that: "The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved" (166a). At the same time, more than two-thirds of the white pupils (45,012 out of a total of 59,828) were in 57 schools readily identifiable as white schools (165a). Less than one-fifth of the pupils in the system attended 24 schools not readily identifiable by race (165a-166a).

Judge McMillan summarized the findings about how this extensive segregation came about in these words:

> The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts repecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning

ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *'de facto'* and the resulting schools are not 'unitary' or desegregated (166a-167a).

The Fourth Circuit accepted these conclusions (186a-187a), and also pointed out as one aspect of this, that North Carolina Courts had enforced racial restrictive covenants on property prior to *Shelley* v. *Kraemer*, 334 U.S. 1. See e.g. *Phillips* v. *Wearn*, 226 N.C. 290, 37 S. E. 2d 895 (1946) (involving property in Mecklenburg); *Eason* v. *Buffaloe*, 198 N.C. 520, 142 S.E. 496 (1930); *Vernon* v. *R. J. Reynolds Realty Co.*, 226 N.C. 58 36 S. E. 2d 710 (1946). These racial restrictive covenants enforced by injunctions and damage suits were the functional and practical equivalent of residential segregation laws and ordinances.[33]

Nor was the decision below unique in recognizing the interrelationship between school segregation and state responsibility for residential segregation. See *Holland* v. *Board of Public Instruction of Palm Beach County*, 258 F. 2d 730, 732 (5th Cir. 1958); *Dowell* v. *Board of Education*, 244 F.

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[33] *Shelley* was argued in this Court on this basis (by the Solicitor General among others) as Mr. Justice Black has described:

> This type of agreement constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts. (*Bell* v. *Maryland*, 378 U.S. 226, 329 (1964), Mr. Justice Black, dissenting.)

Supp. 971, 975-977 (W.D. Okla. 1965), affirmed 375 F. 2d 158 (10th Cir. 1967), cert. denied 387 U.S. 931 (1967), both involving residential segregation ordinances. Cf. *Brewer* v. *School Board of the City of Norfolk,* 397 F. 2d 37, 41-42 (4th Cir. 1968).

Judge McMillan also made explicit findings based upon his examination of the local system about the harm that segregation was inflicting upon black children. Judge McMillan found "that segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children." (66a-67a). Sixth grade students in black schools were on the average achieving at a fourth grade level, whereas there were substantially higher levels in integrated and white schools. (20a; 67a; 97a-99a). The District Judge wrote that:

> "This alarming contrast in performance is obviously not known to school patrons generally.
>
> It was not fully known to the court before he studied the evidence in the case.
>
> It can not be explained solely in terms of cultural, racial or family background without honestly facing the impact of segregation.
>
> The degree to which this contrast pervades all levels of academic activity and accomplishment in segregated schools is relentlessly demonstrated.
>
> Segregation produces inferior education, and it makes little difference whether the school is hot and decrepit or modern and air-conditioned.
>
> It is painfully apparent that "quality education" can not live in a segregated school; *segregation itself is the greatest barrier to quality education.*
>
> As hopeful relief against this grim picture is the uncontradicted testimony of the three or four experts who testified, some for each side, and the very interest-

> ing experience of the administrators of the schools of Buffalo, New York. The experts and administrators all agreed that transferring underprivileged black children from black schools into schools with 70% or more white students produced a dramatic improvement in the rate of progress and an increase in the absolute performance of the less advanced students, without material detriment to the whites. There was no contrary evidence. (In this system 71% of the students are white and 29% are black.) (67a-68a)

Legally, of course, the case does not depend on any such local findings of harm. "The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). But it is well to remember that the segregation system condemned by *Brown* is a massive intentional disadvantaging of the Negro minority by the white majority. See Black, "The Lawfulness of the Segregation Decisions," 69 Yale L. J. 421 (1960). That disadvantage is not dissipated so long as the dual system is intact. The district judge perceived that its elimination is an urgent task.

C. *The Decision Below Conflicts With Applicable Decisions of This Court.*

The district court's decision that each of the predominantly black and all-black schools in Charlotte-Mecklenburg must be reorganized on an integrated basis is in conformity with this Court's decisions defining the nature of the duty to desegregate public schools which was first declared sixteen years ago in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). *Brown II* spoke of the need "to achieve a system of determining admission to the public schools on

a nonracial basis." *Brown* v. *Board of Education*, 349 U.S. 294, 300-301 (1955). In *Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958), the Court wrote of the duty of "initiating desegregation and bring about the elimination of racial discrimination in the public school system." *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), made it clear that *Brown* requires more than nondiscriminatory admission of Negroes to "white" schools. *Green* held that *Brown* was addressed to the whole system of segregation in which "racial identification of . . . schools was complete, extending not just to the composition of student bodies . . . but to every facet of school operations . . ." (391 U.S. at 435). Under *Green* these dual systems must be abolished; the task is the "dismantling of well-entrenched dual systems" (391 U.S. at 437), and "disestablishing state-imposed segregation" (*id.* at 439). The *Green* decision states that a "unitary, non-racial system of public education was and is the ultimate end to be brought about" (*id.* at 436), that discrimination must be eliminated "root and branch" (*id.* at 438), and that the Constitution required "abolition of the system of segregation and its effects" (*id.* at 440). The courts are to render decrees "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*id.* at 438, note 4). The courts are to "retain jurisdiction until it is clear that state-imposed segregation has been completely removed" (*id.* at 439). A call for the complete abolition of racially identifiable schools is sounded by the command that the plan "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442).

Judge McMillan addressed himself to the most obvious remaining characteristic of the dual system in Charlotte—the 25 black schools which serve the bulk of the black population. By the time Judge McMillan wrote his opinion

on December 1, 1969, the school board had failed despite three orders to present a plan which eliminated the black schools. Judge McMillan perceived that school segregation could not be justified or excused on the basis of segregated neighborhood patterns where the state itself was responsible for Fourteenth Amendment purposes for the housing segregation as well as the school segregation.[33] Thus he faced the practical problem of formulating specific instructions and criteria for the men preparing a desegregation plan. He believed that the concern was "primarily not with the techniques of assigning students or controlling school populations, but with *whether those techniques get rid of segregation of children in public schools.* The test is pragmatic, not theoretical" (61a). In order to guide his court appointed consultant in preparing a plan, Judge McMillan stated simple legal guidelines and criteria. They are in the spirit of *Green* and are entirely unexceptionable:

> 2. Drawing school zone lines, like "freedom of transfer," is not an end in itself; and a plan of geographic zoning which perpetuates discriminatory segregation is unlawful . . . [citations omitted].
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> 12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had

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[33] *Dowell* v. *Board of Education*, 244 F. Supp. 971, 975-977 (W.D. Okla. 1965), *affirmed*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *Holland* v. *Board of Public Instruction of Palm Beach County*, 258 F.2d 730, 732 (4th Cir. 1968). Geographic zoning plans are acceptable only if they tend "to disestablish rather than reinforce the dual system of segregated schools." *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086, 1093 (5th Cir. 1969); *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir. 1969); *United States* v. *Indianola Municipal Separate School District*, 410 F.2d 626 (5th Cir. 1969); *Keyes* v. *School District Number One, Denver*, 303 F. Supp. 279 and 289 (D. Colo. 1969), *stay vacated*, 396 U.S. 1215 (1969) (Justice Brennan in Chambers). And see this Court's decision in *Northcross* v. *Board of Education of Memphis*, 397 U.S. 232 (1970).

presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

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14. Where pupils live must not control where they are assigned to school, if some other approach is necessary in order to eliminate racial segregation . . . [citations omitted].

15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated . . . [citations omitted].

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17. Pairing of grades has been expressly approved by the appellate courts . . . [citations omitted]. Pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools.

18. Some 25,000 out of 84,000 children in this county ride school busses each day, and the number *eligible* for transportation under present rules may be more than 30,000. A transportation system already this massive may be adaptable to effective use in desegregating schools.

The court of appeals decision that some indefinite number of black schools may remain conflicts with *Green*. There

is no warrant in *Green* for anything less than complete dismantling of the dual system. The holding that racial identifiability of schools need not be redressed threatens, as Judge Sobeloff has suggested, to water down or temper the duty to convert to a unitary system (203a). The conclusion that the board need accomplish only so much desegregation as seems "reasonable" poses a fundamental threat to the principle of *Brown I*. As Judge Sobeloff wrote, dissenting, "the conclusion of the majority that, all things considered, desegregation of this school system is not worth the price" is a "conclusion neither we nor school boards are permitted to make" (210a).

The district court had power under the *Green* decision to require much more than a minimal sort of plan. The court was not bound to accept school board proposals designed to search out the gray area between a dual system and a unitary system to satisfy minimum desegregation requirements. On the contrary, the court was empowered to strike at the roots as well as the branches of the segregated system. The court was empowered to root out segregation so thoroughly that it is unlikely to occur again. The opinion below in part recognizes this by approving the trial judge's efforts to prevent re-segregation of desegregated schools at the high school level.[34] But the essential thrust of the decision conflicts with this idea. It seems clear that the opinion approves the continuation of some majority black schools. But experience in Charlotte has demonstrated the difficulty of maintaining stable desegregation in majority black schools. Frequently such schools fast become all-black as neighborhood patterns change in an oft-repeated pattern of white flight from Negro neighborhoods and

[34] The court below approved the trial judge's effort "to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent 'tipping' or resegregation of other schools" (195a).

schools. Judge McMillan's plan was designed to cope with this problem by eliminating all racially identifiable schools so that this factor would no longer play a part in the community.

The court of appeals' goal of obtaining as much integration as is "reasonable" in the jurisdiction must leave every board or court which seeks to apply the formula essentially at sea. The standard of reasonableness was adopted, says the court, because "some cities . . . have black ghettos so large that integration of every school is an improbable, if not unattainable, goal." But, of course, the Finger plan demonstrates that this goal is not unattainable in Charlotte-Mecklenburg. And Charlotte-Mecklenburg, the largest school system in North Carolina, is fairly representative of the desegregation problem in the cities of the Fourth Circuit. The United States Commission on Civil Rights had recently made the same point:

> It is a mistake to think of the problems of desegregation and the extent that busing is required to facilitate it solely in the context of the Nation's relatively few giant urban centers such as Chicago, New York, or Los Angeles. In most of our cities the techniques necessary to accomplish desegregation are relatively simple and creates no hardships. The experience in communities which have successfully desegregated could easily be transferred to cities of greater size. (Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970.)

Judge Butzner's decision suggests that complete desegregation can be obtained only in "towns, small cities, and rural areas" by the available techniques. But this very

record demonstrates that the technology is available to design desegregation plans for a city the size of Charlotte which will do the job of desegregating the schools. In part II which follows, we shall discuss the evidence about the workability of this plan.

II.

The Court Below Erred in Not Accepting the District Court's Decision That Its Desegregation Plan Was Feasible and in Setting It Aside as "Unreasonable," Particularly in the Absence of Any Equally Effective and Expeditious Alternate Plan.

The district judge in this case faced an acute practical problem in formulating a remedy to redress the violations of the Constitutional rights of black children in the Charlotte-Mecklenburg system. The system is large with 84,542 pupils in 106 schools. School segregation is still extensive with more than three-fourths of the children still in racially identifiable "white" schools or "black" schools. Some of the integrated schools have rapidly moved through a temporary integration to an all-black re-segregated situation. The free transfer plan was a conspicuous failure. To make matters worse, the school board refused to accept its duty of preparing an adequate plan. The board attacked the judge's decisions in public forums and the state legislature enacted an anti-busing law to nullify his decisions. The board did not even deliver on desegregation promises in its interim plan for 1969-70. In the summer of 1969 the black community had protested "one-way" desegregation in the interim plan by which only black pupils were bused to white schools and formerly black schools were abandoned. White parents groups were aroused against "busing" by televised school board meetings decrying the destruction

of "neighborhood schools." Against this background in October 1969, the board requested a delay in filing a desegregation plan. The judge regretfully concluded:

> The school board is sharply divided in the expressed view of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools. By the responses to the October 10 questions, the Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they *intend not to do it* effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance." (90a-91a)

Judge McMillan had no choice but to deny the requested delay in view of this Court's then recent decision in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (October 29, 1969). The school board then filed a third plan which the court later held "contains no promise or likelihood of desegregating the schools" (93a).

The singular thing about this case is that faced with this panoply of obstacles and difficulties, the district judge promptly found a means to completely integrate every school. He adopted the reasonable procedure of: (1) writing detailed legal guidelines for the preparation of a desegregation plan, (2) appointing the court's own expert consultant to devise a plan, and (3) ordering the professional staff of the Charlotte school system to work with the court's expert and give him full cooperation.[35] The

[35] The board was ordered to provide the consultant with work space, pay his fees and expenses, give him stenographic assistance, the help of business machines, draftsmen, and computers, as well as

procedure worked. By February 5, 1970, about two months after the expert's appointment, the court was able to approve the plan. Over plaintiffs' objection, and at the board's request, implementation was postponed until later in the spring to enable the board to make further preparation.[35]

The decision of the court of appeals approved the plan for junior and senior high schools rejecting the school board's appeal in this regard. But the elementary school plan was struck down because three judges of the court below held it was not "reasonable," and a fourth judge thought the plan undertakes the illegal objective of "achieving racial balance" by busing pupils.

To summarize petitioners' position briefly, we think the ground for disapproving the elementary plan—that the bus-

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access to all the board's studies, including computer studies, of desegregation plans. The school staff was ordered to provide the consultant with "full professional, technical and other assistance" (110a). The Fourth Circuit approved this procedure citing Justice Brandeis' opinion *In the Matter of Peterson*, 253 U.S. 300 (1920). See also, *Scott* v. *Spanjer Bros., Inc.*, 298 F.2d 928 (2nd Cir. 1962); 9 Wigmore, Evidence § 2484 (3rd Ed. 1940), 2 Wigmore, Evidence § 563; McCormick, *Some Observation Upon the Opinion Rule and Expert Testimony*, 23 Texas L. Rev. 109, 131 (1945) (cases recorded as early as the 14th Century); cf. Rule 28 Fed. R. Crim. P., 18 U.S.C. (providing for court appointed experts in criminal cases). The appointment of a court-appointed expert panel to devise a school desegregation plan was approved in *Dowell* v. *Board of Education*, 244 F. Supp. 971, 973 (W.D. Okla. 1965), *aff'd* 375 F.2d 158, 162 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967). If a court has the equity power to award plaintiffs counsel fees against a foot-dragging school board (*Bell* v. *School Board of Powhatan County, Va.*, 321 F.2d 494 (4th Cir. 1963)), *a fortiori*, the court can take the milder course of taxing costs necessary to enable the judge to frame his decree. This is all the more appropriate because the case so plainly involves the public interest.

[35] After the court of appeals stayed part of the plan pending appeal, the district judge concluded that the integration requirement was no longer so urgent and postponed the entire plan until September 1970. Petitioners unsuccessfully opposed each delay and cross-appealed the delay order. The school year ended without any Fourth Circuit action on petitioners' motion to set aside the stay.

ing involved is too onerous for the board—is in Judge Winter's phrase, "insubstantial and untenable" (218a). Judge McMillan has ordered a very feasible and sensible plan. It promises to eliminate segregation immediately. There is no other plan in the record which is equally effective. The district court's determination that the plan is feasible is supported by substantial evidence and the findings to this effect were accepted on appeal as not clearly erroneous. Acceptable procedures were used to formulate the plan. There is no basis for concluding as a matter of law that the plan is "unreasonable." There was no abuse of discretion in formulating the remedy. The arguments about illegal busing to achieve racial balance and the neighborhood school theory are also legally insubstantial.

The district court acted within the limits of its discretion in fashioning an equitable remedy for the present unconstitutional system. The Finger Plan meets the principal test established by *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), in that it does promise to dismantle the dual system and provide a unitary system of schools. It will produce a system without a single school which might be labeled a "white" school or a "black" school. The elimination of racially identifiable schools promised by this plan produces the *result* called for by *Green, supra.*

If there was some proposal in the record which would be *equally effective or more effective* in eliminating segregation, there would be room for discussion about which plan is most desirable. But, Judge McMillan demonstrated that he was prepared to accept school board alternatives which produced equal results in accomplishing desegregation. He preferred such "home-grown products" even where he believed the expert consultant's proposals were more efficient. But an essential finding which supports the Finger Plan for elementary schools is Judge McMillan's conclusion that it

was *necessary* to adopt a plan of this type to accomplish the result of desegregation. The court found:

> Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion. (146a)

Judge Sobeloff's dissenting opinion, noted that "The point has been perceived by the counsel for the board, who have candidly informed us that if the job must be done then the Finger plan is the way to do it" (204).

The elementary plan ought to be upheld if the case is governed by the traditional rule for appellate review of a chancellor's decree in equity. The prevailing rule is that equitable discretion in framing remedies is necessarily broad and that a strong showing of abuse of discretion must be made to reverse such a decree. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago R. I. & P. Co.*, 294 U.S. 648, 677 (1935); *United States* v. *Corrick*, 298 U.S. 435 (1936); *Rogers* v. *Hill*, 289 U.S. 582 (1933). In order to set aside the equity decree the appellant "must demonstrate that there was no reasonable basis for the district judge's decision," and thus that the remedy is so lacking in rationality as to amount to an abuse of discretion. *United States* v. *W. T. Grant Co., supra*, 345 U.S. at 634.

This Court's decisions in school cases have relied on traditional equitable principles on remedial issues. In the second *Brown* decision the Court invoked the tradition of

equity which was said to be "characterized by a practical flexibility in shaping its remedies and by a facility for reconciling public and private needs" (349 U.S. at 300). The *Brown II* Court cited with approval a passage in *Alexander* v. *Hillman*, 296 U.S. 222, 239 (1935), stating.

> Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and properly to enforce substantial rights of all the parties before them.

In *Griffin* v. *School Board*, 377 U.S. 218, 232-233 (1964), the Court said that "relief needs to be quick and effective," and that a federal court could require a county to levy taxes if necessary to maintain a non-discriminatory public school system. *Green* v. *County School Board*, 391 U.S. 430, 439 (1968), emphasized that in formulating a remedy district courts were to assess "the circumstances present and the options available in each instance." In *United States* v. *Montgomery County Board of Education*, 395 U.S. 225, 235 (1969), the Court emphasized that "in this field the way must always be left open for experimentation." In the *Montgomery County* case the Court reversed a court of appeals decision which labeled the district judge's order too rigid and inflexible in favor of the trial court's "more specific and expeditious order." Finally, in decisions this term the Court has limited the discretion of the courts to delay relief by making it plain that the "standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible." *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970); *Dowell* v. *Board of Public Education of Oklahoma City*, 396 U.S. 269 (1969).

There is nothing in this development of school desegregation law since *Brown* which warrants the departure from the traditional rule of appellate review announced by the plurality opinion of Judge Butzner for the court below. This new test of "reasonableness" enables the reviewing court to set aside the trial court's discretion on the ground that the appeals court majority would prefer another mode of relief albeit less effective. This runs exactly counter to the spirit of *Green* which declares that the result—actual desegregation—is the imperative thing and that the methodology of desegregation plans is secondary. It also runs counter to the philosophy of *Alexander, Carter* and *Dowell, supra,* which place a premium on the immediate implementation of constitutional rights pending the completion of litigation. The reasonableness test allows so much scope for unpredictable reversals of those decrees which accomplish actual desegregation as to substantially nullify *Alexander.* The reasonableness test signals the need for trial courts to adopt a "go-slow" cautious approach. Although busing is approved in principle in the opinion below, the result makes it clear that busing must be limited. The standard of "reasonableness" is broad and vague, but it does not allow broad discretion for trial courts to order busing. Any plan found objectionable by a school board can colorably be said to be "unreasonable" justifying at least a stay pending appeal. The "reasonableness" test is "deliberate speed" in a new guise.

The district court's decision that the Finger Plan is feasible is in any event supported by substantial evidence. It was error for the court of appeals to substitute its own finding of "unreasonableness" where there was no claim that the district court's findings were clearly erroneous. Cf. *Northcross* v. *Board of Education,* 397 U.S. 232, 235 (1970) As Judge Sobeloff has shown, in dissent, "there is no genuine dispute" on the feasibility of the plan; it is "simple and quite efficient" (206a). Here are the facts.

The Finger Plan requires transportation of pupils to accomplish desegregation. The system now transports 23,600 pupils by school bus and another 5,000 by common carrier.[37] The school board's proposed plan would bus about 5,000 additional children[38] but still would not desegregate the system, leaving 10 Negro schools.[39] The board's plan by busing about 8,000 more children than the board's proposal (a total of about 13,000 more than at present)[40] will eliminate racial identifiability from every school in the system. The court of appeals affirmed the order as to secondary students (1,500 senior high and 2,500 junior high pupils), but reversed the requirement as to elementary pupils (9,300 pupils, including 1,300 in schools to be simply rezoned, and 8,000 involved in cross busing between paired schools).[41]

The court carefully considered the busing from the standpoint of the children. The crucial finding is this:

> The court finds that from the standpoint of distance travelled, time en route and inconvenience, the children bussed pursuant to the court order will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported at state expense. (143a)

At present the *average* one-way trip in the system is over 15 miles requiring one hour and fourteen minutes.[42] Eighty percent of the buses in the system require more than one

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[37] See 138a.

[38] See 155a.

[39] The board plan would produce 9 elementary schools 83% to 100% black *serving over half of the entire black elementary population* (120a). In this plan Piedmont Junior High would be 90% black and shifting toward 100% black; segregation would actually increase by 1% more black pupils (124a).

[40] See 157a.

[41] *Ibid.*

[42] See 142a, 153a.

hour for a one-way trip now.[43] The average one-way trip under the court plan "for elementary students is less than seven miles, and would appear to require not over 35 minutes at most, because no stops will be necessary between schools."[44]

Judge Butzner's opinion approves "bussing [as] a permissible tool for achieving integration, but . . . not a panacea." He wrote that in deciding on busing boards "should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources." This ruling is enlightened and progressive as used to approve busing plans for secondary schools. But it fails to satisfy constitutional requirements, if it means, as it apparently does, that these factors are to be weighed in determining whether schools will be integrated at all. There is no suggestion in the opinion that the majority found the Finger plan wanting in terms of the "age of the pupils", since busing elementary pupils is an established tradition in this system. There was no suggestion that the times and distances involved were excessive since they plainly compared favorably with the present practice. The determination to reverse the elementary plan is put entirely on the cost factor.

To begin with, the court below states the cost issue not in dollar terms, but in terms of the increased percentage of busing. Thus the cost is not considered in terms of its "relation to the board's resources" but only in relation to present expenditures for busing. Even on this basis the plan will require less busing in Charlotte than the statewide average of 54.9% of the pupils (137a). But the

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[43] See 142a.

[44] See 153a. "The average *straight line* mileage between the elementary schools paired or grounded under the 'cross-bussing' plan is approximately 5½ miles." (183a) The *trip* mileage was arrived at by the bus superintendent's method of taking straight line mileage and adding 25%.

"board's resources" in this context are much broader than the local funds because in North Carolina transportation costs are largely met by the State, which replaces all buses after the local authorities make the first purchase, and bears most of the operating costs. The total annual cost per pupil is about $20 in the system. (Note that the $39.92 figure mentioned several times in opinions is erroneous and is corrected to $20 at 181a-182a.) Virtually the entire cost is borne by the State, except for one-time bus purchase costs and incidental administrative costs and parking expenses. The capital outlay required for the elementary busing is $5,400 per bus for 90 vehicles, or $486,000. This investment will bring not only vehicles with useful lives of ten or more years but also the right to have them perpetually replaced at no further local cost by the state board of education. Operational costs (reimbursed by the State) for the added elementary busing were found to be $186,000 annually (191a, 181a-182a).

When these expenditures are considered in the context of the local budget figures and the state budget figures they are so small as to be insignificant. The 1969-70 budget for Charlotte-Mecklenburg is $57,711,344, and future years may bring even larger expenditures. Between six and seven million dollars represents capital outlay and debt service. School construction is not included in these figures. In 1968-69 the state's education budget was over 3.59 billion dollars and this included over $14 million spent on transportation for an average of 610,760 pupils daily. Given this financial framework, the decision below that there is a financial barrier to integrating the local school system cannot be sustained. The appropriate principle was stated in *Cooper* v. *Aaron*, 358 U.S. 1, 19, where a unanimous court declared that:

> State support of segregated schools through any arrangement, management, funds or property cannot be

squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

We live in a society where it is a commonplace for government to spend vast sums to protect the constitutional rights of our citizens. New York City in recent weeks is reported to have spent a million dollars for overtime police protections for pro- and anti-war demonstrators in the streets. Examples could be proliferated. The rights of black children to an equal educational opportunity cannot be sacrificed on the ground that it costs too much to grant equal treatment. If necessary, the federal courts may even command that the money be levied and spent to redress denial of constitutional rights. *Griffin* v. *School Board*, 377 U.S. 218 (1964). But this case involves merely a decision about how existing resources are allocated. As a matter of fact, at the time of the judge's supplemental findings of March 21, 1969, the state board of education (a defendant in this case) had "approximately 40 brand new school busses and 375 used busses in storage, awaiting orders from school boards" (157a). "The problem is not one of availability of busses but of unwillingness of Mecklenburg to buy them and of the state to furnish or make them available until final decision of this case" (157a-158a).

Judge Sobeloff found the majority's conclusion with respect to the elementary plan so inconsistent with the decision approving the use of busing, satellite zoning, and similar techniques for secondary students that he said the "decision totally baffles me" (211a). The major distinction between the busing which is approved and that which is rejected is that the secondary plans primarily increased busing of black students to formerly white schools while the elementary plan requires busing of white children as well as Negroes. We are unlikely to ever end the dual

school systems until it becomes accepted that the inconveniences incident to reorganizations of the school systems will not be borne by black pupils alone but will be shared by the white community. Equal protection does require that desegregation plans be generally equitable and not place the entire burden on blacks. Judge McMillan announced at the time he approved the interim plan for 1969-70 that he would not again approve a plan for one-way busing (69a-70a). He wrote that:

> If, as the school superintendent testified, none of the modern, faculty-integrated, expensive, "equal" black schools in the system are suitable for desegregation now, steps can and should be taken to change that condition before the fall of 1970. Unsuitability or inadequacy of a 1970 "black" school to educate 1970 white pupils will not be considered by the court in passing upon plans for 1970 desegregation. (70a)

Judge McMillan's plan should be approved as an intelligent effort to comply with the *Brown* decision. When first considering the idea of eliminating all racially identifiable schools by a percentage formula he pointed out that:

> . . . it would be a great benefit to the community. It would tend to eliminate shopping around for schools; all the schools, in the New Kent County language, would be "just schools"; it would make all schools equally "desirable" or "undesirable" depending on the point of view; it would equalize the benefits and burdens of desegregation over the whole county . . . ; it would get the Board out of the business of lawsuits and real estate zoning and leave it in the education business; and it would be a tremendous step toward the stability of real estate values in the community and the progress of education of children. Though seemingly radical in nature, if viewed by people who live in totally segregated neighborhoods, it may like sur-

> gery be the most conservative solution to the whole problem and the one most likely to produce good education for all at a minimum cost.

This record shows that there is no reason not to use school buses to integrate the schools except to keep them segregated. Busing is a legitimate technique of educational administration. In Charlotte schools today, the walk-in neighborhood school is primarily a phenomenon in the black neighborhoods. Of 17,000 children in black schools, only about 541 are now transported to school (142a); no black school depends very much on school buses. By contrast, white schools have the opposite pattern, and "suburban schools, including the newest ones, have been located far away from black centers, and where they cannot be reached by many students without transportation" (*ibid.*). The Center for Urban Education recently said that "Riding the yellow school bus is as much a symbol of American education in 1970 as the little red schoolhouse was in 1900. And, until recently, it had conveyed no emotional overtones other than nostalgia for lost youth." ("On the Matter of Busing: A Staff Memorandum from the Center for Urban Education", February 1970.) The Civil Rights Commission has made the same point:

> Thus the arguments that some now make about the evils of busing would appear less than ingenuous. The plain fact is that every day of every school year 18 million pupils—40 percent of the Nation's public school children—are bused to and from school, and the buses log in the aggregate more than two billion miles—nine billion passenger miles—each year. It also should be understood that the overwhelming majority of school busing has nothing to do with desegregation or achieving racial balance. The trend toward consolidation of schools, for example, particularly in rural areas, requires extensive busing. It causes no

disruption to the educational routines of the children and is treated as normal and sensible.

• • •

In the Commission's view, the emphasis that some put on the issue of busing is misplaced. As most Americans would agree, it is the kind of education that awaits our children at the end of the bus ride that is really important.

(Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1713~~ 281

JAMES E. SWANN, *et al.*,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*

APPENDIX TO PETITION FOR CERTIORARI OPINIONS BELOW

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Opinion and Order dated April 23, 1969 Regarding Desegregation of Schools of Charlotte and Mecklenburg County, North Carolina

Preliminary Summary

The case, originally filed in 1965, is now before the court under the "Motion for Further Relief" filed by the plaintiffs on September 6, 1968. The motion seeks greater speed in desegregation of the Charlotte-Mecklenburg schools, and requests elimination of certain other alleged racial inequalities. Evidence was taken at length on March 10, 11, 12, 13, 17 and 26, 1969. The file and the exhibits are about two and one-half feet thick, and have required considerable study. In brief, the results of that study are as follows:

The Charlotte-Mecklenburg schools are not yet desegregated. Approximately 14,000 of the 25,000 Negro students still attend schools that are all black, or very nearly all black, and most of the 24,000 have no white teachers. As a group Negro students score quite low on school achievement tests (the most objective method now in use for measuring educational progress); and the results are not improving under present conditions. The system of assigning pupils by "neighborhoods," with "freedom of choice" for both pupils and faculty, superimposed on an urban population pattern where Negro residents have become concentrated almost entirely in one quadrant of a city of 270,000, is racially discriminatory. This discrimination discourages initiative and makes quality education impossible. The quality of public education should not depend on the economic or racial accident of the neighborhood in which a child's parents have chosen to live—or find they must live—nor on the color of his skin. The neighborhood school concept never *prevented* statutory racial segrega-

tion; it may not now be validly used to *perpetuate* segregation.

Since this case was last before this court in 1965, the law (or at least the understanding of the law) has changed. School boards are now clearly charged with the affirmative duty to desegregate schools *"now"* by positive measures. The Board is directed to submit by May 15, 1969 a positive plan for faculty desegregation effective in the fall of 1969, and a plan for effective desegregation of pupil population, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970. Such plan should try to avoid any re-zoning which tends to perpetuate segregated pupil assignment. The Board is free to consider all known ways of desegregation, including bussing (the economics of which might pleasantly surprise the taxpayers); pairing of grades or of schools; enlargement and re-alignment of existing zones; freedom of transfer coupled with free transportation for those who elect to abandon *de facto* segregated schools; and any other methods calculated to establish education as a public program operated according to its own independent standards, and unhampered and uncontrolled by the race of the faculty or pupils or the temporary housing patterns of the community.

The Law Which Governs

This case vitally affects 83,000 school children of Charlotte and Mecklenburg County—and their families. That means virtually all of us. The School Board and this court are bound by the Constitution as the Supreme Court interprets it. In order that we think in terms of law and human rights instead of in terms of personal likes and preferences, we ought to read about what the Supreme Court has said.

Before 1954, public education in North Carolina was segregated by law. "Separate but equal" education was acceptable. This *de jure* segregation was outlawed by the two decisions of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and 349 U. S. 294 (1955).

The first *Brown* opinion held that racial segregation of schools by law was unconstitutional because racial segregation, even though the physical facilities and other tangible factors might be equal, deprives Negro children of equal educational opportunities. The Court recalled prior decisions that segregation of graduate students was unlawful because it restricted the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." The Court said:

> "Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Quoting a lower court opinion, the Supreme Court continued:

> "'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard]

the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. . . ."

The second *Brown* case, decided May 31, 1955, directed school boards to do whatever was necessary to carry out the Court's directive as to the pending cases "with all deliberate speed" (349 U. S. 301).

North Carolina's most significant early response to *Brown* was the Pupil Assignment Act of 1955-56,[1] under which local school boards have the sole power to assign pupils to schools, and children are required to attend the schools to which they are assigned.

It is still to this day the local School Board, and not the court, which has the duty to assign pupils and operate the schools, subject to the requirements of the Constitution.

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[1] N.C.G.S., § 115-176. Authority to provide for assignment and enrollment of pupils; rules and regulations.—Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administrative unit who is qualified under the laws of this State for admission to a public school. Except as otherwise provided in this article, *the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete*, and its decision as to the assignment of any child to any school shall be final. . . . No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education. In exercising the authority conferred by this section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the *orderly and efficient administration* of the public schools, and *provide for the effective instruction*, health, safety, and general welfare of the pupils. Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this article. (Emphasis added.)

It is the court's duty to assess any pupil assignment plan in term of the Constitution, which is still the Supreme law of the land.

Some token desegregation of Charlotte city schools occurred during the late 1950's. In 1961, upon economic and administrative grounds not connected with questions of segregation, the Charlotte City schools and the Mecklenburg County schools were consolidated into one school administrative unit under one nine-member board known as the Charlotte-Mecklenburg Board of Education. By 1964 a few dozen out of more than 20,000 Negro school children were attending schools with white pupils.

This suit was filed on January 19, 1965, by Negro patrons, to seek orders expediting desegregation of the schools. At that time, serious questions existed whether *Brown* required any positive action by school boards to eliminate segregated schools or whether it simply forbade active discrimination. An order was entered in 1965 by the then District Judge in line with the law as then understood, substantially approving the Board's plan for desegregation. The Fourth Circuit Court of Appeals affirmed the order.

Pursuant to the approved plan the Board closed certain all-Negro schools, established school zones, built some new schools, and set up a freedom of choice arrangement for the entire system. The students in a zone surrounding each school are assigned to that school; a period is allotted each spring to request assignment to another school; no reason for transfer need be given; all transfer requests are honored unless the requested schools are full; no transportation is available to implement such transfer.

In appraising the results under this plan in 1969, four years later, we must be guided by some other and more recent things the Supreme Court has said.

In *Green* v. *New Kent County School Board*, 391 U. S. 430 at 435 (1968), the Supreme Court held unlawful a county school pupil assignment system which maintained a black school and a white school for the same grades. The Court said:

> "It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were *required* by *Brown II* 'to effectuate a transition to a racially nondiscriminatory school system.' 349 U. S., at 301. It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the 'white' schools. See, *e. g., Cooper* v. *Aaron*, 358 U. S. 1. Under *Brown II* that immediate goal was only the first step, however. *The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about;* . . ."
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> "It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's 'freedom-of-choice' plan to achieve that end.
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> • • • • •
>
> ". . . In the light of the command of that case, what is involved here is the question whether the Board has achieved the 'racially nondiscriminatory school system' *Brown II* held must be effectuated in order

to remedy the established unconstitutional deficiencies of its segregated system. *In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequte to abolish its dual, segregated system. Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. *School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. . . .*"

• • • • •

"*. . . 'The time for mere "deliberate speed" has run out,' Griffin* v. *County School Board,* 377 U. S. 218, 234; *'the context in which we must interpret and apply this language* [of *Brown II*] *to plans for desegregation has been significantly altered.'*"

• • • • •

"*. . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.*

"The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. . . ."

• • • • •

"We do not hold that 'freedom of choice' can have no place in such a plan. We do not hold that a 'freedom-of-choice' plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that *in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself.* As Judge Sobeloff has put it,

> "'*Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects.* If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'" *Bowman* v. *County School Board,* 382 F. 2d 326, 333 (C. A. 4th Cir. 1967) (concurring opinion).

". . . Although the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

* * * * *

"... The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools."

(All emphasis added except for the word "required" in the first quoted paragraph and the word "now" in the fifth quoted paragraph.)

It is obvious that between 1955 and 1968 the meaning and the force of the constitutional guaranty that education if tax paid be equal for all has been intensified. The duty now appears as not simply a negative duty to refrain from active legal racial discrimination, but a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical *apartheid*. It is in this light that the actions of school boards must now be studied.

Findings of Fact

Some Facts About the Charlotte-Mecklenburg School System:

a) *General Information.*—The system covers 550 square miles and serves more than 82,000 pupils. It is 43rd in size among the school administrative units of the United States. The county population is over 335,000. The population of Charlotte is now about 270,000. The student population increases at a rate betwen 2,500 and 3,000 students per year. The schools are 107 in number, including 76 elementary schools (grades 1 through 6), 20 junior high

schools (grades 7 through 9) and 11 senior high schools (grades 10 through 12). The Board also operates a learning academy, 4 child development centers (kindergartens for the underprivileged) and 3 psycho-educational clinics.

The students on the rolls as of January 1969 include 44,835 elementary students, 20,675 junior high students and 16,690 senior high students. Of these students, about 29% are Negro and about 71% are white. The ratio of black to white of all ages in the county is about one to three.

The 5,880 school employees include 3,553 classroom teachers; 404 other members of the instructional staff including principals, directors and special staff members. These include 60 guidance counselors and 114 librarians. Other employees include 325 secretaries and other clerical employees, 995 cafeteria employees, 357 janitors and maids, 219 maintenance and transportation workers and 27 people assigned to educational television work. The school system is the largest employer in the state's most populous county.

The nine members of the Board of Education are elected three every two years on a non-partisan basis for six-year terms.

Over 18% of the 3,553 classroom teachers have graduate certificates. Some 2,870 or nearly 81% have Class A certificates. Some 852 teachers are men.

Of 1968's 4,095 high school graduates, about 62% or 2,539 entered college. The drop-out rate for the past two years has been approximately 2.3% of the total enrollment of the schools.

The operating budget for the system (not counting construction costs) was nearly $40,000,000 last year. Average per pupil expense was over $530. Teachers' salaries range

from $5,669 to $10,230.25. School funds come 58% from the state, 35% from local sources, and 7% from federal funds.

Class size averages approximately 28 students in elementary schools (the first six grades); 26.4 in junior high schools and 29.3 in senior high schools.

All schools have libraries. The total number of books in the libraries is over 806,000, which is nearly 10 books per pupil, with a value estimated at $2,677,804. (This may be compared with the average of roughly one-half a book per pupil in the schools of the District of Columbia a couple of years ago.) These are not the textbooks which are furnished free by the state for individual use, but are library books for general circulation. Circulation last year was 2,884,252, or an average per pupil of 36 books.

The Board operates the largest food service industry in the state, serving over 70,000 meals a day on a budget of four and one-half million dollars.

Nearly one-fourth of the students (almost 20,000 last year) attend classes at the planetarium in the Children's Nature Museum. This is reportedly more children than attend regular classes at any other planetarium in the country.

Special consultants and teachers are provided in special areas such as art, music, languages, social studies, science, mathematics and physical education. Special teachers are employed to teach classes for the gifted, the mentally retarded and the physically handicapped. Guidance counselors, school psychologists and social workers are available where needed.

Faculty salaries are higher in Mecklenburg County than in most other counties of the state, by virtue of a substantial salary supplement from local taxpayers.

b) *History and Geography; Background of De Facto Segregation.*—Charlotte (270,000-plus) sits in the center of Mecklenburg County (550 square miles, total population over 335,000). The central city may be likened to an automobile hub cap, the perimeter area to a wheel, and the county area to the rubber tire. Tryon Street and the Southern Railroad run generally through the county and the city from northeast to southwest. Trade Street runs generally northwest to southeast and crosses Tryon Street at the center of town at Independence Square. Charlotte originally grew along the Southern railroad tracks. Textile mills with mill villages, once almost entirely white, were built. Business and other industry followed the highways and the railroad. The railroad and parallel highways and business and industrial development formed something of a barrier between east and west.

By the end of World War II many Negro families lived in the center of Charlotte just east of Independence Square in what is known as the First Ward—Second Ward—Cherry—Brooklyn area. However, the bulk of Charlotte's black population lived west of the railroad and Tryon Street, and north of Trade Street, in the northwest part of town. The high priced, almost exclusively white, country was east of Tryon Street and south of Trade in the Myers Park—Providence—Sharon—Eastover areas. Charlotte thus had a very high degree of segregation of housing before the first *Brown* decision.

Among the forces which brought about these concentrations should be listed the original location of industry along and to the west of the Southern railroad; the location of Johnson C. Smith University two miles west of Tryon Street; the choice of builders in the early 1900's to go south and east instead of west for high priced dwelling construction; the effect of private action and public law on choice of dwelling sites by black and by white pur-

chasers or renters; real estate zoning which began in 1947; and the economics of the situation which are that Negroes have earned less money and have been less able to buy or rent expensive living quarters.

Local zoning ordinances starting in 1947 generally allow more varied uses in the west than in the east. Few if any areas identified as black have a residential restriction stronger than R-6, which means that a house can be built on a lot as small as 6,000 square feet. Zoning restrictions in other areas go as high as 12,000 and 15,000 square feet per lot. Nearly all industrial land in the city is in the west. The airport in the southwest with its jet air traffic inhibits residential development. Many black citizens live in areas zoned industrial, which means that the zoning law places no restriction on the use of the land. The zoning laws follow the pattern of low cost housing and industry to the west and high cost housing with some business and office developments to the east.

City planning has followed the same pattern.

Tryon Street and the Southern railroad were not built to segregate races. In the last fifteen years grade crossings have been eliminated at great expense at Fourth Street, Trade Street, Twelfth Street and Independence Boulevard; and an elevated half-mile bridge, the Brodie Griffith Skyway, is now being built across the railroad in North Charlotte at a cost of more than three million dollars. The ramparts are being pierced in many spots and inner-city highways now under construction will make communication much simpler.

However, concentration of Negroes in the northwest continues. Under the urban renewal program thousands of Negroes were moved out of their shotgun houses in the center of town and have relocated in the low rent areas to the west. This relocation of course involved many ad

hoc decisions by individuals and by city, county, state and federal governments. Federal agencies (which hold the strings to large federal purses) reportedly disclaim any responsibility for the direction of the migration; they reportedly say that the selection of urban renewal sites and the relocation of displaced persons are matters of decision ("freedom of choice"!) by local individuals and governments. This may be correct; the clear fact however is that the displacement occurred with heavy federal financing and with active participation by local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon—railroad area, or on its immediate eastern fringes.

Onto this migration the 1965 school zone plan with freedom of transfer was superimposed. The Board accurately predicted that black pupils would be moved out of their midtown shotgun housing and that white residents would continue to move generally south and east. Schools were built to meet both groups. Black or nearly black schools resulted in the northwest and white or nearly all white schools resulted in the east and southeast. Freedom of students of both races to transfer freely to schools of their own choices has resulted in resegregation of some schools which were temporarily desegregated. The effect of closing the black inner-city schools and allowing free choices has in overall result tended to perpetuate and promote segregation.

SOME BOARD ACTIONS FOUND NOT TO BE DISCRIMINATORY

No racial discrimination or inequality is found in the following disputed matters:

1. *The use of federal funds for special aid to the disadvantaged.* The testimony and the exhibits failed to show

that federal money was used with any discrimination by race or with any improper displacement of local money.

2. *Use of mobile classrooms.* In recent years the system has required the addition of nearly two classrooms per week. Mobile classrooms have been used to provide extra space temporarily to cope with shifts and growth in school population. Mobiles are not inferior in quality and comfort to permanent classrooms, and recent models are superior in many ways to many existing permanent classrooms. Their use and location are matters to be determined by the Board in light of the court's instructions hereafter on the preparation of a new plan for pupil assignment.

3. *The quality of the school buildings and equipment.* The evidence showed the per pupil value of the land and buildings and equipment of the various schools. Average value of these items per pupil for elementary schools was $861; for junior high schools $1,229; and for senior high schools $1,567. Schools described by witnesses as "white" ranged well up and down on both sides of that average figure and schools described by witnesses as "black" showed a similar variation. Several of the oldest and most respected "white" elementary schools in the county (Sharon Road and Steele Creek, for example) have very low per pupil facilities values. One of the newest but still all black high schools (West Charlotte) has one of the highest per pupil facilities values. The highest priced school (Olympic High) is totally desegregated (522 white and 259 black students). No racial discrimination in spending money or providing facilities appears.

4. *Coaching of athletics.* Coaches at the predominantly black schools are usually black. Coaches at the predomi-

antly white schools are usually white. Several black coaches have been employed at "white" schools. No black coach was shown to have applied and been refused a job. No pattern of discrimination appears in the coaching ranks.

5. *Parent-Teacher Association contributions and activities.* Parents contribute to school projects through voluntary Parent-Teacher Associations. This voluntary parental action is not racial discrimination against children whose parents are less able to make such contributions, and it does not come about through state action.

6. *School fees.* It was contended that the school fee system is discriminatory. For example, at the elementary level, grades 1 through 6, each student is supposed to bring a dollar to school at the beginning of the year to provide some extra learning aids in the form of paper, art materials and the like. In poor communities collection of this fee averages only about 50%, whereas nearly all wealthy children pay all the fees assessed in their schools. This non-payment of school fees by the poor is not a racial discrimination against the poor. The schools where people are poorer have other funds by which this 50¢ per pupil can be made up.

7. *School lunches.* School lunches are provided free to needy students. The court finds that no one has ever knowingly been denied a free lunch on racial grounds if he could not pay for it.

8. *Library books.* Library books of comparable quality and content are available to all students, black and white, in all schools in an average number of nearly ten per pupil.

9. *Elective courses.* Some elective courses such as German are offered at some but not all of the high schools. They are offered at a school only if enough students express a desire for the course. Not all schools therefore have all elective courses every year. This situation is not the result of discrimination on account of race.

10. *Individual Evaluation of Students.* Individual students are evaluated annually in terms of achievement in particular subjects, and divided into groups for the study of particular subjects in accordance with their achievement. (This is not, truly described, the "track" system which was elaborately criticized by Judge Skelly Wright in his 119-page opinion in *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.C. D.C., 1967).) Few black students are in the advanced sections and most are in regular or slow sections. Assignments to sections are made by the various schools based not on race but on the achievement of the individual students in a particular subject. There is no legal reason why fast learners in a particular subject should not be allowed to move ahead and avoid boredom while slow learners are brought along at their own pace to avoid frustration. It is an educational rather than a legal matter to say whether this is done with the students all in one classroom or separated into groups.

11. *Gerrymandering.* Gerrymandering was contended in the 1965 hearing of this case. Perhaps the evidence comes closer to proving it this time. The court is not by this order foreclosing the later assertion of that contention or for that matter any other contention which may be advanced, because it is the court's duty to keep the matter under advisement. However, in view of the court's orders herein which are expected to produce substantial changes in the

pupil assignment system and a reappraisal of all zoning considerations, it is believed that nothing in particular need be said here about specific school district lines.

SOME COMMENT ON SPECIFIC ISSUES

a) *The Present State of Desegregation.*—Defendant's Exhibit Seven (attached as an appendix to this opinion) shows pupil and faculty population for each school in the system, by races, in March of 1965 and in October of 1968. From this and other evidence the following facts are apparent:

1) *The Rural Schools Are Largely Desegregated.* Of the 32,000 rural children of all twelve grades, some 23,000, black and white, are being hauled by bus to desegregated schools. No rural schools are all-black. The only all-white county schools are four new schools in the south and east portions of the county: Beverly Woods, Devonshire, Idlewild and Lansdowne.

2) *The City Schools are Still Largely Segregated.* A few city schools, Elizabeth (58% Negro); Highland (13% Negro); Plaza Road (19% Negro); Randolph (28% Negro); Sedgefield (19% Negro); Spaugh (18% Negro) and Harding (17% Negro) have a substantial degree of apparently stabilized desegregation. However, most of the fully desegregated city schools are not stable in that situation, but are rapidly moving (through a temporary desegregation) from an all-white to an all-black condition. Dramatic examples are Barringer (84% Negro); Villa Heights (86% Negro); Piedmont (89% Negro); Tryon Hills (50% Negro); Hawthorne Junior High (52% Negro); Lakeview (65% Negro); and apparently Dilworth (39% Negro) and Wilmore (33% Negro).

3) *More Than Three-Fourths of the Children Attend Schools Which Have One or More Children of the Opposite Race.* In Cornelius (49% Negro), Dilworth (39% Negro), Elizabeth (58% Negro) and a few others, the races are close to being balanced in numbers. However, most schools have only a small handful of the minority race. Illustrations are: Second Ward High School (1,139 black and three white); Midwood (522 white, one black); Lincoln Heights (817 black, two white).

4) *Most Black Students Attend Totally or Almost Totally Segregated Schools.* Out of 24,000 black students:

4,780	attend nine all-black elementary schools;
3,380	attend six elementary schools which are more than 99% black;
2,491	attend three all-black junior high schools;
727	attend York Road with only six white fellow junior high students;
1,569	high school students attend all-black West Charlotte; and
1,139	black Second Ward High School students have only three white classmates.
14,086	

In other words, of the 24,000 or so black students, 14,086 of them attend school daily in schools that are all-black unless at York Road they see one of the six white students or at Second Ward they see one of the three white students, who were enrolled there last October.

5) *Most White Students Attend Largely or Completely Segregated Schools.* Thirteen elementary schools with 8,044 pupils are 100% white; eighteen other elementary schools with a pupil enrollment of 10,651 have only 150 black students. The total number of white elementary students is only 31,545. At the junior high level, 7,641 out of 14,741 white students attend school with only 193 black students in six schools. In the high schools, 12,310 white students attend school with 1,642 blacks, while 2,735 black students at West Charlotte and Second Ward attend school with three white students.

b) *The Opinions of Experts.*—Doctors Larson, Finger and Passy, all from Rhode Island College, of Providence, Rhode Island, testified at length. They submitted a 55-page report which outlines several possible plans for realignment of school zones and for provision of transportation; for pairing schools; for setting up feeder systems; for educational parks; and other approaches towards desegregation. None was as familiar with the local situation as the local Board and school administrators. All drew certain conclusions from the Coleman Report, which is a collection of statistics on performance of school children in certain areas about the country. Some said that kindergarten for all children would help the situation. Some said underprivileged children should start getting public education several years before first grade age. Some said that improving the faculty was important. Available statistics and expert opinion agreed that Negro students as a group do noticeably worse on achievement tests than students generally. The experts agreed that if children are underprivileged and undercultured, their school performance will be generally low. One expert, Dr. Passy, said that socio-

economic-cultural background is the sole major determinant of school performance. The Abraham Lincoln-Charles Kettering theory of the rise of Americans from poor backgrounds received small support.

One point on which the experts all agree (and the statistics tend to bear them out) is that a racial mix in which black students heavily predominate tends to retard the progress of the whole group, whereas if students are mingled with a clear white majority, such as a 70/30 ratio (approximately the ratio of white to black students in Mecklenburg County), the better students can hold their pace, with substantial improvement for the poorer students.

c) *The "Neighborhood School" Theory.*—Recently, the School Board has followed what it calls the "neighborhood school" theory. Efforts have been made to locate elementary schools in neighborhoods, within walking distance of children. The theory has been cited to account for location and population of junior and senior high schools also.

"Neighborhood" in Charlotte tends to be a group of homes generally similar in race and income. Location of schools in Chalotte has followed the local pattern of residential development, including its *de facto* patterns of segregation. With a few significant exceptions, such as Olympic High School (about ⅓ black) and Randolph Road Junior High School (28% black), the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built. Specific instances include Albemarle Road Elementary (99%+ white); Beverly Woods (100% white); Bruns Avenue (99%+ black); Hidden Valley (100% white); Olde Providence (98% white); Westerly Hills (100+ white); Albemarle Road Junior High (93% white).

Today people drive as much as forty or fifty miles to work; five or ten miles to church; several hours to football games; all over the county for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood. Parents with children of all ages may be members of two or three separate and widely scattered school "communities." *Putting a school in a particular location is the active force which creates a temporary community of interest among those who at the moment have children in that school.* The parents' community with the school ordinarily ends the day the youngest child graduates.

If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships. The neighborhood school concept may well be invalid for school administrative purposes even without regard for racial problems. The Charlotte-Mecklenburg School Board today, for example, is transporting 23,000 students on school buses. First graders may be the largest group so transported. If a first grader lives far enough from school to ride a bus, the school is not part of his neighborhood.

When racial segregation was required by law, nobody evoked the neighborhood school theory to *permit* black children to attend white schools close to where they lived. The values of the theory somehow were not recognized before 1965. It was repudiated by the 1955 North Carolina General Assembly and still stands repudiated in the Pupil Assignment Act of 1955-56, which is quoted above. The neighborhood school theory has no standing to override the Constitution.

d) *Bussing.*—Under North Carolina General Statutes, §115-180, the Board is expressly authorized to operate

school busses to transport school children. The state pays bus expenses only for rural children and for some who have been annexed into the city in recent years. This apparent discrimination against city dwellers is reportedly under attack in another court. This Board already transports 23,000 students to school every day out of the 32,000 who live in the area presently eligible for bus service. The present cost of school bussing is about $19 for bus operation plus the cost of the bus which at $4,500 per bus should not exceed $20 per pupil a year. In other words, it costs about $40 a year per pupil to provide school bus transportation, out of total per pupil school operating costs of about $540. The income of many black families is so low they are not able to pay for the cost of transportation out of segregated schools to other schools of their choice.

The Board has the power to use school buses for all legitimate school purposes. Buses for many years were used to operate segregated schools. There is no reason except emotion (and I confess to having felt my own share of emotion on this subject in all the years before I studied the facts) why school busses cannot be used by the Board to provide the flexibility and economy necessary to desegregate the schools. Busses are cheaper than new buildings; using them might even keep property taxes down.

e) *Faculty Desegregation.*—The Board employs over 2,600 white teachers and over 900 black teachers. New teachers hired last year numbered 700. Technically their contracts are with the Board of Education to teach where assigned. The Board makes no sustained effort to desegregate faculties. The choice where to teach is a matter between the principal and the prospective teacher. The Board assumes white teachers will tend to choose white schools and black teachers black schools.

The results of this passive selection policy are obvious. Of the thirteen all-black schools in the system serving 8,840 students, only four have any white teachers. Those four have ten white teachers and 161 black teachers for 3,662 students. Few predominantly black schools have any substantial number of white teachers, except a few schools which serve areas rapidly turning from white to black. Eight other schools 99% or more black had only six white teachers among them for 5,246 black and 24 white pupils. Second Ward and West Charlotte High Schools, with 2,700 black students and three white students, have 131 black teachers and only nine white teachers.

All of the white elementary schools have at least one and in a few cases as many as three or four black teachers. The proportions of black teachers in the junior and senior high schools run slightly higher. The system has not operated, however, to produce any substantial teaching of black students by white teachers.

Desegregation of faculties does not depend upon proof of superiority of one group of teachers or students over the other. Whatever the discrimination that may result from a segregated faculty, it will be eliminated only when a child attending any school in the system will face about the same chances of having a black or a white teacher as he would in any other school. Mecklenburg schools pay a sizeable salary supplement. Desegregation is proceeding in other counties and school districts. It can not be assumed and should not be a tacit part of Board policy that white school teachers are opposed to equality of education or that they will refuse to teach in black schools. In fact, white and black teachers are working together in substantial numbers in several schools of this system and there was no evidence at the hearing of any friction or

difficulty caused by a bi-racial faculty. It is from the teachers that children learn their first glimmerings of the right to equality of opportunity which still constitutes America's chief contribution to modern civilization. The right of all children to equal education is part of that right. It is believed that if the Board takes a stand that requires faculty desegregation and treats all teachers equally in working towards that end, the teachers will participate wholeheartedly.

f) *Metropolitan High School.*—Supported by impressive recommendations from Engelhart, Engelhart & Leggett, educational consultants, the Board has planned and has two million dolars on hand to build Metropolitan High School at or near the location of present Second Ward High School. In addition to being a school for conventional high school work, it is to be a center for vocational training and special courses in music, the creative and performing arts and other special subjects not practical to offer in all the high schools. Second Ward is now a 99%+ black school in the Brooklyn urban renewal area four or five blocks south of the Court House and City Hall. The First Baptist Church and the School Board itself have buildings under way on adjacent or nearby land. This is near the geographical and traffic center of the city and county, one-half a mile from the central business district, a few blocks from Central Piedmont Community College and within easy travel distance of most of the city. The location and proposed purposes appear ideal.

Plaintiffs' attorneys object to Metropolitan High School. Some present school patrons want the school built. The School Board has announced a stoppage of work on that school pending this decision.

All three groups may be proceeding upon an erroneous assumption—that the school if built will be a black school because the pupil and faculty populations will be governed by freedom of transfer and school zones as presently administered. That assumption should no longer be entertained. Pupils for regular and vocational subjects can travel or be transported to and from this area, in all directions, with greater ease than is true of any other location in the county. The nearest other high schools, Harding, West Charlotte, Garinger, East and Myers Park, form a hollow pentagon six or seven miles on the side surrounding Second Ward. It would be tragic to refrain from building a needed educational facility simply upon the assumption that it has to be an all-black school and therefore either unlawful or unattractive. The School Board is advised to make plans for desegregation of this school along with other schools in the system. With the unrestricted statutory power to assign pupils and provide transportation, the only thing necessary to build Metropolitan High School according to the dreams of its planners is the decision to do so.

g) *The Percentage Racial Mix.*—Counsel for the plaintiffs says that since the ratio of white to black students is about 70/30, the School Board should assign the children on a basis 70% white and 30% black, and bus them to all the schools. This court does not feel that it has the power to make such a specific order. Nevertheless, the Board does have the power to establish a formula and provide transportation; and if this could be done, it would be a great benefit to the community. It would tend to eliminate shopping around for schools; all the schools, in the *New Kent County* language, would be "just schools"; it would make all schools equally "desirable" or "undesirable" de-

pending on the point of view; it would equalize the benefits and burdens of desegregation over the whole county instead of leaving them resting largely upon the people of the northern, western and southwestern parts of the county; it would get the Board out of the business of lawsuits and real estate zoning and leave it in the education business; and it would be a tremendous step toward the stability of real estate values in the community and the progress of education of children. Though seemingly radical in nature, if viewed by people who live in totally segregated neighborhoods, it may like surgery be the most conservative solution to the whole problem and the one most likely to produce good education for all at minimum cost. It would simply put the all-white and all-black school people in the same school situation now being experienced by patrons of Cornelius, Davidson, Ranson, Long Creek, Dilworth, Olympic, Huntersville, Pineville, Randolph Road Junior High, Statesville Road, and similar schools. Such action would be supported by the unanimous testimony of all the experts and by inferences from the Coleman Report that although mixing a few whites and a heavy majority of blacks retards the whole group, nevertheless mixing a *substantial majority of whites* and a few blacks helps the blacks to advance without retarding the whites.

h) *A Word About the School Board.*—The observations in this opinion are not intended to reflect upon the motives or the judgment of the School Board members. They have operated for four years under a court order which reflected the general understanding of 1965 about the law regarding desegregation. They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been re-

viewed in appellate court decisions. The Charlotte-Mecklenburg schools in many respects are models for others. They are attractive to outside teachers and offer good education. The problem before this court is only one part (albeit a major part) of the educational problem. The purpose of this court is not to criticize the School Board, but to lay down some legal standards by which the Board can deal further with a most complex and difficult problem. The difference between 1965 and 1969 is simply the difference between *Brown* of 1955 and *Green* v. *New Kent County* of 1968. The rules of the game have changed, and the methods and philosophies which in good faith the Board has followed are no longer adequate to complete the job which the courts now say must be done "now."

Conclusions of Law

1. Since 1965, the law has moved from an attitude barring discrimination to an attitude requiring active desegregation. The actions of school Boards and district courts must now be judged under *Green* v. *New Kent County* rather than under the milder lash of *Brown* v. *Board of Education*. The court has outlined changes which should be made in the activity and theory of the local Board.

2. The manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance and community development. The Board did not originate those patterns; however, now is the time to stop acquiescing in those patterns.

3. Freedom of transfer as operated in this system does not answer the problems of racial segregation. The evidence shows that the black students as a group have very low incomes. Freedom of transfer without transportation is to such a student often an empty right.

4. The faculties have not been adequately desegregated as directed. This permits and promotes inequality of education.

5. The court does not find any inequality based upon racial motives or reasons in the use of federal funds; the use of mobile classrooms; quality of school buildings and facilities; athletics; PTA activities; school fees; free lunches; books; elective courses; nor in individual evaluation of students. The problem of alleged gerrymandering of district lines need not be covered separately from the general order herein made.

6. There has been substantial desegregation in many areas—mostly the rural areas—of this large and complicated school system. A majority of the black students, however, still attend segregated schools and seldom, if ever, see a white fellow student. Many all-black and all-white schools still remain. The neighborhood school concept and freedom of choice as administered are not furthering desegregation.

7. The School Board has an affirmative duty to promote faculty desegregation and desegregation of pupils, and to deal with the problem of the all-black schools.

8. The School Board is free and encouraged to use school busses or other public transportation and to use

mobile classrooms as needed to provide equality of educational opportunity.

9. The Board has assets and experience beyond the reach of a judge to deal with all these problems, and should be requested to formulate a plan and time table of positive action.

ORDER

1. All findings or statements of fact in this opinion and order shall be deemed conclusions of law, and all conclusions of law shall be deemed to be findings of fact as necessary in support and furtherance of this order. All competent and relevant evidence in the record has been considered in support of this order.

2. The defendant is directed to submit by May 15, 1969, a plan for the active and complete desegregation of teachers in the Charlotte-Mecklenburg school system, to be effective with the 1969-70 school year. Such plan could approach substantial equality of teaching in all schools by seeking to apportion teachers to each school on substantially the same ratio (about three to one) as the ratio of white teachers and black teachers in the system at large. It is suggested that teachers' preferences not be especially sought and that teachers be assigned as a routine matter for the purpose of accomplishing this equalization of the application of educational manpower and womanpower in the public schools. Such a plan should provide safeguards against racial discrimination in the discharge of any teachers whose jobs might be changed or abolished. Such safeguards should include provisions that if anyone has to be discharged, his qualifications will be weighed against

those of all personnel in the system rather than simply against those in the capacity in which he has been working; no teacher should be dismissed or demoted or denied employment or promotion because of race or color. In other words, the Board will be expected to see to it that teachers displaced by virtue of this order will not be discriminated against on account of race.

3. The defendant is directed to submit by May 15, 1969, a plan and a time table for the active desegregation of the pupils, to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970. Freedom of choice and zoning may be used in such a plan provided they promote rather than defeat desegregation. If freedom of choice is retained in such plan, it should include provision for transportation free for any student who requests transfer out of a school where his race is in the majority, and to any school where his race is in the minority, and a means of insuring that all students have full and timely knowledge of the availability of such transportation.

4. In formulating its plan the Board is, of course, free to use all of its own resources and any or all of the numerous methods which have been advanced, including pairing of grades and of schools; feeding elementary into junior high and into senior high; combinations of zone and free choice where each method proceeds logically towards eliminating segregation; and bussing or other transportation. The Board may also consider setting up larger consolidated school units freely crossing city-county lines to serve larger areas. There is no magic in existing school zone lines nor in the present size of any school. The Board is encouraged to get such aid as may be available from state and federal agencies including the offices

of the Department of Health, Education and Welfare. The court does not direct a treaty with the Department, but does suggest that since its employees are in the business of dealing with these problems, they have a store of technical assets and manpower and information which could be useful in the Board's making any particular judgment or analysis.

5. The plan should be the plan of the Board for the effective operation of the schools in a desegregated atmosphere, removed to the greatest extent possible from entanglement with emotions, neighborhood problems, real estate values and pride. The court's task has not been easy, but it is fully realized that the task facing the Board is far more difficult and will require a conspicuous degree of further public service by the Board's members.

This the 23rd day of April, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

APPENDIX

Page 1

The Charlotte-Mecklenburg Schools

Research Report 2-'69

SUMMATION OF DEGREE OF INTEGRATION 1965 (MARCH) AND 1968-69 (OCT. 1,

	For Pupils		Professional Staff	
I	Schools Having Integration			
. For Pupils	1965 1 N + 22 W = 23 of 109 or 21%	1968 16 N + 68 W = 84 of 112 or 75%	. For Staff	1965 3 N + 0 W = 3 of 109 or 3%	1968 16 N + 82 W = 98 of 112 or 87½%

II	1965		1968		1965		1968	
	N	W	N	W	N	W	N	W
A. Number in Minority Race (integrated)								
.Pupils	9W	476N	1192W	6704N	5.7W	0N	131W	208N
B. Number in Majority Race (integrated)								
. Pupils	343N	16,446W	8697N	47,356W	143.3N	+0W	374N	2575W

Total involved by integration

. Predominantly Negro Schools -- Pupils	352	9889	Staff	149	505
. Predominatly White Schools -- Pupils	16,922	54,060	Staff	0	2783
.Total -- Pupils	17,274 or 24% of 72,336 Enrolled	63,949 or 77% of 83,111	Staff	149 or 5% of 3140 incl. part assignments in schools	3288 or 91% of 3613 assigned at one definite school

The Charlotte-Mecklenburg Schools

RACIAL DISTRIBUTION OF PUPILS AND PROFESSIONAL STAFF
1965 (March) and 1968-69 (Oct. 1, '68)

Grade	1965 No. School	1965 Pupils N	1965 Pupils W	1968 No. School	1968 Pupils N	1968 Pupils W	Professional Staff 1965 N	1965 W	1968 N	1968 W
1-6	72	9,364	27,696	76-	13,290	31,545	377+	1161½	478	1[illegible]
7-9	17	2,475	11,804	21	5,934	14,741	111-	533	228	[illegible]
10-12	8	1,625	10,677	11	4,377	12,313	65	479½	178	[illegible]
	97	13,464	50,177	108-	23,601	58,599	553½	2184	884	[illegible]
					28.7%	72,200	71.3%			
Other	12	6,877	1,818	4+	640	271	323½	79	23	[illegible]
					: Kgn. + Trainable					
1-4	1	360					15½			
1-7	2	431	207				17	9½		
1-9	3	729	1611				32	68		
5-9	1	505					25½			
1-12	3	2400					113½			
7-12	2	2452					120	1½		
Total	109	20,341	51,995	112	24,241	58,870	877	2263	907	[illegible]
		72,336T			83,111T		Include Part-time		Not Incl Part-tim	
		28.1%	71.9%		29.2%	70.8%				

Among teachers assigned more than one school

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69*		
Elementary	N	% N	W	N	% N	W (other)	N	% N	W	N	% N	W (other)
bemarle Rd.				4	1%	499				6	32%	13
exander Street	342	100%		257	100%		14.1	100%		11	100%	
llenbrook				50	10%	452				2	10%	18
hley Park		0%	694		0%	553		0%	22.9	2	9%	20
lin		0%	674	25	3%	699		0%	28.2	1	3%	28
rringer		0%	604	668	84%	131		0%	24.8	13	42%	18
rryhill		0%	1026	119	15%	685		0%	39.6	2	6%	32
thune	343	97%	9	223	99%	3	17.6	100%		11	100%	
varly Woods					0%	286				1	8%	12
ddleville	434	100%					17.2	100%				
llingsville	729	100%		619	100%	2	32.1	100%		25	100%	
rlanwood	2	0%	582	8	1%	640		0%	23.9	3	12%	22
runs				740	99%	4				26	93%	2
antilly		0%	445	2	0%	491		0%	18.8	1	5%	21
ear Creek		0%	207	58	20%	225		0%	9.6	1	9%	12
llinswood		0%	375	72	13%	490		0%	16.1	1	5%	21
rnelius		0%	241	239	49%	252		0%	11.3	7	33%	14
tswold		0%	631	11	2%	567		0%	25.0	1	5%	21
restdale	97	100%					5.0	100%				
vidson		0%	178	101	35%	186		0%	7.8	1	8%	11
rie Davis	808	100%		705	100%		34.3	100%		29	100%	
rita	6	1%	892	165	18%	728		0%	35.4	3	9%	32
vonshire	2	0%	474		0%	889		0%	19.5	4	10%	37
lworth	100	20%	401	223	39%	355		0%	23.8	4	15%	22
uble Oaks	703	100%		800	100%		28.2	100%		32	100%	
ruid Hills	520	100%		504	99%	3	20.7	100%		20	100%	
stover		0%	704	49	8%	580		0%	27.1	1	4%	24
lizabeth	5	1%	448	270	58%	194		0%	22.9	2	9%	21
derly Park		0%	368	2	1%	374		0%	14.9	1	4%	15
irview	702	100%		363	100%		28.0	100%		19	100%	

	First Ward	473	100%	749	100%	22.8	100%	30
1-12-65	J. H. Gunn	696	100%			33.6	100%	
	Hickory Grove		0% 530	80	13% 531		0% 21.7	1
	Hidden Valley				0% 977			2
	Highland	2	1% 273	47	13% 324		0% 14.0	1

* Does not include staff assigned to more than one school per HEW request.

% N is nearest whole per cent that N is of total

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE March 6, 1965 and 1968-69 *

School	1965 Pupils N	% N	W	1968-69 Pupils N	% N	W (other)	Professional Staff 1965 N	% N	W	196 N
Elementary										
	Hoskins		0% 342	18	6% 261			0% 14.7		2
	Huntersville		0% 553	162	22% 560			0% 22.9		2
	Huntingtowne Farms		0% 358	7	1% 695			0% 15.1		1
	Idlewild		0% 592	2	0% 521			0% 23.9		1
1-4-65	Amay James	360	100%	477	100% 1		15.5	100%		19
1-7-65	Ada Jenkins	431	100%				17.0	100%		
	Lakeview		0% 400	269	65% 147			0% 18.5		14
	Lansdowne		0% 633		0% 758			0% 23.9		1
	Lincoln Heights	783	100%	817	100% 2		29.1	100%		30
	Long Creek		0% 423	250	35% 466			0% 17.6		2
1-9-65	Matthews		0% 937	(1-6) 93	11% 742			0% 39.7		1
	Merry Oaks		0% 538		0% 469			0% 21.9		1
	Midwood		0% 560	1	0% 522			0% 24.9		2
	Montclaire		0% 720		0% 722			0% 29.1		1
	Morgan	305	100%				14.9	100%		

Myers Park		0%575	23	4%543		0%.24.9	1	4%. 23
Myers Street	820	100%			32.2	100%.		
Nations Ford		0%.513	63	10%585		0%.21.6	1	4%. 25
Newell		0%.463	73	15%423		0%.18.3	1	5%. 18
Oakdale		0%.402	72	13%480		0%.17.2	1	5%. 21
Oakhurst		0%.548	2	0%615		0%. 22.8	1	4%. 23
Oaklawn	666	100%	650	100%	26.0	100%.	25	93%. 2
Olde Providence			10	2%.434			1	6%. 17
Park Road		0%.583		0%551		0%.22.7	1	5%. 21
Paw Creek		0%.793	63	7%861		0%.30.3	1	3%. 31
Pineville		0%.364	168	32%363		0%.16.2	1	5%. 21
Pinewood		0%.719		0%707		0%.28.1	1	4%. 26
Plaza Road		0%.400	99	19%409		0%.17.7	1	5%. 21
Rama Road		0%.442	2	0%777		0%.18.7	2	7%. 27
Sedgefield	3	1%.526	7	1%.545		0%.21.8	2	9%. 20
Plato Price	505	100%			25.4	100%.		
Selwyn		0%.531	5	1%.598		0%.21.9	1	4%. 22
Seversville	96	38%229				0%.14.8		
Shamrock Gardens		0%536		0%539		0%.21.9	1	5%. 20
Sharon		0%.591		0%519		0%.22.9	1	5%. 20

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils		1968-69 Pupils		Professional Staff 1965		1968-69*	
Elementary	N	% W N	N	% W N (other)	N	% W N	N	% W N (other)
Starmount		0%. 481	25	3%. 713		0%. 20.9	1	3%. 28
Statesville Road		0%. 650	295	36%. 534		0%. 25.9	3	9%. 29
Steele Creek		0%. 222	12	2%. 531		0%. 10.7	1	3%. 20
Sterling	699	100%.			33.9	100%.		
Thomasboro		0%. 885		0%. 705		0%.34.3	2	7%. 25
Torrence-Lytle	1005	100%.			46.1	100%.		
Tryon Hills		0%. 324	241	50%. 245		0%.15.0	1	5%. 20
Tuckaseegee		0%. 631	61	10%. 553		0%.23.9	1	4%. 23
University Park	700	100%.	777	100%.	25.8	100%.	30	97%. 1
Zeb Vance	465	100%.	257	100%.	19.5	100%.	11	100%.

Villa Heights	23	4%	594	796	9[illegible]%	126		0%	28.3	23	62%
Wesley Heights	214	100%					8.3	79%	2.2		
Westerly Hills					0%	569				1	4%
Wilmore	6	2%	323	145	33%	293		0%	15.4	8	40%
Windsor Park	1	0%	679	2	0%	737		0%	25.8	1	9%
Winterfield		0%	455		0%	689		0%	18.7	1	4%
Woodland	360	100%		-			14.8	100%			
Woodlawn		0%	283					0%	14.0		
Isabella Wyche	383	100%		222	100%		18.6	100%		12	100%

Child Development (Kgn.)

Davidson,	Center #1			83	41%	117				3	30%
Pineville,	Center #2			166	82%	37				2	20%
Seversville,	Center #3			174	87%	26				8	80%
Morgan,	Center #4			188	97%	6				8	80%

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69 *	
Junior High	N	% N	W	N	% N	W (other)	N	% N	W	N	% N (other)
Albemarle Road				66	7%	881				4	9%
Alexander		0%	577	347	31%	755		0%	28.9	6	12%
Cochrane		0%	872	76	5%	1444		0%	35.4	6	10%
Coulwood	3	1%	574	119	14%	727		0%	27.1	4	11%
Eastway		0%	1046	3	0%	1364		0%	43.2	3	5%
Alex. Graham		0%	1048	8	1%	1084		0%	43.8	4	9%
Hawthorne	25	4%	670	492	52%	447		0%	33.9	12	27%
Irwin Ave.	785	100%		666	100%		42.7	100%		32	97%
McClintock		0%	1273	46	4%	1228		0%	51.5	2	4%
Northwest	773	100%		932	100%		33.7	100%		39	100%

Piedmont	121	29%	291	428	89%	53		0%	26.8	13	52%	12
Quail Hollow		0%	766	171	12%	1261		0%	35.2	3	5%	61
Randolph				272	28%	711				2	5%	38
Ranson	9	1%	658	253	30%	586		0%	30.0	6	16%	31
Sedgefield	6	1%	920	189	19%	802		0%	40.5	5	11%	39
Smith		0%	1115		0%	1389		0%	48.6	3	5%	57
Spaugh	1	0%	930	186	19%	871		0%	42.5	6	12%	43
Williams	752	100%		893	100%		34.9	100%		37	100%	
Wilson		0%	1064	60	5%	1132		0%	45.6	4	8%	45
York Rd.	(7-12) 1041	100%		727	99%	6	49.9	100%		32	97%	1
Learning Academy - 7th & 8th grades counted in JH, above,										5	19%	21

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COMPARISON OF PUPILS AND PROFESSIONAL STAFFING BY RACE
March 6, 1965 and 1968-69 *

School	1965 Pupils			1968-69 Pupils			Professional Staff 1965			1968-69*		
Senior High	N	% N	W	N	% N	W (other)	N	% N	W	N	% N	W (other)
East Mecklenburg		0%	1782	155	8%	1739		0%	79.2	6	7%	85
Garinger	2	0%	2266	202	9%	2157		0%	100.0	6	6%	102
Harding		0%	1002	169	17%	814		0%	48.0	4	8%	49
Independence				92	9%	962				6	9%	59
Myers Park	31	2%	1772	158	8%	1855		0%	76.7	6	6%	87
North Mecklenburg	1	0%	1155	410	27%	1109		0%	51.8	6	9%	63
Olympic				259	33%	522				5	11%	39
Second Ward	1411	100%		1139	100%	3	70.0	98%	1.5	57	95%	3
South Mecklenburg	30	2%	1430	106	6%	1812		0%	72.0	4	5%	78
West Charlotte	1560	100%		1569	100%		65.0	97%	2.0	74	93%	6
West Mecklenburg	1	0%	1270	118	8%	1340		0%	61.4	4	5%	73

Order dated June 3, 1969

The defendants have filed a proposed plan of action pursuant to the court order of April 23, 1969. The plaintiffs have filed a motion requesting restraint on further school construction until the school board has dealt satisfactorily with the segregation question. A further hearing is indicated. The court has two weeks of criminal court starting June 2; and Monday, June 16, 1969 is the earliest predictable time that a hearing could be conducted.

All parties are therefore notified that a hearing will be held in the United States Court House in Charlotte starting on Monday, June 16, 1969, at 10:00 a.m. All parties are requested to be present.

Under the law the burden is upon the school board to come forward with a plan which "promises realistically to work now" to eliminate segregation in the Charlotte-Mecklenburg schools. The obligation of the court under the law is "to assess the effectiveness of a proposed plan in achieving desegregation." Evidence will be received from all parties on these general subjects.

Without limiting any party in the scope and type of relevant evidence which he may wish to produce, the court directs the parties to come forward with exhibits, statistics, records, and other information so that the court will be in adequate position to make findings upon the following subjects, among others:

1. What has been accomplished, by June 16, toward achieving the duty which the defendants have accepted of "achieving substantial faculty desegregation," and what the plan proposed by the defendants may be expected to accomplish further along that line by September, 1969.

2. What school zones may fairly be said to have been gerrymandered (either by control of their boundary lines

or by control of their student capacity or both) so as to fit a particular pocket or community of all- or nearly all-black or all- or nearly all-white students; and what could be done to reduce or eliminate segregation in those zones.

3. What progress if any toward desegregation of pupils may reasonably and predictably be expected by September, 1969, from the pupil plan presented by the defendants.

4. What effect if any the pupil plan may be expected to have upon the present large group of all-black or 99%+ black schools, and upon the more than 14,000 children who still attend them.

5. Why students allowed to transfer from one zone to another to avoid racial discrimination should be penalized by being required to wait a year before taking part in varsity athletics, as the proposed pupil plan requires, which self-admitted "penalty" is lifted if they return to the zone originally assigned by the defendants.

6. The actual meaning of the "free transfer" plan—the numerical extent to which the plan requires that students wishing to transfer and being supplied transportation to transfer will actually find space in the schools of choice if they exercise their option to transfer. This is not a trick question but one directed to the ambiguity of the plan and the conflicts in the language used in the plan. Clarification is requested.

7. What steps will be followed to insure that the transfer-with-transportation choice is actually communicated personally to children who may be entitled to the choice, and to their parents, and affirmatively accepted or rejected by them.

8. Statistics on school population by race in the system for the years since consolidation and similar statistics for the separate county and city units from 1954 until consolidation.

9. The facts about school bussing operations of the Charlotte-Mecklenburg school system, including such records as already exist on bus routes, year by year, since 1961, including where the busses get the pupils and where they take them, and the races of the pupils transported.

10. The pupil attendance zones or school zones, year by year, for all years since 1954.

11. What the pending school construction programs will do in terms of creating pupil accommodations, and whether the programs will tend to perpetuate or to alleviate segregation in the schools.

12. Why decision on the construction and purposes of Metropolitan High School should not be postponed until after a final court ruling, appellate or otherwise, has been rendered, so that the decision on the educational questions can be made in a quieter and non-racial atmosphere. Also, why the defendants should not retain any land or control over any land they may now have, pending such decision.

13. Why no action has been taken by the defendants on the various possible methods for further reduction of segregation such as re-examination of zones, enlargement or combination of school zones, reorganizing the existing 23,000 pupil bus system, pairing of schools, consultation with the Department of Health, Education and Welfare, and other possible methods.

Order Dated June 3, 1969

14. Scholastic aptitude tests and achievement tests and intelligence tests for all grades for which such data are available in all schools in the county and city since 1954.

15. What concrete and specific steps, if any, plaintiffs would have the defendants adopt in order to comply with the Constitution. The court is not interested in a restatement of the previous demand of plaintiffs that all the schools in the system be populated on a 70/30 basis, because as previously stated the court does not have the power to make such an order and the defendants have served notice that they will not undertake such an assignment themselves. What is desired is some tough and detailed thinking and planning as to detailed methods to reduce and promptly eliminate segregation in the Charlotte-Mecklenburg schools.

The above questions and requests, insofar as they call for facts and figures, call for the production—not the creation—of the desired information. Counsel are requested to advise the court immediately if the production of already existing records does not provide any of the statistical information mentioned above. It is not the intention of the court to put the parties to work creating new charts nor re-assembling existing statistics, but rather to make available existing information.

This the 3rd day of June, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Order Adding Additional Parties dated June 3, 1969

Several changes in the personnel of the defendant school board have taken place since this suit was instituted. In order that all parties may be fully before the court and that there be no avoidable technical irregularity.

IT IS ORDERED that all the present members of the Charlotte-Mecklenburg Board of Education be and they are hereby made formal parties to this action; that copies of the MOTION FOR FURTHER RELIEF filed September 6, 1968 be served upon them and that there also be served upon them copies of all orders and motions that have been filed since that time.

Service of these motions and orders (including this order making new parties and the order of this same date regarding the further hearing of June 16, 1969) should be made by the United States Marshal. The members of the school board and their addresses are:

Mr. William E. Poe, Chairman
2101 Coniston Place (Home)
1014 Law Building (Office)
Charlotte, North Carolina

Mr. Henderson Belk
529 Hempstead Place
(Home)
308 East Fifth Street
(Office)
Charlotte, North Carolina

Rev. Coleman W. Kerry, Jr.
1022 Kohler Avenue
Charlotte, North Carolina

Mr. Dan Hood
Route 4
Matthews, North Carolina

Mrs. Julia Maulden
Box 6
Davidson, North Carolina

Order Adding Additional Parties Dated June 3, 1969

Mr. Ben F. Huntley
Box 128
8301 Pineville Road
(Office)
Pineville, North Carolina

Mrs. Betsey Kelly
3501 Mountainbrook Road
Charlotte, North Carolina

Mr. Sam S. McNinch, III
2914 Hampton Avenue
(Home)
4037 E. Independence Blvd.
(Office)
Charlotte, North Carolina

Dr. Carlton G. Watkins
1223 Marlwood Terrace
(Home)
1630 Mockingbird Lane
(Office)
Charlotte, North Carolina

This the 3rd day of June, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Opinion and Order dated June 20, 1969

Pursuant to notice dated June 4, 1969, a hearing was held in Charlotte on June 16, 17 and 18, 1969, on various matters including (1) the motion of the individual defendants for dismissal; (2) the motion of the plaintiffs for contempt citations against the individual defendants; (3) the proposals offered by the defendants pursuant to the April 23, 1969 order as a plan for desegregating the Charlotte-Mecklenburg schools; and (4) the motion of the plaintiffs for an order restraining further school construction until the segregation issue has been satisfactorily resolved.

I.

The Motion of the School Board Members to Dismiss.

The motion of the individual defendants, members of the school board, to dismiss was and is denied. This is a suit under the Civil Rights Act involving questions of equal protection of laws and racial discrimination and segregation in the public schools. The individual defendants are proper parties and their presence is appropriate and desirable.

II.

The Motion for a Contempt Citation.

The motion of the plaintiffs that the individual defendants be found in contempt of the court is on this record denied. The board is badly divided and many of its recent decisions appear to be made by a five to four vote. Supreme Court judges now and then make five to four decisions. (Fortunately their votes in all major school segregation cases appear to have been unanimous.) The members of

the board have had uncomplimentary things to say about each other and about the court, and many of them obviously disagree with the legality and propriety of the order of the court; but these latter sentiments may be regarded by the court as evidence of disagreement with rather than contempt for the court who is himself not far removed from active participation in the time-honored custom of criticizing a judge who has ruled against him. Moreover, on an issue of such significance, the amount of foot-dragging which has taken place, up to now at least, should not be considered as contempt of court.

III.

The Plan of the Defendants.

1. *The history of the plan.*—The order of this court directing a further plan for desegregation was entered April 23, 1969. Within hours, various of the defendants expressed sharp views pro and con. The board met on April 28, 1969, and for the first time briefly discussed the order. By a five to four margin, apparently, they decided informally not to try to appeal immediately, upon the basis that the right of appeal from the order to prepare a plan was doubtful. The school superintendent was instructed to prepare a desegregation plan. No express guidelines were given the superintendent. However, the views of many members expressed at the meeting were so opposed to serious and substantial desegregation that everyone including the superintendent could reasonably have concluded, as the court does, that a "minimal" plan was what was called for, and that the "plan" was essentially a prelude to anticipated disapproval and appeal. In a county and city criss-

crossed by school bus routes for 23,000 pupils, more than twenty thousand citizens, mostly from affluent suburbia, many of whose children undoubtedly go to school on school busses, signed petitions against "involuntary" bussing of students. The frenzy of parents received a ready forum in televised meetings of the board. The staff were never directed to do any serious work on re-drawing of school zone lines, pairing of schools, combining zones, grouping of schools, conferences with the Department of Health, Education and Welfare, nor any of the other possible methods of making real progress towards desegregation.

The superintendent revealed the general terms of his plan within a few days and later presented it formally on May 8, 1969. It provided for full faculty desegregation in 1969, which the superintendent said he considered feasible. It provided moderate changes in the pupil assignment plans; and it contemplated future study of the other methods of desegregation suggested in the April 23, 1969 order.

The board then met, struck out virtually all the effective provisions of the superintendent's plan, and asked for more time from the court, which had previously been promised.

The board's committee on buildings and sites, newly reconstituted, met and voted to cancel the long standing plans for Metropolitan High School, and voted to build it as only a specialty and vocational school without including the comprehensive high school which consultants and experts, including the school board's staff and superintendent, had recommended and still recommend. No new facts except the order of court had developed to account for the sudden change of plan. The stated reason for the change was that a general high school in Second Ward (though not a vocational or technical school) would necessarily be black and

therefore should not be built. [The Second Ward school site, where Metropolitan is scheduled to be built, is squarely in the center of the city's population; is a scant four blocks from the south boundary of its zone; and is apparently the easiest high school in town to desegregate; its boundaries could easily be re-drawn by extending its southern boundary (Morehead Street) and its eastern boundary (Queens Road) a few blocks.]

Thereafter, on May 28, 1969, the plan was filed. Volunteers were requested among the teachers; pupil transfer requests were set out; and data on the workings of the plan began to accumulate.

During the early debate over the court order, events transpired between the chairman and the superintendent which were thought by an assistant superintendent and others to threaten the superintendent's job if he pushed for compliance with the court's order. A few days before this hearing, the board committee on personnel declined to accept the superintendent's recommendation that Robert Davis, a Negro, be appointed principal of one of the schools. This was the first time such a recommendation had not been accepted. After some debate, the decision was postponed, with the superintendent requested to bring in alternate names. The publicly stated reasons for not approving the appointment were that Davis, whose training, experience and qualifications were unquestioned, is a plaintiff in this case and a member of the Negro Classroom Teachers Association and has spoken out publicly in favor of compliance wth this court's order—including one television appearance before the board itself to which the board had invited interested citizens. Davis, according to the press, was eventually confirmed for the job on June 19, 1969, but only after a "loyalty oath" had been exacted. The

effect of the so-called "job threat" and the Davis incident, following the public statements of board members, is a clear message: School employees voice opinion contrary to the board majority on desegregation at personal risk.

2. *The June 16, 1969 hearing.*—The defendants, under the law, had the burden of showing that their plan would desegregate the schools. To carry that burden they introduced a short written brief and some statistical data and rested their case without live testimony. The plaintiffs called all members of the school board and the Rhode Island expert, Dr. Finger, who testified at the March hearing, and a few other witnesses. There was some rebuttal from the board.

3. *Findings as to General Board Policy.*—

a) The board does not admit nor claim that it has any positive duty to promote desegregation.

b) School sites and school improvements have not been selected nor planned to promote desegregation and the board admits no such duty.

c) Board policy is that the Constitution is satisfied when they locate schools where children are and provide "freedom of transfer" for those who want to change schools.

d) Despite its inclusion in the "Plan," the decision of the board about Metropolitan High School is not really a final one; several members consider the issue in doubt, and the full board has not formally considered it.

4. *The Pupil Assignment Plan.*—The plan now proposed is the plan previously found racially discriminatory, with the addition of one element—the provision of transportation for children electing to transfer out of schools where their races are in a majority to schools where they will be in a minority. Such provision of transportation is approved.

Another provision of the plan makes high school athletes who transfer from one school to another ineligible for varsity or junior varsity athletics until they have been a year in the new school. For the current year, with the returns almost complete, only two white students out of some 59,000 have elected to transfer from white schools to black schools. Some 330 black students out of some 24,000 have elected to transfer to white schools. Only the tiniest handful of white students have ever in any year asked to transfer to black schools. The effect of the athletic penalty is obvious—it discriminates against black students who may want to transfer and take part in sports, and is no penalty on white students who show no desire for such transfers. The defendants' superintendent considers athletics an important feature of education. This penalty provision is racially discriminatory. The board is directed not to enforce it any more and to give adequate individual notice to all rising 10th, 11th and 12th grade students that they may reconsider their previous choice of schools in light of the removal of the penalty.

Freedom of transfer increases rather than decreases segregation. The school superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished. The use of a free transfer provision is a decision for the board; it may make desegregation more palatable to the community at large; it is not, per se,

if the schools are desegregated, unconstitutional. Nevertheless, *desegregation of schools is something that has to be accomplished independent of freedom of transfer.* This is a fact which because of the complexity of the statistics has only become clear to the court since the previous order was issued.

5. *The Faculty Assignment Plan.*—The plan originally proposed by the superintendent would have desegregated the faculty as a routine matter in 1969. The plan proposed by the board however is not materially different from the already existing plan. It continues to rely upon voluntary transfers and it contemplates affirmative assignment of teachers to black schools only late in the day after a hopeful routine of filling vacancies (some of which do not exist) has been followed. The board has not taken a position of leadership with the teachers and the results are apparent. Only 28 out of 2,700 white teachers, and only 38 out of 900 black teachers, had on June 18, 1969 indicated a willingness to transfer to schools of the opposite race. Testimony of the board members who comprise the majority of the board suggests that they do not really contemplate substantial faculty desegregation and that they may consider figures of "10%"; or one black teacher to each white school and one white teacher to each black school; or filling vacancies from the opposite race as they arise, to be compliance with the needs of the situation. None of these ideas, of course, amounts to desegregation of the faculty. The evidence submitted by the board does not demonstrate that the faculty plan will work. Several board members said that the plan to assign teachers is not an "idle promise."

All that it takes to make the faculty plan work is timely decision by the board to implement the assignment of teach-

ers. Board members are requested in this connection to consider the latest unanimous Supreme Court decision, *United States* v. *Montgomery County Board of Education* (October Term 1968), Case No. 798, decided June 2, 1969, reversing the Fifth Circuit Court of Appeals and upholding a district court order for faculty desegregation under a mathematical formula. Ruling on the factulty plan will therefore be deferred until after August 4, 1969, by which time the board is directed to file a report stating in detail what the plan has done and what the status of faculty assignments then is. The court considers the faculty assignment plan to be important and agrees with the superintendent of schools that immediate desegregation of the faculty is feasible. This is a substantial improvement which is available without arousing ghosts of "bussing," "neighborhood schools," or additional expense.

IV.

Gerrymandering

This issue was passed over in the previous opinion upon the belief which the court still entertains that the defendants, as a part of an overall desegregation plan, will eliminate or correct all school zones which were created or exist to enclose black or white groups of pupils or whose population is controlled for purposes of segregation. However, it may be timely to observe and the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of "building schools where the pupils are" without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James, obviously serve school

zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not named as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true "neighborhood school" philosophy.

• • • • •

The findings of fact in the April 23, 1969 order and all statements in this opinion are treated as findings of fact in support of the order. All of the evidence in the case is considered in support of the order.

ORDER

Based upon the evidence and upon the foregoing findings of fact the orders of the court are as follows:

1. The motion of the individual defendants to dismiss is denied.

2. No citations for contempt are made.

3. Decision on the faculty assignment plan is deferred pending receipt of a progress report from the board on or before August 4, 1969.

4. The one year penalty on transferring high school athletes is disapproved with direction as above for appropriate personal communication to rising high school students.

5. The provision of transportation for students transferring from a majority to a minority situation is approved.

6. The board is directed to proceed no further with action on Metropolitan High School pending a showing by the board that the school if constructed will be adequately desegregated and a finding by the court to that effect. This is based upon the previous findings that the board's decision on Metropolitan was unduly affected by racial considerations and that the board has not accepted its affirmative legal duty to build school facilities so as to promote desegregation.

7. As to the other building projects referred to in the motion for restraint on construction, the burden remains upon the defendants to show that these programs will produce desegregation. The written material tendered by the defendants on this subject is lengthy, and does not appear to sustain that burden. However, decision on the request for injunction against projects other than Metropolitan will be delayed pending further study of the evidence.

8. It is further ordered that the defendants proceed to prepare and submit by August 4, 1969, a positive plan for desegregation of the pupils of the Charlotte-Mecklenburg school system, as originally directed on April 23, 1969. A witness, Dr. Finger, described in detail a plan for desegregation by changing certain school zone lines and merging certain schools into districts and using certain schools as feeders for others. This plan shows a high degree of realism in that it minimizes the necessity for long-range transportation and takes substantial advantage of location and makeup of populations. Local school administration consider such a plan feasible. The local school administrative staff are also better equipped than Dr.

Finger, a "visiting fireman," to work out and put into effect a plan of this sort. It is believed that if the resources of the board can be directed as originally ordered toward preparing a Charlotte-Mecklenburg plan for the Charlotte-Mecklenburg schools, desegregation of both faculties and students may be accomplished in an orderly fashion. Counsel are requested to notify the court promptly if more time beyond August 4, 1969 is needed.

This is the 20th day of June, 1969.

JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Supplemental Findings of Fact in Connection With the Order of June 20, 1969 (Dated June 24, 1969)

The relatively complete extent of the segregation of the schools in this system is demonstrated by study of the defendants' statistics which were attached to and included in the original opinion of this court of April 23, 1969. There are about 24,000 black students in the county. As near as can be estimated, approximately 21,000 of these attend schools within the City of Charlotte. When *Brown* v. *Board of Education* was decided in 1954, the City of Charlotte had less than 7,500 black students. Today within the City of Charlotte 14,086 black students attend 21 schools which are totally black or more than 99% black. An additional 2,895 black students attend six schools whose black population is between 50% and 86% black. These schools are all rapidly moving to a totally or near-totally black condition under present policies. When all this is put together and understood, it becomes clear that of the City's 21,000 or so black students, nearly 17,000 of them according to the figures, and certainly more than 17,000 when the population trends are considered, are attending racially identifiable black schools.

This the 24th day of June, 1969.

JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Order dated August 15, 1969

Preliminary Summary

Pursuant to this court's June 20, 1969 order, the defendants submitted on July 29, 1969 an amended plan for desegregation of the Charlotte-Mecklenburg schools, including a highly significant policy statement accepting for the first time the Board's affirmative constitutional duty to desegregate students, teachers, principals and staffs "at the earliest possible date." On August 4, 1969, a report was filed in connection with the plan. A hearing was conducted on August 5, 1969. The plan is before the court for approval.

Because the schools must open September 2, and because the Board's plan includes both substantial action and genuine assurance of sustained effort toward prompt compliance with the law of the land, the plan of operation, for 1969-70 only, is approved and as indicated below, the defendants are directed to prepare and file by November 17, 1969, detailed plans and undertakings for completion of the job of desegregating the schools effective in September, 1970.

The Amended Plan—And Its Reception

The plan proposes, among other things, to close seven old all-black inner-city schools and to assign their 3,000 students to various outlying schools, now predominantly white, mostly in high rent districts.

This technique of school closing and reassignment has been employed in dozens of school districts to promote school desegregation. It is not original with the local School Board.

The school closing issue has provoked strident protests from black citizens and from others; evidence showed that

n estimated 19,000 names are listed on a petition denounc-
ng the plan as unfair and discriminatory. The signers add
heir own brand of protest to that of the 21,000 whites who
ast May (though protesting their acceptance of the princi-
les of desegregation) raised a "silk-stocking" community
utcry against bus transportation except to schools of in-
ividual choice. Another 800 white Paw Creek petitioners
ave joined in protest against a part of the plan under
hich some 200 fifth and sixth grade pupils would be as-
gned to re-opened Woodland, a new unused (and formerly
lack) school. Comment from people who have not studied
he evidence tends to ignore the law—the reason this ques-
on is before a *court* for decision—and to concentrate on
ublic acceptance or what will make people happy. A cor-
espondent who signs "Puzzled" inquires:

> "If the whites don't want it and the blacks don't want it, why do we have to have it?"

The answer is, the Constitution of the United States.

THE CONSTITUTION—THE LAW OF THE LAND—REQUIRES DESEGREGATION OF PUBLIC SCHOOLS

North Carolina reportedly refused to ratify the United
tates Constitution until the Bill of Rights had been in-
orporated into it. The Fourteenth Amendment to that
onstitution, now part of the Bill of Rights, guarantees to
l citizens the "equal protection of laws." In *Brown* v.
oard of Education, 347 U. S. 483 (1954), 349 U. S. 294
1955), the Supreme Court held that racial segregation in
ublic schools produces inferior education and morale, re-
ricts opportunity for association, and thus violates the
ual protection guaranty of the Constitution and is un-
wful. In *Green* v. *New Kent County School Board*, 391

U. S. 430 (1968), and two other simultaneous unanimous decisions, the Supreme Court held that school boards have the *affirmative duty* to get rid of dual school systems, to eliminate "black schools" and "white schools," and to operate "just schools." The Court said:

> "The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work *now*." (Emphasis on the word *"now"* was put in the text by the Supreme Court.)

For years people of this community and all over the south have quoted wistfully the statement in *Briggs* v. *Elliott* by Judge John J. Parker (who at his death was one of my few remaining heroes) that though the Constitution forbids segregation it does not require integration. Passage of time, and the revelation of conditions which might well have changed Judge Parker's views if he had lived, have left Judge Parker's words as a landmark but no longer a guide. The latest decision on this subject by the Fourth Circuit Court of Appeals (which is the court that first reviews my actions) contains this statement:

> "The famous Briggs v. Elliott dictum—adhered to by this court for many years—that the Constitution forbids segregation but does not require integration, is now dead." *Hawthorne* v. *Lunenburg*, Nos. 13,283, 13,284, Fourth Circuit Court of Appeals, *July 11, 1969*.

"Freedom of choice," as this court has already pointed out, does not legalize a segregated school system. A plan with freedom of choice must be judged by the same standard as a plan without freedom of choice—whether or not the plan desegregates the public schools. The courts are concerned primarily not with the techniques of assigning

students or controlling school populations, but with *whether those techniques get rid of segregation of children in public schools.* The test is pragmatic, not theoretical.

Continued Operation of Segregated Public Schools Is Unlawful

The issue is one of law and order. Unless and until the Constitution is amended it is and will be unlawful to operate segregated public schools. Amending the Constitution takes heavy majorities of voters or lawmakers. It is difficult to imagine any majority of Supreme Court, of Congress or of popular vote in favor of changing the Constitution to say that public school pupils may lawfully be kept in separate schools because they are black. A community bent on "law and order" should expect its school board members to obey the United States Constitution, *and should encourage them in every move they make toward such compliance.* The call for "law and order" in the streets and slums is necessary, but it sounds hollow when it issues from people content with segregated public schools.

The questions is not whether people like desegregated public schools, but what the law requires of those who operate them.

The Duty to Observe the Constitution and Desegregate the Schools Cannot Be Reduced or Avoided Because of Soothing Sayings From Other Government Officials Nor Outcries From Those Who Want the Law to Go Away.

The rights and duties of the parties to this suit are in this court for decision according to *law*—not according to HEW guidelines or public clamor. The court and the school board are bound by the Constitution. *So are the legislative and executive branches of government.* No one in Washing-

ton or Raleigh or local government is above or beyond the Constitution. None have power to change it except by lawful means. None have *or claim* the power to interfere with the courts in cases like this one. The malleable HEW "guidelines" put out by the President's administrator for educational affairs, and dubious inferences from statements of other officials, however highly placed, are irrelevant to the constitutional rights of the parties in this case. Also irrelevant are soothing sayings of the Vice President (who has the duty in this area) to black-tie political audiences, and the not-so-soothing sayings of citizens who erroneously talk as if the school segregation issue were a simple matter of political pressure and short-term public opinion. As for the Attorney General of the United States, he has just filed the biggest desegregation suit of all—*against the whole State of Georgia!* Segregation of children in public schools, whether they be black or white, and regardless of whether they do or don't want to stay apart, is unlawful. As the Supreme Court said in *Brown II*:

> "... the vitality of these constitutional principles can not be allowed to yield simply because of disagreement with them."

THE SCHOOL BOARD'S NEW PLAN REPRESENTS SUBSTANTIAL PROGRESS.

Against this background the Board's new plan is reviewed:

1. The most obvious and constructive element in the plan is that the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members "at the earliest possible date." It has recognized that where people

live should not control where they go to school nor the quality of their education, and that transportation may be necessary to comply with the law. It has recognized that easy methods will not do the job; that rezoning of school lines, perhaps wholesale; pairing, grouping or clustering of schools; use of computer technology and all available modern business methods can and must be considered in the discharge of the Board's constitutional duty. This court does not take lightly the Board's promises and the Board's undertaking of its affirmative duty under the Constitution and accepts these assurances at face value. They are, in fact, the conclusions which necessarily follow when any group of women and men of good faith seriously study this problem *with knowledge of the facts of this school system and in light of the law of the land.*

2. In the second place, by the following actions the Board has demonstrated its acceptance of its stated new policies:

a) The desegregation of faculties and the non-racial reassignment of principals and employees from newly closed schools. In the formerly all-black faculties the Board has dramatically exceeded its goal. It is assumed by the court that this process of faculty desegregation will continue and that the goal for 1970-71 will be that faculties in all schools will approach a ratio under which all schools in the system will have approximately the same proportion of black and white teachers.

b) The closing of seven schools and the reassignment of 3,000 black pupils to schools offering better education.

c) The reassignment of 1,245 students from several overcrowded primarily black schools to a number of outlying predominantly white schools.

d) The announced re-evaluation of the program of locating and building and improving schools, so that each project or site will produce the "greatest degree of desegregation possible."

e) The Board correctly and constructively concluded that the so-called "anti-bussing law" adopted by the General Assembly of North Carolina on June 24, 1969, does not inhibit the Board in carrying out its constitutional duties and should not hamper the Board in its future actions. Leaving aside its dubious constitutionality (if it really did what its title claims to do) the statute contains an express exception which renders it ineffectual in that it does not prevent "any transfer necessitated by overcrowded conditions or *other circumstances which in the sole discretion of the School Board require reassignment.*"

f) The elimination without objection of the former provision which had the effect of inhibiting transfer rights of black would-be athletes.

g) Quite significantly, the Board calls upon the Planning Board, the Housing Authority, the Redevelopment Commission and upon real estate interests, local government and other interested parties to recognize and share their responsibility for dealing with problems of segregation in the community at large as well as in the school system.

h) The proposals for programs of "compensatory education" of students, and for teacher orientation and

exchange of activities among black and white students. The court assumes that these somewhat vaguely stated ideas will become implemented with concrete action.

3. *The Seven School Problem.*—The Board plan proposes to close Second Ward High School, Irwin Avenue Junior High School and five inner-city elementary schools (five of which were already marked for abandonment) and to reassign their 3,000 students to outlying white schools. This part of the plan has struck fire from black community leaders and some other critics. Counsel for the plaintiffs contend that it puts an unconstitutional and discriminatory burden upon the black community with no corresponding discomfort to whites. One spokesman for a large group of dissenting and demonstrating black citizens was allowed to express his views at the August 5, 1969 hearing. Threats of boycotts and strikes have been publicized.

This part of the plan is distasteful, because all but 200* of the students being reassigned *en masse* are black. It can legitimately be said and has been eloquently said that this plan is an affront to the dignity and pride of the black citizens. Pride and dignity are important. If pride and dignity were all that are involved, this part of the plan ought to be disapproved. The court, out of forty-year memory of four years of transportation on an unheated Model-T school but thirteen miles each way from a distant rural community to high school in a "city" of 4,000, is fully aware how alien and strange are the sensations experienced by a school child who is hauled out of his own community and into a place where the initial welcome is uncertain or cool.

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* The 200 students being reassigned from Paw Creek to Woodland are white.

However, this part of the plan is not compulsory. Students who want to remain in the comfort of their familiar area may elect to attend the Zebulon Vance School instead; alternatives are also provided for the junior high school students.

Moreover, as one of the attorneys remarked at the first hearing in a discussion about reassignments and school busses: "The question is really not one of 'bussing' but whether what the child gets when he gets off of the bus is worth the trouble."

I personally found the better education worth the bus trip.

Despite their undoubted importance, pride and dignity should not control over the Constitution and should not outweigh the prospects for quality education of children. The uncontradicted evidence before the court is that segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children. By way of brief illustration a table follows showing the contrasting achievements of sixth grade students in five of the closed schools (Bethune, Fairview, Isabella Wyche, Alexander Street and Zeb Vance) and in five of the schools to which black students are going to be transferred:

Order dated August 15, 1969

AVERAGE ACHIEVEMENT TEST SCORES

SIXTH GRADE—1968-69

	SP.	*LANG.*	*ACM. (Math)*	*WM (Word Meaning)*
Bethune	45	34	41	41
Ashley Park	61	62	56	58
Fairview	46	38	42	39
Westerly Hills	61	61	52	57
Isabella Wyche	41	34	40	38
Myers Park	80	84	58	73
Alexander Street	45	38	34	40
Shamrock Gardens	57	62	53	56
Zeb Vance	38	34	39	42
Park Road	71	75	58	66

This alarming contrast in performance is obviously not nown to school patrons generally.

It was not fully known to the court before he studied e evidence in the case.

It can not be explained solely in terms of cultural, racial family background without honestly facing the impact segregation.

The degree to which this contrast pervades all levels academic activity and accomplishment in segregated hools is relentlessly demonstrated.

Segregation produces inferior education, and it makes ttle difference whether the school is hot and decrepit or odern and air-conditioned.

It is painfully apparent that "quality education" can t live in a segregated school; *segregation itself is the reatest barrier to quality education.*

As hopeful relief against this grim picture is the un-ntradicted testimony of the three or four experts who

testified, some for each side, and the very interesting experience of the administrators of the schools of Buffalo, New York. The experts and administrators all agreed that transferring underprivileged black children from black schools into schools with 70% or more white students produced a dramatic improvement in the rate of progress and an increase in the absolute performance of the less advanced students, without material detriment to the whites. There was no contrary evidence. (In this system 71% of the students are white and 29% are black.)

Moreover, the Board's announced policy and the uncontradicted testimony of the superintendent show that serious arrangements are being made to welcome, rather than rebuff, the transferees into all school activities. This is something new and important.

No legal authority is cited that the Constitution prohibits transport of consenting black children from an inferior educational environment into a better educational environment for the purpose of complying with the constitutional requirement of equal protection of laws.

The choice of how to do the job of desegregation is for the School Board—not for the court.

The Board has wide discretion in choosing methods; many effective methods are described in the evidence; the court's duty is simply to pass on the legality of the Board's actions. It appears to the court that the improvement in the education of 4,200 school children is the one most obvious result of the Board's plan of action for 1969-70, and that this is more important constitutionally than other considerations which have been advanced.

It is not the intention of this court to endorse or approve any future plan which puts the burden of desegregation primarily upon one race. However, there is not time before September 2, 1969 to do a complete job of reassign-

ing pupils; the plan is a step toward more complete compliance with the law; the court reluctantly votes in favor of the 4,200 school children and approves the plan on a one-year basis.

The Major Task Lies Ahead This Fall

The big job remains to be done. After implementation of the current plan, further large scale faculty transfers will still be necessary. Sixteen years after *Brown* v. *Board of Education,* some thirteen thousand school children will remain in black or nearly all-black schools. Most white students will remain in substantially all-white schools. The failure of the plan to deal with those problems of course can not be approved. The failure of the plan to include a time table for the performance of specific elements of the program of course can not be approved, *Felder, et al.* v. *Harnett County Board of Education, et al.,* 409 F. 2d 1070 (4th Cir., 1969). These matters must be covered by specific instructions to the Board.

All findings of fact in the previous orders of April 23, 1969, and June 20, 1969, and the supplemental findings of June 24, 1969, are incorporated herein to the extent that they are consistent with the findings, conclusions and orders herein reached and given. All evidence at all hearings is considered in reaching these conclusions.

Order

1. The policy statement of the Board is approved.

2. The faculty desegregation program is approved.

3. The plan to desegregate pupils by closing seven all-black schools and assigning their pupils to outlying white

schools is approved only (1) with great reluctance, (2) as a one-year, temporary arrangement, and (3) with the distinct reservation that "one-way bussing" plans for the years after 1969-70 will not be acceptable. If, as the school superintendent testified, none of the modern, faculty-integrated, expensive, "equal" black schools in the system are suitable for desegregation now, steps can and should be taken to change that condition before the fall of 1970. Unsuitability or inadequacy of a 1970 "black" school to educate 1970 white pupils will not be considered by the court in passing upon plans for 1970 desegregation. The defendants contended and the court found in its April 23, 1969 order that facilities and teachers in the various black schools were not measurably inferior to those in the various white schools. It is too late now to expect the court to proceed upon an opposite assumption.

4. The plan to reassign 1,245 students from presently overcrowded black schools is approved.

5. Reassignment of the Paw Creek students to Woodland is approved.

6. The proposals of the Board for restructure of attendance lines; for consideration of pairing and grouping schools; for review of the construction programs; and for support programs, student exchange and faculty orientation are approved in principle, although for lack of specific detail and time table they are not approved as presented.

7. The Board is directed to prepare and present by November 17, 1969, the following:

(1) Plan for complete faculty desegregation for 1970-71.

(2) Plan for student desegregation for 1970-71, including making full use of zoning, pairing, grouping, clustering, transportation and other techniques, complete with statistics and maps and other data showing precisely what (subject to later movement of pupils) the assignment of pupils and teachers will be for the year 1970-71, having in mind as its goal for 1970-71 the complete desegregation of the entire system to the maximum extent possible. (The assumption in the Board's report that a school is desegregated when it has as many as 10% of a minority race in its student body is not accepted by the court, and neither the Board nor the court should be guided by such a figure.) "Possible" as used here refers to educational—*not* "political"—possibility. If Anson County, two-thirds black, can totally desegregate its schools in 1969, as they have now done, Mecklenburg County should be able to muster the political will to follow suit.

(3) A detailed report showing, complete with figures and maps, the location and nature of each construction project proposed or under way, and the effect this project may reasonably be expected to have upon the program of desegregating the schools.

8. Since a mid-city high school may prove most desirable, the Board is directed pending further orders of court not to divest itself of any land, options, rent arrangements or other access to or control over real estate which it may now have in the Second Ward area.

9. Jurisdiction is retained.

This the 15th day of August, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Order dated August 29, 1969

The School Board's amended plan for desegregation of the Charlotte-Mecklenburg schools was approved by order of court dated August 15, 1969. The Board has now tendered a modification to this plan which was filed today, August 29, 1969.

The modification relates to the facilities to be provided for those black children whose parents exercise freedom of choice to attend a black elementary school in the inner city instead of attending the white schools listed in the July 29, 1969 plan which has already been approved by the court.

The amendment calls for using the building of former Irwin Avenue Junior High School with certain minor renovations, instead of Zeb Vance School, and a limit of six hundred students upon those who would be admitted to this program at Irwin Avenue School. This part of the motion to amend is approved. The choice of building, *per se,* is a matter for the School Board, not the court.

The amendment proposes that the Irwin Avenue School would be operated "as an innovative school." The court does not know what this means. If by this phrase is meant that anything will be done to make this school more attractive to the black students than the black schools they have been attending, then the program will constitute the location and use of a school facility for the purpose of promoting segregation which by previous decisions of this and other courts the defendants have been fully advised is unconstitutional. *Felder, et al.* v. *Harnett County, North Carolina,* 409 F.2d 1070 (4th Circuit, 1969) (decided April 22, 1969), and cases cited therein. The addition of "innovations" at Irwin Avenue School will not be approved by the court unless these "innovations" have been arranged and

provided for all the black students who transfer to white schools under the July 29, 1969 plan of the Board previously approved. The phrase "innovative" may refer to what the Board has heretofore called "compensatory education." The court has not yet been advised of any performance by the Board in line with the undertaking in its July 29, 1969 plan to provide "compensatory education" for pupils who lag behind their classmates in academic achievement. Unless and until the court can be informed and satisfied that this "compensatory education" is provided in the other schools, the court is of the opinion that providing it in the Irwin Avenue School would set up a magnet to attract black children away from desegregated assignments and therefore on the present record at least that part of the plan is disapproved.

The proposal to provide transportation for any of the students attending Irwin Avenue School is expressly disapproved. The effect of providing transportation is to subsidize at tax payers' expense those who are actively seeking to defeat the constitutional mandate to desegregate the schools. No authority is advanced or suggested to justify such a flagrant violation of the law, and none has been imagined by the court. The Board is expressly restrained from and enjoined against providing transportation in any form to any student in the system, black or white, which may or might enable him to travel any part of the distance from his home to or from any school elected by or for him under "freedom of transfer" or "freedom of choice," except that the Board may provide transportation as previously ordered by this court to those students who elect to transfer or who are transferred by the Board from a school in which their race is in a majority to a school in which their race

is in the minority. As this court pointed out before, bus transportation has too long been used as a tool to promote segregation. The year 1969 is too late in the day to start using this tool for that purpose in new situations.

This the 29th day of August, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Order dated October 10, 1969

On April 23, June 20 and August 15, 1969, orders were entered directing the defendants to submit a plan and a time table for the desegregation of the Charlotte-Mecklenburg schools, to be completed by the fall of 1970. Nearly six months after the original order, faculty desegregation is well along and there have been a number of substantial improvements in the stated policies of the Board, including the stated assumption of duty by the Board to desegregate the schoools "at the earliest possible date." Limited steps have been taken toward compliance with the pupil desegregation provisions of that original order. However, the major part of the job remains undone, and no plan for desegregation of the entire system has apparently been voted on by the Board.

The latest order set November 17, 1969, as the revised date for defendants to file a complete plan and time table. Defendants have now filed a 15-page motion and supporting affidavit asking the court to extend by another two and one-half months, to February 1, 1970, the time for compliance with the orders. Plaintiffs oppose the extension.

The justification advanced for this delay is that they have hired a systems analyst to re-draw attendance lines, and that the three months between August 15 and November 17 are not enough time to program a computer and prepare a plan.

It would be a happy day if the job could be turned over to a computer. A computer, if programmed objectively, could produce objective results; all could blame the machine (in addition to the court) for any unpleasant decisions. Also, the court would like to avoid unnecessary pressure on the school staff and administrators.

However, the information thus far available is inadequate to justify the extension. Computers are for time-*saving*,

not delay. The computer work was estimated by the Board's chosen systems analyst, Mr. Weil, to require ninety man days of work. He proposes to consume ninety calendar days with this job! The Board's motion says that their decisions about construction and location of 21 building projects (involving many millions of dollars) are to be held up pending development of the plan. The school budget approaches fifty million dollars. The question fairly arises why the Board should not employ or assign more than one person at a time to feed the computer. Mr. Weil's original plan, which is in evidence, was prepared in a very few days. The court has on file also three or four other plans, including at least one which local school officials say is educationally and technically feasible, which were prepared in a few days each. The use of a computer does not appear to justify the delay.

Moreover, computers cannot make political nor legal decisions; they react to what is fed into them; and the request for postponement leaves the court to speculate over what will be fed into the computer. The motion does not say that Mr. Weil has been instructed by the Board to frame a plan to desegregate the schools; his commission, by a Board committee only, is limited to re-drawing attendance lines; the vague references in the Board's motion to his instructions as to travel limitation and specified school capacities and desirable racial balance permit the inference, in fact, that his mission could be *re*-segregation of much of the system.

The motion also contains no commitment on the part of the Board to adopt any plan that the computer may produce; it gives no information about the Board's intentions as to other desegregation methods it will use; and it promises no *result* from the delay except *consideration* by the

Board of a computer plan for re-arranging school lines.

The motion is preoccupied with one *method,* and silent about *results.*

Before passing on the motion, the court has a duty to discover what the Board has accomplished since its July 29 promises were made, and whether the extra time will promote genuine progress toward compliance with the Constitution or whether it will just be time lost.

The Board is therefore directed to file with the court by October 29, 1969, the following information:

1. A full statistical report on the results of the closing of the inner-city schools and where the 4,200 black pupils the Board proposed on July 29 to transfer to white schools are actually going to school as of October 10, 1969.

2. The figures regarding the effect of freedom of transfer on the desegregation proposed in the July 29, 1969 plan for closing inner-city schools and transferring their students.

3. A report on freedom of choice or freedom of transfer: How many children, by school or location and race, chose to transfer out of and into the various schools for the 1969-70 year.

4. Full reports on the current numbers and races of the children and teachers in the system, school by school, with percentages of each race for each school.

5. A report on the children being provided bus transportation, school by school.

6. A description of what has been done to provide the compensatory education programs proposed in the July 29 plan and policy statement.

7. A copy of all September and October, 1969, reports of the Board to the Department of Health, Education and Welfare.

Unless the Board has made the hard decisions needed to desegregate the schools, the time spent on a computer plan may well be just more time lost, and delaying decision may simply compress into fewer months next year the decisions that should have already been made. Therefore, in addition to the above, the Board is directed to answer by October 29, 1969, the following questions:

1. What, in verbatim detail, are the instructions that have been given to Mr. Weil?

2. What is Mr. Weil's assigned mission or goal?

3. What areas of the district is he directed to include in his program of re-drawing attendance lines?

4. What areas, if any, is he directed to exclude?

5. What schools will his program affect?

6. Will pairing, grouping or clustering of schools be used by the Board as needed to supplement the computer plan?

7. Will the Weil program of re-drawing attendance lines produce desegregation of all the schools by September, 1970?

8. If the Weil program does not produce desegregation of all the schools by September, 1970, what does the Board plan to do to produce that result?

9. Will any plan produced by the Weil method or any other re-drawing of attendance lines desegregate

the schools if unrestricted freedom of transfer or freedom of choice is retained?

The value of the answers to these nine questions is substantially dependent on whether they are made by vote of the full Board or by non-voting representatives such as attorneys or other agents.

Pending receipt of the above information, the court will defer action on the request for time extension. Action will also be deferred for the present on the motions which have been filed by the plaintiffs which include requests for abolition of freedom of choice and appointment of an outside expert to devise a plan in default of Board action.

This the 10th day of October, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Order dated November 7, 1969

On October 29, 1969, the United States Supreme Court announced its decision in the Mississippi school case, *Alexander* v. *Holmes County,* Case No. 632. That decision, the most significant in this field since *Brown* v. *Board of Education,* peremptorily reversed an order of the Fifth Circuit Court of Appeals which, upon request of the United States Attorney General, had postponed until 1970 the effective desegregation of thirty Mississippi school districts, and had extended from August 11 to December 1, 1969, their deadline for filing desegregation plans. The Supreme Court held that the Court of Appeals

> "* * * *should have denied all motions for additional time* because continued operation of *segregated schools* under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. *Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin* v. *School Board,* 377 U. S. 218, 234 (1964); *Green* v. *School Board of New Kent County,* 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)

The Supreme Court further directed the Fifth Circuit Court of Appeals to make such orders as might be necessary for the *immediate* start in each district of the operation of a "totally unitary school system for all eligible pupils without regard to race or color."

It is this court's opinion that the word "dual" in the Supreme Court opinion is another word for "segregated," and that "unitary" is another word for "desegregated" or "integrated." It is also this court's opinion that although,

as defendants say, this is not Mississippi, nevertheless the Supreme Court's prohibition against extension of time as laid down in *Alexander* v. *Holmes County* is binding upon this court and this school board, and bars the exercise of the court's usual discretion in such matters, and that to allow the request of the defendants for extension of time to comply with this court's previous judgments would be contrary to the Supreme Court's decision and should not be done.

Therefore, and based also upon the considerations set out in the memorandum opinion to be filed contemporaneously herewith, the motion of the defendants for extension of time for compliance with the court's August 15, 1969 order is denied. Ruling on all other pending motions is deferred.

This the 7th day of November, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Memorandum Opinion dated November 7, 1969

Preliminary Statement

On Wednesday, October 29, 1969, the United States Supreme Court announced its decision in the Mississippi school case (*Alexander* v. *Holmes County*, Case No. 632). That decision peremptorily reversed an order of the Fifth Circuit Court of Appeals which, upon request of the United States Attorney General, had postponed until 1970 the effective desegregation of thirty Mississippi school districts, and had extended from August 11 to December 1, 1969, their deadline for filing desegregation plans. The Supreme Court held that the Court of Appeals

> "* * * *should have denied all motions for additional time* because continued operation of *segregated schools* under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. *Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin* v. *School Board*, 377 U. S. 218, 234 (1964); *Green* v. *School Board of New Kent County*, 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)

The Supreme Court further directed the Fifth Circuit Court of Appeals to make such orders as might be necessary for the *immediate* start in each district of the operation of a "totally unitary school system for all eligible pupils without regard to race or color."

The Mississippi school districts in the *Holmes County* case had degrees of desegregation ranging from nearly zero to about 16% of the Negro pupils. They like Mecklenburg hoped that their "freedom of choice" plans would satisfy the Constitution.

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The request for time extension, and all later proceedings in this cause, must be considered in light of the Supreme Court's reaffirmation of the law which this court has been following, and in light of the urgency now required by the *Holmes County* decision.

THE RESULTS OF THE 1969 PLAN

For pupil desegregation, the July 29, 1969 plan proposed to close seven black inner-city schools (most or all of which had previously been ear-marked for eventual "phase-out") and to transfer their 3,000 students in specified numbers to named suburban schools. All the transferee schools except West Charlotte were white. In addition, 1,245 black students, in specified numbers, were to be transferred from eight black or largely black schools to other designated suburban white schools.

The plan was accepted and approved because of its apparent promise to extend the opportunities of a desegregated education to over 4,000 new black students.

The plan has not been carried out as advertised: (a) Only 73 of the 1,245 scheduled for transfer from overcrowded black schools have been so transferred; those 73 were transferred not to the schools designated, but to other schools not mentioned in the plan. (b) It is now revealed that the closed schools, which were billed in July to produce 3,000 black students for transfer, actually had only 2,627 students in them when the schools closed in June! (c) The Board allowed full freedom of choice for students from the closed schools, and those students in large numbers elected to go to Harding High School, and to Williams Junior High, Northwest Junior High and other black schools, instead of to the assigned white schools. As a result, Harding High School was transformed immediately

from 17% black to 47% black. This produced community consternation but no racial disorder among the students. The result may be deplorable, but the fact that the students at Harding High School have adjusted peaceably to the situation (like others before them at Cornelius, Davidson, Olympic, Randolph Road, Hawthorne and Elizabeth, and like the people of Anson and other North Carolina counties) shows that Mecklenburgers can live with desegregated schools. (d) The transfers proposed simply appear never to have been made to most of the suburban schools named in the plan. (e) *The plan therefore transferred to white schools only 1,315 instead of the promised 4,245 black pupils!* From closed schools, the elementary transferees numbered 463 instead of the advertised 1,235; junior high transferees were 273 instead of 630; and senior high transferees were 506 instead of 1,135; and from overcrowded schools 73 instead of 1,245. If Harding (47% black, 630 Negro students), Olympic (42% black, 376 Negro students), and Wilmore (49% black, 228 Negro students) should be allowed to continue their rapid shift from white to black, the net result of the 1969 pupil plan would be nearly zero.

Faculty desegregation has significantly and commendably improved since the April 27 order. Nevertheless, only six "black" schools and one "black" kindergarten have predominantly white faculties; and 98 out of the 106 schools and kindergartens in the system are today readily and obviously identifiable by the race of the heavy majority of their faculties.

The "performance gap" is wide.

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THE SITUATION TODAY

The following table illustrates the racial distribution of the present school population:

SCHOOLS READILY IDENTIFIABLE AS WHITE

% WHITE	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
100%	9	6,605	2	6,607
98–99%	9	4,801	49	4,850
95–97%	12	10,836	505	11,341
90–94%	17	14,070	1,243	15,313
86–89%	10	8,700	1,169	9,869
	57	45,012	2,968	47,980

SCHOOLS READILY IDENTIFIABLE AS BLACK

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
100%	11	2	9,216	9,218
98–99%	5	41	3,432	3,473
90–97%	3	121	1,297	1,418
56–89%	6	989	2,252	3,241
	25	1,153	16,197	17,350

SCHOOLS NOT READILY IDENTIFIABLE BY RACE

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
32–49%	10	4,320	2,868	7,188
17–20%	8	5,363	1,230	6,593
22–29%	6	3,980	1,451	5,431
	24	13,663	5,549	19,212
TOTALS:	106	59,828	24,714	84,542

Some of the data from the table, re-stated, is as follows:

Number of schools	106
Number of white pupils	59,828
Number of black pupils	24,714

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Total pupils	84,542
Per cent of white pupils	71%
Per cent of black pupils ..	29%
Number of "white" schools	57
Number of white pupils in those schools	45,012
Number of "black" schools	25
Number of black pupils in those schools	16,197
Number of schools not readily identifiable by race	24
Number of pupils in those schools	19,212
Number of schools 98-100% black	16
Negro pupils in those schools	12,648
Number of schools 98-100% white	18
White pupils in those schools	11,406

Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

The schools are still in major part segregated or "dual" rather than desegregated or "unitary."

The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from

public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *"de facto,"* and the resulting schools are not "unitary" or desegregated.

Freedom of Choice

Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the "black" schools.*

Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in *Green* v. *New Kent County,* 391 U.S. 430 (1968):

> "• • • If there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable."

Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate

as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason.

The "National Standings"

The defendants filed some statistics concerning the one hundred largest school systems in the country, and say that Charlotte-Mecklenburg desegregation compares favorably with that in most of those systems. That may well be so. The court is not trying cases involving the other ninety-nine school boards, and has not studied any evidence about them and does not know their factual nor legal problems. The court in its first order of April 23, 1969 has noted the substantial desegregation achieved in certain areas in the Charlotte-Mecklenburg system, and is still aware of it. The fact that other communities might be more backward in observing the Constitution than Mecklenburg would hardly seem to support denial of constitutional rights to Mecklenburg citizens. The court doubts that a double standard exists. The Attorney General of the United States has filed suit for desegregation in Connecticut as well as in the whole State of Georgia. One of the most stringent desegregation orders on record was entered recently against a school board in the City of Chicago. Constitutional rights will not be denied here simply because they may be denied or delayed elsewhere. There is no "Dow-Jones average" for such rights. With all due deference to the complexities of this school system, which have already been fully noted

in previous opinions, the Board and the community must still observe the Constitution. The fact that the school system ranks high in some artificial "national standings" or that one-third of the Negro students do attend desegregated schools or predominantly white schools is no answer to the constitutional problems presented by sixteen thousand black Mecklenburgers still going to all-black or largely black schools in this predominantly white community.

The Prospects for the Future

The second part of the Board's report is answers to the court's questions designed to determine whether the Board has made the hard decisions necessary to desegregate the schoos.

The answers show that those decisions have not been made.

The computer expert has been given restrictions which, taken at face value, indicate that his work will not lead to desegregation of all the schools. One such restriction has the apparent effect of limiting attendance to those who live a maximum of roughly a mile and a half from the school. (This is the requirement that all grids or areas must be "contiguous to the home grid or to grids which are contiguous to the home grid.") Another is the limitation that no school attended by whites should have less than a 60% white student population. (Unless this were coupled with a further requirement that no school attended by blacks shall have more than a 40% black student population, this appears to put the black schools "off limits" for his study.) The original verified motion of the School Board contained two other limitations. Those were that "a 'desirable' racial balance should be obtained" and that "reasonable limitation on distance of travel for a child has been imposed." The

record is silent on what these limitations mean and whether they are still in effect.

The Board has not accepted pairing and grouping and clustering of schools as legitimate techniques, but has simply indicated that it will "consider" those techniques where they offer *"reasonable* prospects of producing *stable* desegregation * * *." (Emphasis added.)

The report states unconditionally that:

> *"The information supplied by the systems analysis approach will not produce desegregation of all schools by September, 1970.* Dramatic results are expected. It is *hoped* that the number of all white and all black schools will be substantially *reduced.* The number of such schools cannot be determined at this time." (Emphasis added.)

The report also says that:

> "* * * *The Board of Education does not feel that it will be possible to produce pupil desegregation in each school by September, 1970.* It is expected that faculties will fairly represent a cross section of the total faculty so that most and *possibly* all schools will not have a racially identifiable faculty. Furthermore, the restructuring of attendance lines coupled with faculty desegregation *may* satisfy constitutional requirements." (Emphasis added.)

The School Board is sharply divided in the expressed views of its members. From the testimony of its members, and from the latest report, it cannot be concluded that a majority of its members have accepted the court's orders as representing the law which applies to the local schools.

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By the respones to the October 10 questions, the Board has indicated tat its members do not accept the duty to desegregate th schools at any ascertainable time; and they have clealy indicated that they *intend not to do it* effective in thefall of 1970. They have also demonstrated a yawning gapbetween predictions and performance.

Withholdingor delaying the constitutional rights of children to eqal educational opportunity on such vague terms as theses not the province of the School Board nor of this court.

Furthermore since the Supreme Court has now prohibited lower ourts from granting extensions of time, it may well be tht the gradual time table laid down by this court's April 23, 1969 order contemplating substantial progress in 190 and complete desegregation by September 1970) was ands too lenient.

If the plan ndered by the School Board on November 17, 1969 is thorugh and informative, and sufficiently shows an unconditionl purpose on the part of the Board to complete its job ective by September, 1970, the Board may perhaps be alowed to adhere to the existing time table. Certainly a Mcklenburg plan ought if possible to be prepared by the lecklenburg School Board and its large and experienced stff, rather than by outside experts. Decision on that and cher pending questions must await further developments, including the Board's November 17, 1969 report.

CONCLUSIONS

The school ystem is still discriminatorily segregated by race and maitained that way by state action. In many ways it is no in compliance with the Constitution. The Board has notshown a valid basis for an extension of time

to comply with the court's judgment; it has shown no intention to comply by any particular time with the constitutional mandate to desegregate the schools; and it has suggested its intention *not* to comply by September, 1970. In spite of those facts the court would like as a matter of discretion to grant some of the time extension requested, but is of the considered opinion that in *Alexander* v. *Holmes County* the Supreme Court has prohibited the exercise of such discretion. The findings of fact in this opinion will be considered, along with facts found in previous orders, opinions and memoranda, as the basis for such future judgments and orders as may be appropriate, including such judgments and orders as may be appropriate upon receipt of the Board's November 17, 1969 plan. All statements of fact in this memorandum opinion, whether or not labeled as such, shall be deemed findings of fact, as necessary to support such judgments and orders.

This the 7th day of November, 1969.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Opinion and Order dated December 1, 1969

On April 23, June 20 and August 15, 1969, the defendant school board was ordered to file plans to desegregate the schools of Charlotte and Mecklenburg County, North Carolina. The defendants have admitted their duty to desegregate the schools; considerable progress has been made toward desegregation of faculties; and progress, previously noted, has been made in some other areas. The schools, however, remain for the most part unlawfully segregated. The facts supporting that conclusion in all the court's previous orders are reiterated here.

The issue is what to do pursuant to the board's latest plan, filed November 17, 1969. The plan recites the following ostensible purpose:

> "The Board of Education has embarked upon a comprehensive program for the purpose of restructuring attendance lines involving all schools and all students served by the system. The primary purpose of this program is to achieve further desegregation in as many schools as possible * * *."

The plan says that a computer analyst has been hired to draw up various *theoretical* possible school zone attendance lines, and that school personnel, before February 1, 1970, will draw the *actual* lines.

The details of the plan show that it contains no promise nor likelihood of desegregating the schools.

The plan and the report accompanying it say (emphasis added):

> "No school district *to which white students are assigned* should have less than 60 per cent white student population to avoid 'tipping.'" (Plan, page 2.)

* * * * *

"... it is the plan of this School Board to limit schools *to which white students are assigned* to those schools in which it is possible to provide a student population which is at least 60 per cent white." (Plan, page 5.)

• • • • •

"In determining the initial attendance lines, the ratio of black to white students will not exceed 60% white–40% black WHERE THE SCHOOL IS DESEGREGATED." (Report, page 5.)

• • • • •

"*A majority of the Board of Education believes that the constitutional requirements of desegregation will be achieved by the restructuring of attendance lines, the restricting freedom of transfer, and other provisions of this plan. The majority of the Board has, therefore, discarded further consideration of pairing, grouping, clustering and transporting.*" (Plan, page 6.)

The strongest claim made in the plan with respect to the all-black schools is that among 43 elementary schools in the densely populated areas of Charlotte it is "*theoretically* [school board's emphasis] possible to populate these schools with the following ratios of black students: ... Seven (7) schools in which the black student population is 100 per cent." (Plan, pages 3 and 4.) Since the 100% black elementary schools in the system (Billingsville, Marie Davis, Double Oaks, First Ward, Lincoln Heights, Oaklawn and University Park) number exactly seven, this language obviously proposes that these seven schools will remain all-black.

The plan contains no factual information nor estimate regarding plans for desegregation of the 31 other elemen-

tary schools, the 20 junior high schools, and the 10 senior high schools in the system.

Concerning faculty desegregation the plan says:

> "*During* the 1970-71 school year, the Board of Education will staff each school so that the faculty at each school will be *predominantly* white and, *where practicable* will reflect the ratio of white and black teachers employed in the total faculty of the school system." (Plan, page 7.)

With regard to the physical facilities, the court on August 15, 1969, ordered the defendants to produce by November 17 "A detailed report showing, complete with figures and maps, the location and nature of each construction project proposed or under way, and the effect this project may reasonably be expected to have upon the program of desegregating the schools." In response to that order, the plan lists the names of 21 out of 91 projects, expresses a few opinions and conclusions about the building program, and promises a partial study by February 1, 1970 and a "general long range study" *"by June of 1970,"* but it sheds no factual light on the effect of any part of the building program on the segregation issue. Since the board has, in seven months, failed to produce a program for desegregation, it is only natural that they can not predict the effect of any particular building project on such a program. The court has yet not received information necessary to appraise the effects of current building activity on the current unprogrammed course of desegregation.

When the plan is understood, it boils down to this:

1. It proposes to re-draw school zone lines, and to restrict freedom of choice, which the court had already

advised the board to eliminate except where it would promote desegregation. It states no definable desegregation goals.

2. The "60-40" ratio is a one-way street. The plan implies that there will be no action to produce desegregation in schools with black populations above 40%, *and that no white students are to be assigned to such schools.*

3. Continued operation of all seven of the all-black elementary schools would be assured. The same would appear to be true for the entire group of 25 mostly "black" schools, mentioned in the court's November 7 order, which serve 16,197 of the 24,714 black students in the system.

4. Transportation to aid children transferring out of segregated situations (which was ordered by the court on April 23 as a condition of any freedom of transfer plan, *and which was a part of this plan as advertised in the board's October 29 report*) has been eliminated from the plan as filed with the court. Inevitable effects of this action would be to violate the court order and to leave the children recently reassigned from seven closed black inner-city schools with no way to reach the suburban schools they now attend! This is *re*-segregation.

5. Other methods (pairing, grouping, clustering of schools) which could reduce or eliminate segregation—and which the board, on October 29 when it was asking for a time extension, promised to consider—have now been expressly left out of the plan.

6. No time is set to complete the job of faculty and pupil desegregation.

7. In the written argument ("Report") filed with the plan, with the candor characteristic of excellent attorneys, the board's attorneys say:

> "It is important that the Court does not construe the information submitted in the plan relating to racial ratios of elementary schools as being in the nature of a guarantee by the Board since it is anticipated *the results of restructuring the attendance lines may produce a greater or lesser degree of desegregation, the extent of which cannot be determined at this time.*" (Report, page 4; emphasis added.)

The defendants have the burden to desegregate the schools and to show any plan they propose will desegregate the controls. They have not carried that burden. Re-drawing school zone lines won't eliminate segregation unless the decision to desegregate has first been made.

THE SCHOOLS ARE STILL SEGREGATED

The extent to which the schools are still segregated was illustrated by the information set out in previous orders including the order of November 7, 1969. Nearly 13,000 out of 24,714 black students still attend schools that are 98% to 100% black. Over 16,000 black students still attend predominantly black schools. Nine-tenths of the faculties are still obviously "black" or "white." Over 45,000 out of 59,000 white students still attend schools which are obviously "white."

THE RESULT IS UNEQUAL EDUCATION

The following table further illustrates the results. Groups A and B show that sixth graders, in the seven

100% black schools the plan would retain, perform at about fourth grade levels, while their counterparts in the nine 100% white elementary schools perform at fifth to seventh grade levels. Group C shows that sixth graders in Barringer, which changed in three years from 100% middle income white to 84% Negro, showed a performance drop of 1½ to 2 years. Group D shows however that Randolph Road, 72% white and 28% Negro, has eighth grade performance results approximately comparable to Eastway, which is 96% white, and Randolph results are approximately two years ahead of all-black Williams and Northwest. Until unlawful segregation is eliminated, it is idle to speculate whether some of this gap can be charged to racial differences or to "socio-economic-cultural" lag.

If the courts should accept the defendants' contention that all they have to do is re-draw attendance lines and allow a type of freedom of choice, two-thirds or more of the black children in Mecklenburg County would be relegated permanently to this kind of separate but unequal education.

AVERAGE ACHIEVEMENT TEST SCORES, GRADE 6, REPORTED IN GRADE EQUIVALENT, 1965-66/1968-69

GROUP A - 100% Black Elementary	WM	PM	SP	LANG	ACM	ACN	AAPP	SS	SC
	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69
Billingsville	37/39	39/42	43/45	36/37	37/38	41/44	38/39	42/43	37/38
Marie Davis	42/43	42/44	49/48	39/41	43/45	45/48	43/41	43/45	39/40
Double Oaks	44/40	42/40	49/46	35/36	41/39	45/44	41/37	44/40	41/37
First Ward	43/40	42/41	50/48	39/36	40/39	44/46	43/41	48/44	42/40
Lincoln Heights	45/44	44/44	52/49	44/42	45/43	46/48	43/41	47/46	42/41
Oaklawn	44/44	42/45	50/53	42/47	41/45	50/49	43/44	41/49	40/47
University Park	44/44	44/47	51/48	43/43	40/44	46/48	41/44	46/46	41/43
GROUP B - 100% White Elementary									
Devonshire	52/59	54/62	57/60	57/64	49/53	53/63	55/59	57/64	57/65
Hidden Valley	/59	/62	/61	/62	/51	/60	/59	/64	/67
Merry Oaks	62/60	66/66	66/67	66/71	53/54	59/65	67/64	70/68	73/72
Montclaire	66/67	68/72	69/70	71/76	58/60	61/67	66/68	70/71	76/77
Pinewood	67/64	68/68	71/68	71/71	58/61	62/67	68/71	72/71	73/70
Rama Road	68/67	68/72	70/71	73/76	58/61	64/67	70/70	72/73	76/78
Shamrock Gardens	59/56	61/57	66/57	64/62	52/53	58/57	63/57	65/61	62/61
Thomasboro	58/55	59/55	63/58	59/58	52/51	55/57	60/56	63/59	64/61
Windsor Park	61/64	63/68	61/66	65/69	55/53	59/63	63/62	65/69	67/72
GROUP C - Barringer	61*/46#	63*/46#	64*/50#	66*/42#	53*/45#	59*/48#	64*/44#	65*/47#	68*/45#

*100% white in 1965
84% black in 1968-69

AVERAGE ACHIEVEMENT TEST SCORES, GRADE 8, REPORTED IN GRADE EQUIVALENT, 1965-66/1968-69

GROUP D - Junior High	PM	SP	LANG	ACM	ACN	AAPP	SS	SC
	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69	1965-'66 / 1968-'69
Randolph Road (28% black)	/80	/82	/79	/62	/79	/76	/79	/81
Williams (100% black)	55/52	67/64	55/52	52/49	58/61	58/55	56/56	55/56
Northwest (100% black)	59/58	73/71	59/56	54/50	60/61	58/58	59/57	59/58
Eastway (96% white)	84/82	85/86	83/81	74/67	79/82	81/75	83/82	87/87

Opinion and Order dated December 1, 1969

THE LAW STILL REQUIRES DESEGREGATION

Segregation in public schools was outlawed by the decisions of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and 349 U. S. 294 (1955).

The first *Brown* opinion (*Brown I*) held that racial segregation, even though physical facilities and other tangible factors might be equal, deprives Negro children of equal educational opportunities. The Court recalled prior decisions that segregation of graduate students was unlawful because it restricted the student's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." The Court said:

> "Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Quoting a lower court opinion, the Supreme Court continued:

> " 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendence to [retard] the educational and mental development of Negro children

and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.* * * *." (Emphasis added.)

* * * * *

"* * * Such segregation has long been *a nationwide problem, not merely one of sectional concern.*" (Emphasis added.)

The selection of cases for the *Brown* decision demonstrates the nationwide reach of that concern; Brown lived in Kansas and the defendant board of education was that of Topeka, Kansas; defendants in companion cases included school authorities in Delaware and the District of Columbia. Later important cases have involved not just Southern schools, but also schools in New York, Chicago, Ohio, Denver, Oklahoma City, Kentucky, Connecticut and other widely scattered places.

Court decisions setting out the principles upon which the various orders of this court have been based include the following:

SUPREME COURT CASES

Alexander v. *Holmes County* (Mississippi), No. 632 (October 29, 1969).

Brown v. *Board of Education of Topeka* (Kansas), 347 U. S. 483 (1954), 349 U. S. 294 (1955).

Cooper, Members of the Board of Directors of the Little Rock (Arkansas) *Independent School District* v. *Aaron*, 358 U. S. 1 (1958).

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Green v. *County School Board of New Kent County* (Virginia), 391 U. S. 430 (1968).

Griffin v. *County School Board of Prince Edward County* (Virginia), 377 U. S. 218 (1964).

Keyes v. *Denver* (Colorado) *School District Number 1*, Application for Vacation of Stay (Justice Brennan, Supreme Court, August 29, 1969).

Monroe v. *Board of Commissioners of the City of Jackson* (Tennessee), 391 U. S. 450 (1968).

Raney v. *Board of Education of the Gould School District* (Arkansas), 391 U. S. 443 (1968).

United States v. *Montgomery County* (Alabama) *Board of Education*, 395 U. S. 225 (1969).

CIRCUIT COURT CASES

Brewer v. *School Board of City of Norfolk* (Virginia), 397 F.2d 37 (4th Cir., 1968).

Felder v. *Harnett County* (North Carolina) *Board of Education*, 409 F.2d 1070 (4th Cir., 1969).

Wanner v. *County School Board of Arlington County* (Virginia), 357 F.2d 452 (4th Cir., 1966).

Henry v. *Clarksdale* (Mississippi) *Municipal Separate School District*, 409 F.2d 682 (5th Cir., 1969) (*petition for cert. filed*, 38 U.S.L.W. 3086) (U. S. 9/2/69) (No. 545).

United States v. *Greenwood* (Mississippi) *Municipal Separate School District*, 406 F.2d 1086 (5th Cir., 1969) (*cert. denied*, 395 U. S. 907 (1969)).

United States v. *Hinds County School Board*, Nos. 28030 and 28042 (5th Cir., July 3, 1969).

Clemons v. *Board of Education of Hillsboro, Ohio*, 228 F.2d 853 (6th Cir. 1956) (*cert. denied*, 350 U. S. 1006).

United States v. *School District 151 of Cook County, Illinois* (Chicago), 404 F.2d 1125 (7th Cir., 1968) (*rehearing denied*, January 27, 1969).

DISTRICT COURT CASES

Eaton v. *New Hanover County* (North Carolina) *Board of Education*, No. 1022 (E.D. N.C., July 14, 1969).

Keyes v. *School District Number One, Denver* (Colorado), 303 F. Supp 289 (D. Colo., 1969).

Some of these principles which apply to the Charlotte-Mecklenburg situation are:

1. Racial segregation in public schools is unlawful, *Brown I; Green* v. *New Kent County, Virginia; Clemons* v. *Hillsboro, Ohio*. Such segregation is unlawful even though not required nor authorized by state statute, *Clemons* v. *Hillsboro*. Acts of school boards perpetuating or restoring separation of the races in schools are *de jure*, unlawful discrimination, *Cooper* v. *Aaron; Keyes* v. *Denver, Colorado School Board* (August 14, 1969), approved by the Supreme Court of the United States two weeks later, *Keyes* v. *Denver*, U. S. Supreme Court, August 29, 1969.

2. Drawing school zone lines, like "freedom of transfer," is not an end in itself; and a plan of geographic zoning which perpetuates discriminatory segregation is unlawful, *Keyes* v. *Denver; Brewer* v. *Norfolk; Clemons* v. *Hillsboro; Henry* v. *Clarksdale, Mississippi; United States* v. *Hinds County; United States* v. *Greenwood*.

3. No procedure, plan, method or gimmick will legalize state maintained segregation. The constitutional test of a plan is whether it gets rid of segregation in public schools, and does it "now," *Green* v. *New Kent County; Monroe* v. *Jackson; Alexander* v. *Holmes County.*

4. Good faith of the school authorities, if it exists, does not excuse failure to desegregate the schools. ". . . The availability to the Board of other more promising courses of action may indicate a lack of good faith; and at the least *it places a heavy burden upon the Board to explain its preference for an apparently less effective method.*" *Green* v. *New Kent County.* (Emphasis added.)

5. "Natural boundaries" for school zones are not constitutionally controlling. If a zone encloses a black school in a district like this one where white students are in a heavy (71% white, 29% black) majority, the "naturalness" of the boundary or the existence of reasons for the boundary unrelated to segregation does not excuse the failure to desegregate the school, *Keyes* v. *Denver, Colorado; Henry* v. *Clarksdale; Clemons* v. *Hillsboro.*

6. It is appropriate for courts to require that school faculties be desegregated by formula, if necessary, and by a definite time or on a definite schedule, *United States* v. *Montgomery.* Faculty assignments so that each school has approximately the same ratio of black teachers as the ratio of black teachers in the school system at large are appropriate and necessary to equalize the quality of instruction in this school system, *United States* v. *Montgomery; United States* v. *Cook County; Eaton* v. *New Hanover County* (North Carolina).

Opinion and Order dated December 1, 1969

7. Bus transportation as a means to eliminate segregation results of discrimination may validly be employed, *Keyes* v. *Denver; United States* v. *Cook County,* Illinois, 404 F.2d 1125, 1130 (1969).

8. Race may be considered in eliminating segregation in a school system, *Wanner* v. *Arlington County, Virginia; United States* v. *Cook County; Green* v. *New Kent County.*

9. ". . . Whatever plan is adopted will require evaluation in practice and the court should retain jurisdiction until it is clear that state imposed segregation has been completely removed." *Green* v. *New Kent County; Raney* v. *Board of Education.*

10. The alleged high cost of desegregating schools (which the court does not find to be a fact) would not be a valid legal argument against desegregation, *Griffin* v. *School Board; United States* v. *Cook County, Illinois.*

11. The fact that public opinion may oppose desegregating the schools is no valid argument against doing it, *Cooper* v. *Aaron, Green* v. *New Kent County; Monroe* v. *Jackson.*

12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

13. School location and construction and renovation and enlargement affect desegregation. Courts may properly restrain construction and other changes in location or capacity of school properties until a showing is made that such change will promote desegregation rather than frustrate it, *Felder* v. *Harnett County.*

14. Where pupils live must not control where they are assigned to school, if some other approach is necessary in order to eliminate racial segregation, *Green* v. *New Kent County; Keyes* v. *Denver; Eaton* v. *New Hanover County, North Carolina Board of Education.*

15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I,* this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated, *Green* v. *New Kent County; Henry* v. *Clarksdale; United States* v. *Hinds County.*

16. The school board is endowed by Chapter 115, Section 176 of the General Statutes of North Carolina with "full and complete" and "final" authority to assign students to whatever schools the board chooses to assign them. The board may not shift this statutory burden to others. In *Green* v. *New Kent County,* the Supreme Court said of "freedom of choice":

> "Rather than foster the dismantling of the dual system the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must . . . fashion steps which promise realistically to convert

promptly to a system without a 'white' school and a 'Negro' school but just schools."

17. Pairing of grades has been expressly approved by the appellate courts, *Green* v. *New Kent County; Felder* v. *Harnett County*. Pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools.

18. Some 25,000 out of 84,000 children in this county ride school busses each day, and the number *eligible* for transportation under present rules may be more than 30,000. A transportation system already this massive may be adaptable to effective use in desegregating schools.

19. The school board has a duty to promote acceptance of and compliance with the law. In a concurring opinion in *Cooper* v. *Aaron*, 358 U. S. at 26 (1958), Justice Frankfurter said:

> *"That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system.* This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with Negro populations of large proportions. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law,

precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

"Lincoln's appeal to 'the better angels of our nature' failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's First and Second Inaugurals bequeathed to the Union, cemented with blood, a moral heritage which, when drawn upon in times of stress and strife, *is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.*" (Emphasis added.)

Order

It is Ordered, Adjudged and Decreed as follows:

1. All facts found in this and previous orders, and all competent evidence including plans, reports and admissions in pleadings in the record are relied upon in support of this order.

2. The November 17 plan entitled "Amendment to Plan for Further Desegregation of Schools" is disapproved.

3. The defendants are directed to desegregate faculties in all the schools effective not later than September 1, 1970, so that the ratio of black teachers to white teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system.

4. A consultant will be designated by the court to prepare immediately plans and recommendations to the court for desegregation of the schools. The legal and practical considerations outlined in detail in earlier parts of this opinion and order are for his guidance.

5. The defendants are directed to cooperate fully with the consultant. This cooperation will include but not be limited to providing space at the headquarters of the board of education in which he may work; paying all of his fees and expenses; providing stenographic assistance and the help of business machines, draftsmen and computers if requested, along with telephone and other communications services. He shall have full access to maps, drawings, reports, statistics, computer studies, and all information about all phases of the school system which may be necessary to prepare plans or reports. He shall be supplied with

any studies and plans and partial plans for desegregation of the schools which the defendants may have. The defendants will provide this consultant with full professional, technical and other assistance which he may need in familiarizing himself with the school system and the various problems to be solved in desegregating the schools. Any and all members of the board of education who wish to cooperate in the preparation of such a plan may do so. The cooperation of the school administrators and staff will be requested and will be appreciated.

6. Action on the motion of plaintiffs for an order directing immediate desegregation of the entire system is deferred.

7. Further orders with reference to restraining construction and enlargement of schools are deferred.

8. Motion has been filed for a citation of the school board members for contempt of court. Litigants are bound by court orders and may be punished for disobedience of such orders even though such orders may ultimately be reversed on appeal, *Walker* v. *Birmingham,* 388 U. S. 307 (1967). The evidence might very well support such citations. Nevertheless, this is a changing field of law. Despite the peremptory warnings of *New Kent County* and *Holmes County,* strident voices, including those of school board members, still express doubt that the law of those cases applies to Mecklenburg County. This district court claims no infallibility. Contempt proceedings against uncompensated public servants will be avoided if possible. Action on the contempt citation is deferred.

9. If the members of the school board wish to develop plans of their own for desegregation of the schools, with-

out delaying or interfering with the work of the consultant, they may proceed to do so, and if they wish any guidance from the court they will find their guidance in the previous opinions and orders of this court and in the court decisions and principles set out in this opinion and order.

10. Jurisdiction is retained for further orders as may be appropriate.

This is the 1st day of December, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Order dated December 2, 1969

The court appoints as a consultant under the terms outlined in the court's order of December 1, 1969, Dr. John A. Finger, Jr., of Providence, Rhode Island.

The school board and staff are directed to cooperate with Dr. Finger as set out in the December 1, 1969 order.

This the 2nd day of December, 1969.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Order dated February 5, 1970

On December 2, 1969, this court appointed Dr. John A. Finger, Jr., of Providence, Rhode Isand, to study the Charlotte-Mecklenburg school system and advise the court how the schools could be desegregated. The defendant school board, by order of December 1, 1969, had been extended a fourth opportunity to submit a plan if they wished. Dr. Finger went to work; the school staff worked with him; and they have produced some extremely useful information and reports, which will be referred to in this order as the Board plan and the Finger plan.

Hearings on the plans were conducted on February 2 and February 5, 1970.

The Board plan, prepared by the school staff, relies almost entirely on geographic attendance zones, and is tailored to the Board's limiting specifications. It leaves many schools segregated. The Finger plan incorporates most of those parts of the Board plan which achieve desegregation in particular districts by re-zoning; however, the Finger plan goes further and produces desegregation of all the schools in the system.

Taken together, the plans provide adequate supplements to a final desegregation order.

The court would like again to express appreciation to Dr. Finger for the intelligence, resourcefulness and tact with which he has pursued his difficult assignment, and to Dr. William Self, Superintendent of the schools, and to his able staff, for the excellent work done by them in their difficult role of helping prepare one plan to comply with what the court believes the law requires, and simultaneously preparing another plan to suit the majority of the School Board who, at last reckoning, still did not appear to accept the court's order as representing the law of the land.

Order dated February 5, 1970

The court is also grateful to the Board's outside consultant, Mr. Weil, of Systems Associates, Inc., whose two hundred days of work and whose computer studies formed the building blocks, or points of departure, for much of the work of the others.

Recent appellate court decisions have hammered home the message that sixteen years of "deliberate speed" are long enough to desegregate tax supported schools. On October 29, 1969, in *Alexander* v. *Holmes County*, 369 U.S. 19, the Supreme Court ordered numerous Deep South school districts to be completely desegregated by January 1, 1970; schools in Atlanta, Miami and parts of Chicago have been ordered totally desegregated; the Supreme Court in January ordered February 1, 1970, desegregation of 300,000 pupils in six Gulf Coast states; the Fourth Circuit Court of Appeals in *Nesbit* v. *Statesville*, —— F.2d. —— (December 2, 1969), ordered elimination by January 1, 1970, of the racial characteristics of the last black schools in Durham, Reidsville and Statesville, North Carolina; and in *Whittenberg* v. *Greenville, South Carolina*, the Fourth Circuit Court of Appeals, in an opinion by Chief Judge Clement F. Haynsworth, Jr., has just last month ordered the desegregation by February 16, 1970, of the 58,000 students in Judge Haynsworth's own home town. Judge Robert Martin of Greenville, pursuant to that mandate, on February 2, 1970, ordered all the Greenville schools to be populated by February 16, 1970, on a basis of 80% white and 20% black.

In the *Greenville* opinion the court said:

> "These decisions leave us with no discretion to consider delays in pupil integration until September 1970. Whatever the state of progress in a particular school

district and whatever the disruption which will be occasioned by the immediate reassignment of teachers and pupils in mid-year, there remains no judicial discretion to postpone immediate implementation of the constitutional principles as announced in *Green* v. *County School Board of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (Oct. 29, 1969); *Carter* v. *West Feliciana Parish School Bd.*, —— U.S. —— (Jan. 14, 1970)."

These decisions are binding on the United States District Court for the Western District of North Carolina. Unless that were true, the Constitution would mean whatever might be the temporary notion of whichever one of 340-odd federal judges happened to hear the case. This is a matter of law, not anarchy; of constitutional right, not popular sentiment.

The order which follows is not based upon any requirement of "racial balance." The School Board, after four opportunities and nearly ten months of time, have failed to submit a lawful plan (one which desegregates all the schools). This default on their part leaves the court in the position of being forced to prepare or choose a lawful plan. The fairest way the court knows to deal with this situation was stated clearly in the December 1, 1969 order, as follows:

> "In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to

understand that variations from that norm may be unavoidable."

THEREFORE, and in accordance with the specific, detailed, numbered guidelines of this court's order of December 1, 1969, IT IS ORDERED:

1. That the defendants discontinue the operation of segregated schools.

2. That the defendants take such action as is necessary to desegregate all the schools—students and faculty.

3. That desegregation of faculty be accomplished, as previously ordered, by assigning faculty (specialized faculty positions excepted) so that the ratio of black and white faculty members of each school shall be approximately the same as the ratio of black and white faculty members throughout the system.

4. That teachers be assigned so that the competence and experience of teachers in formerly or recently black schools will not be inferior to those in the formerly or recently white schools in the system.

5. That no school be operated with an all-black or predominantly black student body.

6. That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students.

7. That transportation be offered on a uniform nonracial basis to all children whose attendance in any school

is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance. Estimates of the number of children who may have to be transported have run as high as 10,000 or more. Since the cost to the local system is about $18 or $20 a year per pupil, and the cost to the state in those areas where the state provides transportation funds is about another $18 or $20 a year per pupil, the average cost for transportation is apparently less than $40 per pupil per year. The local school budget is about $45,000,000 a year. It would appear that transporting 10,000 additional children, if that is necessary, and if the defendants had to pay it all, would add less than one per cent to the local cost of operating the schools. The significant point, however, is that the cost is not a valid legal reason for continued denial of constitutional rights.

8. That if geographic zones are used in making school assignments, the parts of a zone need not be contiguous.

9. That the defendants maintain a continuing control over the race of children in each school, just as was done for many decades before *Brown* v. *Board of Education*, and maintain the racial make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable.

10. That "freedom of choice" or "freedom of transfer" may not be allowed by the Board if the effect of any given transfer or group of transfers is to increase the degree of segregation in the school from which the transfer is requested or in the school to which the transfer is desired.

11. That the Board retain its statutory power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Administrative transfers shall not be made if the result of such transfers is to restore or increase the degree of segregation in either the transferor or the transferee school.

12. That if transfers are sought on grounds of "hardship," race will not be a valid basis upon which to demonstrate "hardship."

13. That the Board adopt and implement a continuing program, computerized or otherwise, of assigning pupils and teachers during the school year as well as at the start of each year for the conscious purpose of maintaining each school and each faculty in a condition of desegregation.

14. That the defendants report to the court weekly between now and May 15, 1970, reporting progress made in compliance with this order; and that they report thereafter on July 15, August 15, September 15 and November 1, 1970, and on February 1 and May 1, 1971.

5. That the internal operation of each school, and the assignment and management of school employees, of course be conducted on a non-racial, non-discriminatory basis.

16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger,

Jr., are *illustrations of means or partial means to that end.*[1] The defendants are encouraged to use their full "know-how" and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*

17. The choice or approval or partial approval of any proposed desegregation plan is subject to all the requirements and restrictions of the preceding sixteen paragraphs, as well as to any later requirements or restrictions set out in this order.

18. Subject to the above, the Board's pupil assignment plan for senior high school pupils is approved, with one

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1. The following are exhibits to this order:
   - A. The Board's map of proposed senior high school attendance zones.
   - B. The Board's list of proposed senior high school populations.
   - C. The Board's map of proposed junior high school attendance zones.
   - D. The Board's list of proposed junior high school populations.
   - E. Dr. Finger's map of proposed junior high school attendance zones.
   - F. Dr. Finger's list of proposed junior high school populations.
   - G. The Board's map of proposed elementary school attendance zones.
   - H. The Board's list of proposed elementary school populations.
   - I. Dr. Finger's map of proposed elementary school attendance zones.
   - J. Dr. Finger's list of proposed elementary school populations.
   - K. Dr. Finger's list of pairing and grouping of elementary schools and grades.

exception. This exception is that black students, some 300 in number, should be assigned from map grids 294D, 295C, 295D, and 318A, to attend Independence High School.

19. Although the Board junior high school plan is inferior in design and results to Dr. Finger's plan, it is a purely "home grown" product and the court would like to approve it, if it can be brought into compliance with law by desegregating Piedmont Junior High School, and by adding transportation as above indicated, and by increasing the black attendance at several outlying schools. The Board may if it wishes consider (1) re-zoning; (2) two-way transporting of pupils between outlying schools and Piedmont; (3) closing Piedmont and assigning the pupils to Albemarle Road, Carmel, McClintock and Quail Hollow. Unless the court has been notified in writing by noon of February 6, 1970, of an affirmative decision adopting one of these choices by formal Board action, the junior high schools are directed to be desegregated according to Dr. Finger's plan, as illustrated by exhibits E and F.

20. The Board's plan for elementary schools, illustrated by exhibits G and H, cannot be approved because (1) it retains nine schools 83% to 100% black, serving over half the black elementary pupils, and (2) it leaves approximately half the 31,500 white elementary students attending schools that are 86% to 100% white; and (3) it promises to provide little or no transportation in aid of desegregation, even though the plan's zones in some cases are apparently five or six miles long. The Board plan for elementaries openly rejects the duty to eliminate all the black schools.

The Finger plan uses many of the same basic attendance lines as the Board plan; however, it does not stop short of

the constitutional requirements, and by pairing and clustering groups of schools it achieves full desegregation of the elementary schools. The school staff worked out the details of this plan and are familiar with it. Its attendance zones are illustrated on the map, exhibit I; its elementary school populations are listed in exhibit J; and the pairing and grouping of the outlying and inner-city schools, grade by grade, are shown in detail on exhibit K. Subject to the qualifications previously stated, the Board is directed to follow the Finger plan with reference to elementary schools.

21. THE TIME TABLE: Deadlines to complete various phases of the program required in this order are as follows:

SENIOR HIGH SCHOOLS.—Seniors may remain in their present schools until the end of the school year; the Board may make any decision they deem wise about allowing seniors to transfer before graduation to schools where their race will be in the minority. *Eleventh and tenth graders* will be transferred to their new schools not later than the 4th day of May, 1970.

JUNIOR HIGH SCHOOLS (Grades 7, 8, 9).—Complete desegregation shall be accomplished not later than the 1st day of April, 1970.

FACULTY.—Complete desegregation of the various faculties shall be accomplished by the various times set out above for desegregation of the student bodies.

22. MODIFICATIONS.—The intention of this order is to put on the Board the full duty to bring the schools into compliance with the Constitution as above outlined, but to leave maximum discretion in the Board to choose methods that will accomplish the required result. However, it is directed

that leave of court be obtained before making any material departure from any specific requirement set out herein. The court will undertake to rule promptly on any such requests for deviation from prescribed methods.

23. APPEAL.—The court claims no infallibility and does not seek to prevent appeal from all or any part of this order, and will allow the making of any record needed to present on appeal any contention the parties desire to make, and will do what this court can to expedite such appeal. However, in accordance with *Whittenberg* v. *Greenville, supra,* this order will not be stayed pending appeal, and immediate steps to begin compliance are directed.

24. All evidence in the cause and all findings and conclusions in previous orders which support or tend to support this order are relied upon in support of this order.

25. Jurisdiction of this cause is retained for further orders.

This the 5th day of February, 1970.

.....

James B. McMillan
United States District Judge

The Charlotte-Mecklenburg Schools

Exhibit B

DESEGREGATION PLAN for 1970-71

Senior High Schools

School	1970-71 Capacity		1969-70				Board Plan			
	Base	+20%	B	W	T	%B	B	W	T	%B
East Mecklenburg	1700	2040	215	1925	2140	10%	360	1716	2076	17%
Garinger	1874	2249	492	2148	2640	18%	721	1914	2635	27%
Harding	1202	1442	612	720	1332	45%	395	692	1087	36%
Independence	1047	1256	101	1111	1212	9%	23	1241	1264	2%
Myers Park	1679	2015	224	1767	1991	12%	426	1883	2309	18%
North Mecklenburg	1158	1390	446	1185	1631	28%	440	998	1438	31%
Olympic	807	968	351	512	863	41%	201	687	888	23%
South Mecklenburg	1523	1828	90	2024	2114	5%	482	1846	2328	21%
West Charlotte	1593	1912	1641	0	1641	100%	597	1045	1642	36%
West Mecklenburg	1374	1649	141	1444	1585	9%	494	998	1492	33%
Total	13,957	16,749	4,313	12,836	17,149		4,139	13,020	17,159	

The Charlotte-Mecklenburg Schools

Exhibit D

DESEGREGATION PLAN for 1970-71

Junior High Schools

School	1970-71 Capacity		1969-70				Board Plan			
	Base	+20%	B	W	T	%B	B	W	T	%B
Albemarle Road	948	1138	63	995	1058	5%	19	753	772	2%
Alexander	874	1049	328	761	1089	30%	303	698	1001	30%
Cochrane	1190	1428	72	1544	1616	5%	571	1150	1721	33%
Coulwood	704	845	101	770	871	12%	313	551	864	36%
Eastway	1093	1312	61	1356	1417	4%	375	971	1346	28%
Alexander Graham	996	1194	101	1028	1129	8%	261	888	1149	23%
Hawthorne	850	910	550	472	1022	54%	276	704	980	28%
Kennedy	801	961	802	9	811	99%	325	510	835	39%
McClintock	923	1100	84	1288	1372	6%	25	1048	1073	2%
Northwest	1068	1282	1032	1	1033		296	675	971	30%
Piedmont	631	757	408	55	463	89%	758	84	842	90%
Quail Hollow	1238	1486	129	1421	1550	9%	138	1144	1282	11%
Randolph	972	1170	279	710	989	28%	307	683	990	31%
Ranson	851	1021	246	548	794	31%	295	558	853	35%
Sedgefield	777	930	167	809	976	17%	234	612	846	28%
Smith	1093	1312	51	1436	1487	4%	330	957	1287	26%
Spaugh	826	1091	262	839	1101	24%	346	752	1098	32%
Williams	801	967	1081	0	1081	100%	336	722	1058	32%
Wilson	1044	1253	60	1145	1205	5%	346	795	1141	30%
Carmel	558	670					2	555	557	0%
J. H. Gunn (Wilgrove)	558	670					49	470	519	9%
Total	18,796	22,546	5,877	15,187	21,064		5,905	15,280	21,185	

Exhibit F

DESEGREGATION PLAN for Charlotte-Mecklenburg Schools

Junior High Schools

School	1970-71 Capacity Base	+20%	1969-70 B	W	T	%B	Court Consultant Plan B	W	T	%B
Albemarle Road	948	1138	63	995	1058	5%	292	696	988	30%
Alexander	874	1049	328	761	1089	30%	335	690	1025	33%
Cochrane	1190	1428	72	1544	1616	5%	370	984	1354	27%
Coulwood	704	845	101	770	871	12%	245	568	813	30%
Eastway	1093	1312	61	1356	1417	4%	351	839	1190	30%
Alexander Graham	996	1194	101	1028	1129	8%	359	938	1297	28%
Hawthorne	850	910	550	472	1022	54%	290	677	967	30%
Kennedy	801	961	802	9	811	99%	184	606	790	23%
McClintock	923	1100	84	1288	1372	6%	386	925	1311	30%
Northwest	1068	1282	1032	1	1033		336	736	1072	31%
Piedmont	631	757	408	55	463	89%	243	538	781	32%
Quail Hollow	1238	1486	129	1421	1550	9%	339	1050	1389	25%
Randolph	972	1170	279	710	989	28%	402	832	1234	33%
Ranson	851	1021	246	548	794	31%	264	583	847	31%
Sedgefield	777	930	167	809	976	17%	171	641	812	21%
Smith	1093	1312	51	1436	1487	4%	350	929	1279	27%
Spaugh	826	1091	262	839	1101	24%	324	807	1131	29%
Williams	801	967	1081	0	1081	100%	308	727	1035	30%
Wilson	1044	1253	60	1145	1205	5%	230	570	800	29%
Carmel	558	670					142	444	586	24%
J. H. Gunn	558	670					49	475	524	9%
Total	18,796	22,546	5,877	15,187	21,064		5,970	15,255	21,225	

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity		1969-70*				Board Plan			
	Base	+12%	B	W	T	%B	B	W	T	%B
Albemarle Rd.	432	484	4	510	514	1%	4	469	473	1%
Allenbrook	540	605	61	452	513	12%	59	496	555	11%
Ashley Park	621	696	27	574	601	4%	155	421	576	27%
Bain	702	786	33	735	768	4%	25	706	731	3%
Barringer	486	544	843	16	859	98%	203	320	523	39%
Berryhill	836	936	98	639	737	13%	247	574	821	30%
Beverly Woods	540	605	68	684	752	9%	8	648	656	1%
Billingsville	594	665	596	0	596	100%	113	325	438	26%
Briarwood	540	605	6	680	686	1%	2	663	665	0%
Bruns Ave.	675	756	759	10	769	99%	624	73	697	90%
Chantilly	432	484	0	472	472	0%	142	303	445	32%
Clear Creek	324	363	48	229	277	17%	43	266	309	14%
Collinswood	621	696	111	443	554	20%	224	448	672	33%
Cornelius	459	514	181	235	416	44%	182	265	447	41%
Cotswold	540	605	23	537	560	4%	128	449	577	24%
Davidson	324	363	104	186	290	36%	102	174	276	37%
Marie Davis	756	847	662	0	662	100%	666	82	748	89%
Derita	783	877	150	678	828	18%	152	595	747	20%
Devonshire	648	726	0	903	903	0%	0	925	925	0%
Dilworth	648	726	90	317	407	22%	241	376	617	39%
Double Oaks	675	756	836	0	836	100%	825	3	828	100%
Druid Hills	486	544	472	3	475	99%	465	20	485	96%
Eastover	648	726	42	559	601	7%	157	478	635	25%
Elizabeth	405	454	314	125	439	72%	112	294	406	28%
Enderly Park	513	575	3	371	374	1%	119	238	357	33%

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity Base	1970-71 Capacity +12%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B
First Ward	702	786	805	0	805	100%	770	7	777	99%
Hickory Grove	459	514	70	533	603	12%	74	556	630	12%
Hidden Valley	648	726	0	1100	1100	0%	1	1077	1078	0%
Highland	297	333	69	305	374	18%	76	237	313	24%
Hoskins	297	333	13	212	225	6%	124	219	343	36%
Huntersville	675	756	145	531	676	21%	130	554	684	19%
Huntingtowne Farms	594	665	7	603	610	1%	3	614	617	0%
Idlewild	567	635	47	581	628	7%	59	549	608	10%
Irwin Ave.			292	0	292	100%	*			
Amay James	378	423	462	3	465	99%	90	169	259	35%
Lakeview	378	423	346	89	435	80%	119	285	404	29%
Lansdowne	756	847	75	802	877	9%	79	719	798	10%
Lincoln Heights	648	726	711	0	711	100%	903	6	909	99%
Long Creek	702	786	267	468	735	36%	259	523	782	33%
Matthews	945	1058	86	802	888	10%	81	837	918	9%
Merry Oaks	486	544	0	442	442	0%	0	557	557	0%
Midwood	459	514	9	437	446	2%	116	401	517	23%
Montclaire	675	756	0	718	718	0%	1	781	782	0%
Myers Park	432	484	22	444	466	5%	150	314	464	32%
Nations Ford	621	696	43	669	712	6%	177	548	725	24%
Newell	594	665	74	438	512	14%	64	436	500	13%
Oakdale	540	605	69	517	586	12%	202	460	662	31%
Oakhurst	594	665	5	616	621	1%	92	504	596	15%
Oaklawn	594	665	584	0	584	100%	597	3	600	99%
Olde Providence	540	605	80	512	592	14%	83	461	544	15%

*distributed to surrounding schools

DESEGREGATION PLAN for 1970-71

Elementary Schools

School	1970-71 Capacity Base	1970-71 Capacity +12%	1969-70 B	1969-70 W	1969-70 T	1969-70 %B	Board Plan B	Board Plan W	Board Plan T	Board Plan %B
Park Road	540	605	44	548	592	7%	41	571	612	7%
Paw Creek	594	665	27	609	636	4%	83	602	685	12%
Paw Creek Annex	270	302	30	271	301	10%				
Pineville	486	544	136	356	492	28%	123	379	502	25%
Pinewood	648	726	0	674	674	0%	0	900	900	0%
Plaza Road	459	514	80	340	420	19%	181	350	531	34%
Rama Road	648	726	1	815	816	0%	3	744	747	0%
Sedgefield	540	605	3	548	551	1%	223	364	587	38%
Selwyn	486	544	31	617	648	5%	32	459	491	7%
Shamrock Gardens	486	544	0	515	515	0%	84	496	580	15%
Sharon	459	514	72	361	433	17%	91	421	512	18%
Starmount	648	726	25	712	737	3%	67	833	900	7%
Statesville Road	648	726	333	522	855	39%	160	553	713	23%
Steele Creek	378	423	5	509	514	1%	195	475	670	29%
Thomasboro	729	816	0	690	690	0%	135	777	912	15%
Tryon Hills	486	544	309	164	473	65%	200	342	542	37%
Tuckaseegee	540	605	58	578	636	9%	57	510	567	10%
University Park	648	726	825	1	826	100%	735	132	867	85%
Villa Heights	810	907	902	83	985	92%	877	170	1047	83%
Westerly Hills	405	454	46	539	585	8%	144	332	476	30%
Wilmore	378	423	222	210	432	51%	153	250	403	38%
Windsor Park	648	726	1	748	749	0%	1	782	783	0%
Winterfield	648	726	48	688	736	7%	52	653	705	7%
Total	40,391	45,239	13,010	31,278	44,288		12,885	31,523	44,408	

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DESEGREGATION PLAN for Charlotte-Mecklenburg Schools

Elementary Schools

School	1970-71 Capacity Base	+20%	1969-70 B	W	T	%B	Court Consultant Plan B	W	T	%B
Albemarle Rd.	432	434	4	510	514	1%	162	338	500	32%
Allenbrook	540	605	61	452	513	12%	135	341	476	28%
Ashley Park	621	696	27	574	601	4%	175	426	601	29%
Bain	702	786	33	735	768	4%	25	706	731	3%
Barringer	486	544	843	16	859	98%	203	320	523	39%
Berryhill	836	936	93	639	737	13%	247	574	821	30%
Beverly Woods	540	605	68	684	752	9%	186	446	632	29%
Billingsville	594	665	596	0	596	100%	113	325	438	26%
Briarwood	540	605	6	680	686	1%	256	479	735	35%
Bruns Avenue	675	756	759	10	769	99%	252	540	792	32%
Chantilly	432	484	0	472	472	0%	142	333	475	30%
Clear Creek	324	363	48	229	277	17%	43	266	309	14%
Collinswood	621	696	111	443	554	20%	224	406	630	36%
Cornelius	459	514	181	235	416	44%	182	265	447	41%
Cotswold	540	605	23	537	560	4%	128	404	532	24%
Davidson	324	363	104	186	290	36%	102	174	276	32%
Marie Davis	756	847	662	0	662	100%	193	532	725	27%
Derita	783	877	150	678	828	18%	167	625	792	21%
Devonshire	643	726	0	903	903	0%	333	624	957	35%
Dilworth	648	726	90	317	407	22%	241	376	617	39%
Double Oaks	675	756	836	0	836	100%	234	496	730	32%
Druid Hills	486	544	472	3	475	99%	158	303	461	34%
Eastover	648	726	42	559	601	7%	157	445	602	26%
Elizabeth	405	454	314	125	439	72%	132	304	436	30%
Enderly Park	513	575	3	371	374	1%	150	270	420	36%

Elementary Schools

School	1970-71 Capacity		1969-70				Court Consultant Plan			
	Base	+20%	B	W	T	%B	B	W	T	%B
First Ward	702	786	805	0	805	100%	265	686	951	28%
Hickory Grove	459	514	70	533	603	12%	272	439	711	38%
Hidden Valley	643	726	0	1100	1100	0%	310	679	989	31%
Highland	297	333	69	305	374	18%	76	237	313	24%
Hoskins	297	333	13	212	225	6%	139	244	333	36%
Huntersville	675	756	145	531	676	21%	130	534	684	19%
Huntingtowne Farms	594	665	7	603	610	1%	205	414	619	33%
Idlewild	567	635	47	581	628	7%	190	410	600	32%
Irwin Avenue			292	0	292	100%	*			
Amay James	373	423	462	3	465	99%	105	194	299	35%
Lakeview	378	423	346	89	435	80%	139	280	419	33%
Lansdowne	756	847	75	802	877	9%	207	496	703	29%
Lincoln Heights	648	726	711	0	711	100%	241	456	697	35%
Long Creek	702	786	267	468	735	36%	239	523	782	33%
Matthews	945	1058	36	302	880	10%	31	837	913	9%
Merry Oaks	486	544	0	442	442	0%	106	236	342	31%
Midwood	459	514	9	437	446	2%	116	446	562	21%
Montclaire	675	756	0	718	718	0%	280	504	784	36%
Myers Park	432	484	22	444	466	5%	150	445	595	25%
Nations Ford	621	696	43	669	712	6%	177	582	759	23%
Newell	594	665	74	438	512	14%	74	546	620	12%
Oakdale	540	605	69	517	586	12%	250	460	710	35%
Oakhurst	594	665	5	616	621	1%	197	534	731	27%
Oaklawn	594	665	584	0	584	100%	226	594	820	28%
Olde Providence	540	605	80	512	592	14%	145	351	496	29%

* Assigned from area to increase desegregation
Oakhurst 105B
Shamrock Gardens 90B

DESEGREGATION PLAN (Cont'd)

Elementary Schools

School	197071 Capacity Base	+20%	1968-76 B	W	T	%B	B	W	T	%B
Park Road	540	605	44	548	592	7%	148	359	507	29%
Paw Creek	594	665	27	609	636	4%	160	395	555	29%
Paw Creek Annex	270	302	30	271	301	10%	83	209	292	28%
Pineville	486	544	136	356	492	28%	123	379	502	25%
Pinewood	648	726	0	674	674	0%	283	697	980	29%
Plaza Road	459	514	80	340	420	19%	181	350	531	34%
Rama Road	648	726	1	815	816	0%	273	493	766	36%
Sedgefield	540	605	3	548	551	1%	223	364	587	38%
Selwyn	486	544	31	617	648	5%	150	309	459	33%
Shamrock Gardens	486	544	0	515	515	0%	174	511	685	25%
Sharon	459	514	72	361	433	17%	123	245	368	33%
Starmount	648	726	25	712	737	3%	217	441	658	33%
Statesville Road	648	726	333	522	855	39%	160	553	713	23%
Steele Creek	378	423	5	509	514	1%	195	475	670	29%
Thomasboro	729	816	0	690	690	0%	230	770	1000	23%
Tryon Hills	486	544	309	164	473	65%	107	262	369	29%
Tuckaseegee	540	605	58	578	636	9%	119	300	419	28%
University Park	648	726	825	1	826	100%	260	461	721	36%
Villa Heights	810	907	902	83	985	92%	265	668	933	28%
Westerly Hills	405	454	46	539	585	8%	144	332	476	30%
Wilmore	378	423	222	210	432	51%	153	250	403	38%
Windsor Park	648	726	1	748	749	0%	272	561	833	33%
Winterfield	648	726	48	688	736	7%	261	537	798	33%
Total	40,391	45,239	13,010	31,278	44,288		12,984	31,386	44,370	

Exhibit K, pa

ELEMENTARY SCHOOLS TO BE PAIRED

Present School .e Count	1 - 4 B	1 - 4 W	5 - 6 B	5 - 6 W	
Albemarle Road	2	338	2	174	
Allenbrook	0	341	0	156	
Beverly Woods	1	446	1	249	
Briarwood	4	477	2	220	
Bruns Avenue	526	0	246	0	
Marie Davis	431	59	193	26	
Devonshire	0	624	0	276	
Double Oaks	585	2	232	0	
Druid Hills	310	2	158	1	
First Ward	533	0	262	0	
Hickory Grove	54	329	16	208	
Hidden Valley	0	677	0	302	
Huntingtowne Farms	0	414	0	195	
Idlewild	0	410	0	163	
Lansdowne	2	496	1	291	
Lincoln Heights	456	0	239	0	
Merry Oaks	0	236	0	119	
Montclaire	0	504	0	217	
Oaklawn	405	0	193	0	
Olde Providence	2	351	1	146	
Park Road	0	300	0	160	
Paw Creek	16	395	11	214	
Paw Creek Annex	27	209	3	53	
Pinewood	0	697	0	346	
Rama Road	3	493	0	244	
Selwyn	0	284	0	188	
Sharon	0	245	0	117	
Starmount	19	441	6	228	
Tryon Hills	218	110	91	54	
Tuckaseegee	49	300	19	171	
University Park	550	0	260	0	
Villa Heights	683	114	264	48	
Windsor Park	0	515	1	233	
Winterfield	0	494	0	199	
Total	4,876	10,303	2,201	4,998	22,

Exhibit K.

Charlotte-Mecklenburg Schools
ELEMENTARY SCHOOLS PAIRED

Grade 1-4 Schools	B	W	T	%
ington Farms				
	545	1100	1645	33
Road				
	431	1056	1487	29
rwood				
	589	1103	1692	35
Valley	310	679	989	31
rly Woods				
Providence	538	1293	1831	29
rle Road				
ild				
Oaks	458	984	1442	32
brook				
Creek				
Creek Annex				
	497	1245	1742	29
tory Grove	272	439	711	38
tclaire				
Road	553	997	1550	36
yn				
sor Park				
terfield	683	1407	2090	33
Total	4,876	10,303	15,179	

Grade 5-6 Schools	B	W	T	%
Bruns Avenue	252	540	792	32
Marie Davis	193	532	725	27
Double Oaks	234	496	730	32
Druid Hills	158	303	461	34
First Ward	265	606	951	28
Lincoln Heights	241	456	697	35
Oaklawn	226	594	820	28
Tryon Hills	107	262	369	29
University Park	260	461	721	36
Villa Heights	265	668	933	28
	2,201	4,998	7,199	

Amendment, Correction or Clarification of Order of February 5, 1970 dated March 3, 1970

Paragraph 7 of the February 5, 1970, order read in part as follows:

> "7. That transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance. Estimates of the number of children who may have to be transported have run as high as 10,000 or more."

Since February 5, estimates have been made by defendants that paragraph 7 would require transporting more than 23,000 pupils rather than 10,000 to 14,000, as estimated at the hearing. Upon reviewing the evidence introduced since that hearing, it appears that these higher estimates may be based on construing the above language of paragraph 7 so as to require an offer of transportation to all children who live more than 1½ miles from their school, including city children who are not now entitled to transportation. These, according to the testimony, may number as many as 13,000.

The court regrets any lack of clarity in the order which may have given rise to this interpretation. Paragraph 7 was never intended to require transportation beyond that now provided by law for city children who are not reassigned, nor for those whose reassignments are not required by the desegregation program.

Accordingly, paragraph 7 of the February 5, 1970 order is amended by deleting the words "attendance in any school" and inserting the words "reassignment to any school," in the first sentence.

This the 3rd day of March, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Court of Appeals Order Granting Stay Order of March 5, 1970

ORDER

An application for a stay pending appeal of the order of the District Court dated February 5, 1970 made to Judge Craven was by him referred to the entire Court pursuant to Rule 8 of the Federal Rules of Appellate Procedure.

Upon consideration by the full Court, it appears that disposition of this appeal will depend in part upon a resolution of factual questions as yet undetermined in the District Court. Specifically, the parties are in wide disagreement as to the impact of the order upon the School Board's transportation system, the number of pupils for whom transportation will be required under the order, the number of school buses needed to provided such transportation, their availability, and the cost of their acquisition and operation. The resolution of such factual issues is necessary to an orderly consideration of the issues on appeal insofar as they are directed to the order's requirement that transportation be provided for pupils reassigned under the order.

To facilitate the hearing and the disposition of this appeal, the District Court is requested, after such evidentiary hearings as may be necessary, to make supplemental findings of fact respecting the general issue of busing and the effect of its order with respect to the number of pupils transported, the number of buses required, their availability, and the additional capital and operating costs of transportation.

The District Court is requested, if possible, to file a supplemental order or memorandum, including such findings of fact, by March 20, 1970.

Court of Appeals Order Granting Stay Order of March 5, 1970

This appeal is accelerated. The hearing of the appeal will be scheduled in the Court of Appeals in Richmond, Virginia, on April 9, 1970 and the attorneys for all parties are directed to file their briefs in the office of the Clerk of the Court of Appeals for the Fourth Circuit not later than Tuesday, April 7, 1970.

Since it appears that the appeal cannot be heard and determined prior to April 1, 1970, the date for implementation of the first phase of the order of the District Court, and since the Court of Appeals is presently unable to appraise, in the absence of the requested additional findings of fact, the impact of the busing requirements,

IT IS NOW ORDERED that the order of the District Court dated February 5, 1970 be, and it hereby is, stayed insofar as it requires the reassignment of pupils for whom transportation would be required under the order but who are now not transported or who are now being transported at substantially less distance and at substantially less expense, such reassignments being those arising out of the pairing and clustering of schools with resulting cross-busing.

To the extent that the stay granted by this order requires other modifications in the District Court's order, such modifications as may appear appropriate to the District Court to achieve a cohesive and efficient system of public education are authorized.

Except with respect to the busing requirements of the order which are hereby stayed and the resulting necessary modifications hereby authorized, the application for a stay is denied, and implementation of the order of the District Court is directed at the times and in the manner specified

Court of Appeals Order Granting Stay Order of March 5, 1970

therein, subject to the further orders of this Court and the ultimate disposition of the appeal. This is in conformity with the general direction of the Supreme Court that orders of the District Court shall be implemented pending the hearing and determination of appeals from such orders. Alexander v. Holmes County Board of Education, 396 U.S. 19; Carter v. West Feliciana Parish School Board, — U.S. — (January 14, 1970).

By direction of the Court.

/s/ CLEMENT L. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

Supplementary Findings of Fact dated March 21, 1970

Pursuant to the March 5, 1970 order of the Fourth Circuit Court of Appeals, the court makes the following supplemental findings of fact:

1. Paragraph seven of this court's order of February 5, 1970, as amended, reads:

> "7. That transportation be offered on a uniform non-racial basis to all children whose reassignment to any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance. Estimates of the number of children who may have to be transported have run as high as 10,000 or more. Since the cost to the local system is about $18 or 20 a year per pupil, and the cost to the state in those areas where the state provides transportation funds is about another $18 or $20 a year per pupil, the average cost for transportation is apparently less than $40 per pupil per year. The local school budget is about $45,000,000 a year. It would appear that transporting 10,000 additional children, if that is necessary, and if the defendants had to pay it all, would add less than one per cent to the local cost of operating the schools. The significant point, however, is that cost is not a valid legal reason for continued denial of constitutional rights."

2. A bird's-eye picture of the indispensable position of the school bus in public education in North Carolina, and especially in the school life of grades one through six (elementary students) is contained in a summary by the de-

fendant Dr. Craig Phillips entitled "RIDING THE SCHOOL BUSES" (Plaintiffs' Exhibit 15), published January 1, 1970, which reads as follows:

"The average school bus transported 66 students each day during the 1968-69 school year; made 1.57 trips per day, 12.0 miles in length (one way); transported 48.5 students per bus trip, including students who were transported from elementary to high schools.

"During the 1968-69 school year:

610,760 pupils were transported to public schools by the State

54.9 percent of the total public school average daily attendance was transported

70.9 percent were elementary students

29.1 percent were high school students

3.5 students were loaded (average) each mile of bus travel

The total cost of school transportation was $14,293,-272.80, including replacement of buses: The average cost, including the replacement of buses, was $1,541.05 per bus for the school year—181 days; $8.51 per bus per day; $23.40 per student for the school year; $.1292 per student per day; and $.2243 per bus mile of operation." (Emphasis added.)

In Mecklenburg County, the average daily number of pupils currently transported on state school busses is approximately 23,600—plus another 5,000 whose fares are paid on the Charlotte City Coach Lines.

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3. Separate bus systems for black students and white students were operated by the defendant Mecklenburg County Board of Education for many years up until 1961. Separate black and white bus systems were operated by the combined Charlotte-Mecklenburg Board from 1961 until 1966 (Defendants' answers to Plaintiffs' requests for admissions, Nos. 1 and 8, filed March 13, 1970).

4. Pertinent figures on the local school transportation system include these:

Number of busses	280
Pupils transported on school busses daily	23,600
Pupils whose fares are paid on Charlotte City Coach Lines, Inc.	5,000
Number of trips per bus daily	1.8
Average daily bus travel	40.8 miles
Average number of pupils carried daily, per bus	83.2
Annual per pupil transportation cost	$19—$20
Additional cost (1968-69) per pupil to state	$19.92
Total annual cost per pupil transported	$39.92
Daily transportation cost per pupil transported	$0.22

5. Information about North Carolina:

Population	4,974,000
1969-71 total state budget	$3,590,902,142

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1969-71 total budgeted state funds for public schools	$1,163,310,993
1968-69 amount spent by state on transportation (including replacement busses)	$14,293,272.80
1969-71 appropriation for purchase of school busses	$6,870,142
Average number of pupils transported daily, 1968-69	610,760
Average number of pupils transported daily per bus—statewide	66

6. The 1969-70 budget of the Charlotte-Mecklenburg school system is $57,711,344, of which nearly $51,000,000 represents operational expense and between $6,000,000 and $7,000,000 represents capital outlay and debt service. These funds come from federal, state and county sources, as follows:

Federal	State	County	Total
$2,450,000	$29,937,044	$25,324,300	$57,711,344

The construction of school buildings is not included in these budget figures (see Plaintiffs' Exhibit 6).

7. State expenditures in the past ten years have usually not equalled appropriations. There has been a sizeable operating surplus in the state budget for every biennium since 1959-60 (State Budget, page 86).

8. The state superintendent of public instruction in his biennial report (Plaintiffs' Exhibit 12) for the years 1966-68 recommended that "city transportation should be pro-

vided on the same basis as transportation for rural children as a matter of equity."

9. The 1969 report of the Governor's Study Commission on the Public School System of North Carolina (Plaintiffs' Exhibit 13) recommended that transportation be provided for all school children, city as well as rural, on an equal basis. Signatory to that report was one of the present defendants, the state superintendent of public instruction.

10. The basic support for the public schools of the state comes from the State Legislature.

11. Some 5,000 children travel to and from school in Mecklenburg County each day in busses provided by contract carriers such as Charlotte City Coach Lines, Inc. (Morgan's deposition of February 25, 1970, page 36).

12. Upon the basis of data furnished by the school board and on the basis of statistics from the National Safety Council, it is found as a fact that travel by school bus is safer than walking or than riding in private vehicles.

13. Traffic is of course heavy all over the 540 square miles of the county. Motor vehicle registration for 1969 was 191,165 motor vehicles (161,678 automobiles and 29,487 trucks).

14. Many children eligible for transportation do not accept that transportation. Estimates have been made that this number of those who do not accept transportation is in the neighborhood of 50% of those who are eligible.

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15. Approximately 5,000 children in the system attend school outside the school zone in which they reside. Although requested of the defendants by the court on March 7, 1970, information as to where these children go to school has not been forthcoming and the defendants have indicated that it is impossible to produce it.

16. As the state transportation regulations* are understood by the court, the state will bear its share (about half) of transportation costs for children who live more than 1½ miles from their school, as follows:

(a) All rural children, wherever they attend school;

(b) All perimeter children (those living in territory annexed by the city before 1957), wherever they attend school; and

(c) All inner city children assigned to schools in either the perimeter or the rural areas of the system.

17. The defendants submitted information on the number of children who live within 1½ miles of the schools which are to be desegregated by zoning. This information shows that East Mecklenburg, Independence, North Mecklenburg, Olympic, South Mecklenburg and West Mecklenburg high schools, and Quail Hollow and Alexander junior high schools, with total student populations of 12,184, have in the aggregate only 96 students who live within 1½ miles from the schools. Some 12,088 then are eligible for transportation. These same schools among them provide bus transportation for 5,349 students. This information illustrates the importance of the bus as one of the essential

* General Statutes of North Carolina, Chapter 115, §180-192.

elements in the whole plan of operation of the schools. It also shows the wide gap between those entitled to transportation and those who actually claim it. There is no black school in the system which depends very much upon the school bus to get the children to school. The total number of children transported in October, 1969, to schools identifiable as black was 541 out of total population in those black schools of over 17,000. Black schools, including the new black schools, have been located in black areas where busses would be unnecessary. Suburban schools, including the newest ones, have been located far away from black centers, and where they can not be reached by many students without transportation.

18. Bus travel in both urban and rural areas takes time. An analysis of the records of bus transportation, based upon the reports of school principals, is contained in the extensive exhibits bearing Plaintiffs' Exhibit numbers 22, 23, 24, 25, 26 and 27. For the month of October, 1969, by way of illustration, these principals' reports when analyzed show that out of some 279 busses carrying more than 23,000 children both ways each day:

The average one way trip is one hour and fourteen minutes;

80% of the busses require more than one hour for a one way trip;

75% of the busses make two or more trips each day; Average miles traveled by busses making one round trip per day is 34½; and

Average bus mileage per day for busses making two trips is 47.99.

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19. It was the testimony of Dr. Self and Dr. Finger, and the courts finds as a fact, that transportation provided by the school board's plans, which include narrow corridors several miles long and in places only one-half mile wide, proceeding in straight lines diagonally across streets and other obstacles, would be more expensive per capita than transportation under the satellite zone plan. The court plan calls for pick-ups to be made at a few points in each school district, as testified to by Dr. Self, and for non-stop runs to be made between satellite zones and principal zones. There will be no serious extra load on downtown traffic because there will be no pick-up and discharge of passengers in downtown traffic areas.

20. The court finds that from the standpoint of distance travelled, time en route and inconvenience, the children bussed pursuant to the court order will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported at state expense.

21. On July 29, 1969 (pursuant to the court's April 23, 1969 order that they frame a plan for desegregation and that school busses could be used as needed), the defendants proposed a plan for closing seven inner-city black schools and bussing 4,200 students to outlying schools. The plan was approved. It had some escape clauses in it, and the defendants in practice added some others; but *as presented,* and as approved by the court, the "freedom of choice" contemplated was very narrowly restricted; and bussing of several hundred students has taken place under that plan.

22. Evidence of property valuations produced by the defendants shows that the value of the seven school proper-

ties closed under the July 29, 1969 plan, and now for the most part standing idle, was over three million dollars.

23. The all-black or predominantly black elementary schools which the board plan would retain in the system are located in an almost exclusively Negro section of Charlotte, which is very roughly triangular in shape and measures about four or five miles on a side. Some are air-conditioned and most are modern. Virtually none of their patrons now ride busses; the schools were located where the black patrons were or were expected to be. These schools, their completion dates, and representative academic performances of their sixth grade graduating classes are shown in the following table:

The information shown in the first three columns below was taken from answers to interrogatories, Nos. 1-f, 1-g and 1-h, filed October 25, 1968.

GRADE 6 AVERAGE ACHIEVEMENT TEST SCORES, SHOWN IN GRADE EQUIVALENT (such as 6.2 = 6th grade, 2nd month), 1968-69.

	YEAR BUILT	YEARS OF ADDITIONS	NO. OF MOBILE UNITS	WORD MEANING	PARAGRAPH MEANING	SPELLING	LANGUAGE	ACM (MATH)	ACN (MATH)	AADD (MATH)
AVENUE	1968	--	0	4.1	4.1	4.7	4.1	4.0	4.7	4.1
DAVIS	1951	1953 1957 1959	0	4.3	4.4	4.8	4.1	4.5	4.8	4.1
OAKS	1952	1955 1965	1	4.0	4.0	4.6	3.6	3.9	4.4	3.7
HILLS	1960	1964	0	4.0	4.2	4.5	3.9	3.9	4.5	4.1
WARD	1912	1950 1961 1968	0	4.0	4.1	4.8	3.6	3.9	4.6	4.1
LN HEIGHTS	1956	1958	5	4.4	4.4	4.9	4.2	4.3	4.8	4.1
MN	1964	--	0	4.4	4.5	5.2	4.7	4.5	4.9	4.4
RSITY PARK	1957	1958 1964	5	4.4	4.7	4.8	4.3	4.4	4.8	4.4
HEIGHTS	1912	1934 1937	3	4.3	4.4	4.7	3.6	4.4	4.7	4.2

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24. Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion.

25. In the court's order of April 23, 1969, a suggestion was made that the board seek consultation or assistance from the office of Health, Education and Welfare. The board refused to do this, and as far as the court knows has not sought help from HEW.

26. Some 600 or more pupils transfer from one school to another or register for the first time into the system during the course of each month of the typical school year. It is the assignment of these children which is the particular subject of the reference in paragraph 13 of the order to the manner of handling assignments within the school year.

27. No plan for the complete desegregation of the schools was available to the court until the appointment of Dr. John A. Finger, Jr. and the completion of his tactful and effective work with the school administrative staff in December 1969 and January 1970. Dr. Finger has a degree in science from Massachusetts Institute of Technology and a doctor's degree in education from Harvard University, and twenty years' experience in education and educational problems. He has worked in a number of school desegregation cases and has a rare capacity for perception and solution of educational problems. His work with the staff had

the catalytic effect of freeing and inducing the staff to work diligently in the preparation of plans that would accomplish the result required, and which would be cohesive and efficient from an educational point of view.

28. Hearings on the "Finger" plans and on the board's proposed plans were conducted on February 2 and February 5, 1970. These plans may best be understood if they are considered in four divisions:

29. *The plan for senior high schools.*—The plan ordered to be put into effect May 4, 1970 is the board's own plan for desegregation of the senior high schools in all particulars except that the order calls for the assignment to Independence High School of some 300 black children. The board contends the high school plans will call for additional transportation for 2,497 students and will require 69 busses. The court is unable to accept this view of the evidence. All transportation under both the board and the court plan is covered by state law.

30. *The plan for junior high schools.*—A plan for junior high schools was prepared by the board staff and Dr. Finger and was submitted to the court as Dr. Finger's plan. The board submitted a separate plan. Both plans used the technique of re-zoning. The school board's plan after all of their re-zoning had been done left Piedmont Junior High School 90% black and shifting towards 100% black. The plan designed by Dr. Finger with staff assistance included zoning in such a way as to desegregate all the schools. This zoning was aided by a technique of "satellite" districts. For example, black students from satellite districts in the central city area around Piedmont Courts will be assigned to Alexander Graham Junior High,

which is predominantly white. Black students from the area around Northwest Junior High School (all-black) will be similarly transferred to Wilson Junior High, northwest of the air port. These one-way transfers, essentially identical in nature to the board's July 29, 1969 plan, will result in the substantial desegregation of all the junior high schools, which are left under this plan with black student populations varying from 9% at J. H. Gunn to 33% at Alexander and Randolph.

The court order did not require the adoption of the Finger plan. In paragraph 19 of the order the board were given four choices of action to complete the process of desegregating the junior high schools. These choices were (1) Re-zoning; (2) Two-way transporting of pupils between Piedmont and white schools; (3) Closing Piedmont and assigning the black students to other junior high schools; or (4) Adoption of the Finger plan.

The board elected to adopt and did adopt the Finger plan by resolution on February 9, 1970.

The defendants have offered figures on the basis of which they ask the court to find that 4,359 students will have to be transported under the junior high school plan and that 84 busses will be required. The court is unable to find that these contentions are borne out by the statistics and other evidence offered.

Dr. Self, the school superintendent, and Dr. Finger, the court appointed expert, both testified that the transportation required to implement the plan for junior highs would be less expensive and easier to arrange than the transportation proposed under the board plan. The court finds this to be a fact.

Two schools may be used to illustrate this point. Smith Junior High under the board plan would have a contigu-

ous district six miles in length extending 4½ miles north from the school itself. The district throughout the greater portion of its length is one-half mile wide and all roads in its one-half mile width are diagonal to its borders. Eastway Junior High presents a shape somewhat like a large wooden pistol with a fat handle surrounding the school off Central Avenue in East Charlotte and with a corridor extending three miles north and then extending at right angles four miles west to draw students from the Double Oaks area in northwest Charlotte. Obviously picking up students in narrow corridors along which no major road runs presents a considerable transportation problem.

The Finger plan makes no unnecessary effort to maintain contiguous districts, but simply provides for the sending of busses from compact inner city attendance zones, non-stop, to the outlying white junior junior high schools, thereby minimizing transportation tie-ups and making the pick-up and delivery of children efficient and time-saving.

It also is apparent that if the board had sought the minimum departure from its own plan, such minimum result could have been achieved by accepting the alternative of transporting white children into and black children out of the Piedmont school until its racial characteristics had been eliminated.

In summary, as to junior high schools, the court finds that the plan chosen by the board and approved by the court places no greater logistic or personal burden upon students or administrators than the plan proposed by the school board; that the transportation called for by the approved plan is not substantially greater than the transportation called for by the board plan; that the approved plan will be more economical, efficient and cohesive and easier to administer and will fit in more nearly with the

transportation problems involved in desegregating elementary and senior high schools, and that the board made a correct administrative and educational choice in choosing this plan instead of one of the other three methods.

31. *The plan for elementary schools.*—The elementary school desegregation program is best understood by dividing it into two parts: (a) The 27 schools being desegregated by zoning; and (b) The 34 schools being desegregated by grouping, pairing and transportation between school zones.

32. *The re-zoned group.* Two plans were submitted to the court. The school board plan was prepared for the board by its staff. It relied entirely upon zoning with the aid of some computer data supplied by Mr. Weil, a board employed consultant. It did as much as could reasonably be accomplished by re-zoning school boundaries. It would leave nine elementary schools 83% to 100% black. (These schools now serve 6,462 students—over half the black elementary pupils.) It would leave approximately half the white elementary students attending schools which are 86% to 100% white. In short, it does not tackle the problem of the black elementary schools in northwest Charlotte.

The "Finger plan" was the result of nearly two months of detailed work and conference between Dr. Finger and the school administrative staff. Dr. Finger prepared several plans to deal with the problem within the guidelines set out in the December 1, 1969 order. Like the board plan, the Finger plan does as much by re-zoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black

students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.

The "Finger plan" itself in the form from which in principle the court approved on February 5, 1970, was prepared by the school staff and was filed with the court by representatives of the school board on February 2, 1970. It represents the combined thought of Dr. Finger and the school administrative staff as to a valid method for promptly desegregating the elementary schools, if such desegregation is required by law to be accomplished.

This plan was drafted by the staff and by Dr. Finger in such a way as to make possible immediate desegregation if it should be ordered by an appellate court in line with then current opinions of appellate courts.

The testimony of the school superintendent, Dr. Self, was, and the court finds as a fact, that the zoning portion of the plan can be implemented by April 1, 1970 along educationally sound lines and that the transportation problems presented by the zoning portion of the plan can be solved with available resources.

The court has reviewed the statistics supplied to it by the original defendants with regard to elementary schools to be desegregated by re-zoning. These schools have been zoned with compact attendance areas and with a few exceptions they have no children beyond 1½ miles distance from the school to which they are assigned. Although some transportation will be required, the amount is not considerable when weighed against the already existing capacity of the system. The court specifically finds that not more than 1,300 students will require transportation under this portion of the program and that the bus trips would be so

short and multiple bus runs so highly practical that 10 school busses or less will be adequate.

33. *The pairing and grouping of 54 elementary schools.* —This part of the plan as previously described would group an inner city black school with two or more outlying white schools and assign children back and forth between the two so that desegregated fifth and sixth grades would be established in the presently black schools and desegregated grades one through four would be established in the presently white schools. The estimate of Dr. Finger and Dr. Self, the superintendent, was that this program would require transporting roughly 5,000 white pupils of fifth and sixth grade levels into inner city schools. The board in its latest estimate puts the total figure at 10,206. Just what is the net additional number of students to be transported who are not already receiving transportation is open to considerable question.

34. *The Discount Factors.*—The court accepts at face value, for the most part, the defendants' evidence of matters of independent fact, but is unable to agree with the opinions or factual conclusions urged by counsel as to the numbers of additional children to be transported, and as to the cost and difficulty of school bus transportation. The defendants in their presentation have interpreted the facts to suggest inconvenient and expensive and burdensome views of the court's order. Their figures must be discounted in light of various factors, all shown by the evidence, as follows:

(a) Some 5,000 children daily are provided transportation on City Coach Lines, in addition to the

23,600 and more who ride school busses. These have not been considered in the defendants' calculations.

(b) Not all students eligible for transportation actually accept it. The board's estimates of transportation, however, assume that transportation must be provided daily for all eligible students.

(c) Not all registered students attend all schools every day. The board's figures appear to assume they do. Statewide, average daily attendance is less than 94% of initial registration.

(d) The present average number of students transported round trip, to and from school, per bus, per day, is more than 83. The board's estimates, however, are based on the assumption that they can transport only 44 or 46 pupils, round trip, per bus, per day when the bus serves a desegregation role.

(e) Busses now being used make an average of 1.8 trips per day. Board estimates to implement the desegregation plan contemplate only one trip per bus per day!

(f) The average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. The average length of the one-way trips required under the court approved plan for elementary students is less than seven miles, and would appear to require not over 35 minutes at the most, because no stops will be necessary between schools.

(g) The board's figures do not contemplate using busses for more than one load of passengers morning or afternoon. Round trips instead of one-way trips morning and afternoon could cut the bus requirements sharply.

(h) The number of busses required can be reduced 35% to 50% by staggering the opening and closing hours of schools so that multiple bus trips can be made. This method is not considered in the board's estimates, according to testimony of J. D. Morgan, bus superintendent.

(i) Substantial economies may reasonably be expected when all phases of the bussing operation have been coordinated instead of being considered separately.

(j) In estimating how many children live more than a mile and a half from schools, and therefore are entitled to transportation, the board's transportation people have used some very short measurements. As the court measures the maps, very few of the students in the re-zoned elementary schools, for example, live more than 1½ miles from their assigned schools. If the board wants to transport children who live less than 1½ miles away they may, but if they do, it is because of a board decision rather than because of the court's order.

(k) Transportation requirements could be reduced by raising the walking distance temporarily from 1½ to perhaps 1¾ miles. This has apparently not been taken into account.

(l) Testimony of J. D. Morgan shows that busses can be operated at a 25% overload. Thus a 60-passenger bus (the average size) can if necessary transport 75 children. Some busses in use today transport far more.

35. *Findings of Fact as to Required Transportation.*— After many days of detailed study of maps, exhibits and

statistics, and after taking into account all the evidence, including the "discount factors" mentioned above, the court finds as facts that the maximum number of additional children who may conceivably require transportation under the court ordered plans, and the maximum numbers of additional busses needed are as follows:

	Net Additional Transportees	*Number of Busses Needed*
Senior Highs	1,500	20
Junior Highs	2,500	28
Elementaries:		
Re-zoned	1,300	10
Paired and Grouped	8,000	80
Totals	13,300	138

36. These children (all but a few hundred at Hawthorne, Piedmont, Alexander Graham, Myers Park High School, Eastover, West Charlotte and a few other places), *if assigned to the designated schools, are entitled to transportation under existing state law, independent of and regardless of this court's order respecting bussing.*

37. The court also finds that the plan proposed by the board would have required transportation for at least 5,000 students in addition to those now being transported.

38. *Separability.—Each of the four parts of the desegregation plan is separable from the other.* The re-zoning of elementaries can proceed independent of the pairing and grouping. The pairing and grouping can take place independent of all other steps. *The implementation of the*

pairing and grouping plan itself can be done piecemeal, one group or several groups at a time, as transportation becomes available. It was planned that way.

39. *The Time Table.*—The February 5, 1970 order followed the time table requested by the defendants. At the February 2 hearing, the school board attorney requested until April 1, 1970 to desegregate the elementary schools (T. 20); he requested that high school seniors be allowed to graduate where they are (T. 21); he proposed continuing junior high students and grades 10 and 11 in their present schools until the third week before the end of school (T. 21). The request of Dr. Self, the school superintendent, was identical as to elementaries and 12th graders; he preferred to transfer 10th and 11th graders about two weeks before school was over (T. 95). Availability of transportation was the only caveat voiced at the hearing.

40. The February 5 order expressly provided that "racial balance" was not required. The percentage of black students in the various parts of the plans approved vary from 3% black at Bain to 41% black at Cornelius.

41. *Cost.*—Busses cost around $5,400.00 each, varying according to size and equipment. Total cost of 138 busses, if that many are needed, would therefore be about $745,200.00. That is much less than one week's portion of the Mecklenburg school budget. Busses last 10 to 15 years. The state replaces them when worn out.

Some additional employees will be needed if the transportation system is enlarged.

Defendants have offered various estimates of large increased costs for administration, parking, maintenance, driver education and other items. If they choose to incur

excess costs, the court can not prevent it. However, the evidence shows that school bus systems in Charlotte and other urban North Carolina counties tend to operate at lower costs per student than rural systems. Adding a larger number of short-range capacity loads should not tend to increase the present overall per capita cost of $40 a year.

It is the opinion and finding of the court that the annual transportation cost per student, including amortization of the purchase price of the busses, will be at or close to $40.00, and that the total annual cost, which is paid about half by the state and half by the county, of implementing this order, will not exceed the following:

For zoned Elementaries	(1,300)	$ 52,000
For paired Elementaries	(8,000)	320,000
For Junior Highs	(2,500)	100,000
For Senior Highs	(1,500)	60,000
		$532,000*

41. *Availability.*—The evidence shows that the defendant North Carolina Board of Education has approximately 40 brand new school busses and 375 used busses in storage, awaiting orders from school boards. None had been sold at last report. The state is unwilling to sell any of them to Mecklenburg because of the "anti-bussing" law. No orders for busses have been placed by the school board.

If orders to manufacturers had been placed in early February, delivery in 60 or 90 days could have been anticipated. The problem is not one of availability of busses

* The local system's share of this figure would be $266,000.00, which at current rates is only slightly more than the annual interest or the value of the $3,000,000.00 worth of school properties closed in 1969.

but of unwillingness of Mecklenburg to buy them and of the state to furnish or make them available until final decision of this case.

This the 21 day of March, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Supplemental Memorandum dated March 21, 1970

Pursuant to the order of the Fourth Circuit Court of Appeals, filed March 5, 1970, this memorandum is issued.

Previous orders cover more than one hundred pages. The motions and exhibits and pleadings and evidence number thousands of pages, and the evidence is several feet thick. It may be useful to reviewing authorities to have a brief summary of the case in addition to the supplemental facts on the questions of transportation.

Before 1954, the schools in Charlotte and Mecklenburg County were segregated by state law. The General Assembly, in response to Brown v. Board of Education, adopted the Pupil Assignment Act of 1955-56, North Carolina General Statutes, §115-176, which was quoted in the April 23, 1969 order and which is still the law of North Carolina. It provides that school boards have full and final authority to assign children to schools and that no child can be enrolled in nor attend a school to which he has not been so assigned.

"Freedom of choice" to pick a school has never been a right of North Carolina public school students. It has been a courtesy offered in recent years by some school boards, and its chief effect has been to preserve segregation.

Slight token desegregation of the schools occurred in the years following *Brown*. The Mecklenburg County and the Charlotte City units were merged in 1961.

This suit was filed in 1965, and an order was entered in 1965 approving the school board's then plan for desegregation, which was substantially a freedom of choice plan coupled with the closing of some all-black schools.

There was no further court action until 1968, when a motion was filed requesting further desegregation. Most

white students still attended "white" schools and most blac students still attended "black" schools. The figures o this subject were analyzed in this court's opinion o April 23, 1969 (300 F.Supp. 1358 (1969)), in which th background and history of local segregation and its co tinuing discriminatory nature were analyzed at lengt In that order the court ruled that substantial progress ha been made and that many of the alleged acts of discrimin tion were not proved.

However, certain significant findings and conclusio were made which have been of record without appeal fo eleven months. These include the following:

1. The schools were found to be unconstitutionall segregated.

2. Freedom of choice had failed; no white child ha chosen to attend any black school, and freedom o choice promoted rather than reduced segregation.

3. The concentration of black population in nort west Charlotte and the school segregation which a companied it were primarily the result of discrimin tory laws and governmental practices rather than natural "neighborhood" forces. (This finding was r affirmed in the order of November 7, 1969.)

4. The board had located and controlled the si and population of schools so as to maintain segreg tion.

5. The plan approved and put into effect in 19 had not eliminated unlawful segregation.

6. The defendants operate a sizeable fleet of busse serving over 23,000 children at an average annual co (to state and local governments combined) of not mo than $40 per year per pupil.

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7. Transportation by bus is a legitimate tool for school boards to use to desegregate schools.

8. Faculties were segregated, and should be desegregated.

9. Under *Green* v. *New Kent County School Board*, 391 U.S. 430 (1968), there was now an active duty to eliminate segregation.

The board was directed to submit a plan to desegregate the schools.

The order produced a great outcry from school board members and others. It also produced a plan which called for the closing of Second Ward, the only black high school located near a white neighborhood; and it produced no rezoning, no elimination of gerrymandering, and only minor changes in the pupil assignment plan. It did produce an undertaking to desegregate the faculties. The plan was reviewed in the court order of June 20, 1969, in which the court approved the provision for offering transportation to children transferring from majority to minority situations and directed the preparation of a plan for pupil desegregation.

The court also specifically found that gerrymandering had been taking place; and several schools were cited as illustrations of gerrymandering to promote or preserve segregation.

In June of 1969, pursuant to the hue and cry which had been raised about "bussing," Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called "anti-bussing" statute, N.C. G.S. 115-176.1. That statute reads as follows:

"§115-176.1. Assignment of pupils based on race, creed, color or national origin prohibited. —No person shall be refused admission into or be excluded from any public school in this State on account of

race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creed, colors or national origins from the community.

"Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

"*The provisions of this article shall not apply* to a temporary assignment due to the unsuitability of a school for its intended purpose nor *to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment* .

"The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible

to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit. (1969, c. 1274.)"

The board's next plan was filed July 29, 1969, and was approved for 1969-70 by the order of August 15, 1969. The August 15 order contained the following paragraph:

> "The most obvious and constructive element in the plan is that the School Board has reversed its field and has accepted its affirmative constitutional duty to desegregate pupils, teachers, principals and staff members 'at the earliest possible date.' It has recognized that where people live should not control where they go to school nor the quality of their education, and that transportation may be necessary to comply with the law. It has recognized that easy methods will not do the job; that rezoning of school lines, perhaps wholesale; pairing, grouping or clustering of schools; use of computer technology and all available modern business methods can and must be considered in the discharge of the Board's constitutional duty. This court does not take lightly the Board's promises and the Board's undertaking of its affirmative duty under the Constitution and accepts these assurances at face value. They are, in fact, the conclusions which necessarily follow when any group of women and men of good faith seriously study this problem *with knowledge of the facts of this school system and in light of the law of the land.*"

The essential action of the board's July 29, 1969 plan was to close seven inner-city black schools and to re-assign their pupils to designated white suburban schools, and to

transport these children by bus to these suburban schools. In addition, it was proposed to re-assign 1,245 students from named black schools to named suburban white schools and provide them transportation.

The total of this one-way transportation of black students only to white schools under this plan was stated to be 4,245 children.

No problem of transportation or other resources was raised or suggested.

The evidence of the defendants is that the property value of the schools thus closed exceeds $3,000,000. For the most part, that property stands idle today.

The "anti-bussing" law was not found by the board to interfere with this proposed wholesale re-assignment and "massive bussing," of black children only, for purposes of desegregation.

The plan, by order of August 15, 1969, was approved on a one-year basis only, and the board was directed to prepare and file by November 17, 1969, a plan for complete desegregation of all schools, to the maximum extent possible, by September 1, 1970.

The defendants filed a motion asking that the deadline to prepare a plan be extended from November 17, 1969, to February 1, 1970. The court called for a report on the results of the July 29, 1969 plan. Those results were outlined in this court's order of November 7, 1969. In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board. (See defendants'

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March 13, 1970 response to plaintiffs' requests for admissions.)

The meager results of eight months of planning were further set out in this court's November 7, 1969 order, as follows:

"THE SITUATION TODAY

"The following table illustrates the racial distribution of the present school population:

SCHOOLS READILY IDENTIFIABLE AS WHITE

% WHITE	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
100%	9	6,605	2	6,607
98-99%	9	4,801	49	4,850
95-97%	12	10,836	505	11,341
90-94%	17	14,070	1,243	15,313
86-89%	10	8,700	1,169	9,869
	57	45,012	2,968	47,980

SCHOOLS READILY IDENTIFIABLE AS BLACK

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
100%	11	2	9,216	9,218
98-99%	5	41	3,432	3,473
90-97%	3	121	1,297	1,418
56-89%	6	989	2,252	3,241
	25	1,153	16,197	17,350

SCHOOLS NOT READILY IDENTIFIABLE BY RACE

% BLACK	NUMBER OF SCHOOLS	NUMBERS OF STUDENTS WHITE	BLACK	TOTALS
32-49%	10	4,320	2,868	7,188
17-20%	8	5,363	1,230	6,593
22-29%	6	3,980	1,451	5,431
	24	13,663	5,549	19,212
TOTALS:	106	59,828	24,714	84,542

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Some of the data from the table, re-stated, is as follows:

Number of schools	106
Number of white pupils	59,828
Number of black pupils	24,714
Total pupils	84,542
Per cent of white pupils	71%
Per cent of black pupils	29%
Number of "white" schools	57
Number of white pupils in those schools	45,012
Number of "black" schools	25
Number of black pupils in those schools	16,197
Number of schools not readily identifiable by race	24
Number of pupils in those schools	19,212
Number of schools 98-100% black	16
Negro pupils in those schools	12,648
Number of schools 98-100% white	18
White pupils in those schools	11,406

"Of the 24,714 Negroes in the schools, something above 8,500 are attending 'white' schools or schools not readily identifiable by race. *More than 16,000, however, are obviously still in all-black or predominantly black schools.* The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.

"The schools are still in major part segregated or 'dual' rather than desegregated or 'unitary.'

"The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts

respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *'de facto,'* and the resulting schools are not 'unitary' or desegregated.

"Freedom of Choice

"Freedom of choice has tended to perpetuate segregation by allowing children to get out of schools where their race would be in a minority. The essential failure of the Board's 1969 pupil plan was in good measure due to freedom of choice.

"As the court recalls the evidence, it shows that *no white students have ever chosen to attend any of the 'black' schools.*

"Freedom of choice does not make a segregated school system lawful. As the Supreme Court said in *Green* v. *New Kent County,* 391 U. S. 430 (1968):

"'. . . If there are reasonably available other ways, such for illustration as zoning, promising speedier and

more effective conversion to a unitary, nonracial school ysstem, "freedom of choice" must be held unacceptable.'

"Redrawing attendance lines is not likely to accomplish anything stable toward obeying the constitutional mandate as long as freedom of choice or freedom of transfer is retained. The operation of these schools for the foreseeable future should not include freedom of choice or transfer except to the extent that it reduces segregation, although of course the Board under its statutory power of assignment can assign any pupil to any school for any lawful reason."

(The information on the two previous pages essentially describes the condition in the Charlotte-Mecklenberg schools today.)

Meanwhile, on October 29, 1969, the Supreme Court in *Alexander* v. *Holmes County*, 396 U. S. 19 (1969), ordered thirty Mississippi school districts desegregated immediately and said that the Court of Appeals

> "... *should have denied all motions for additional time* because continued operation of *segregated schools* under a standard of allowing all deliberate speed for desegregation is no longer constitutionally permissible. *Under explicit holdings of this Court, the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin* v. *School Board*, 377 U.S. 218, 234 (1964); *Green* v. *School Board of New Kent County*, 391 U. S. 430, 439, 442 (1968)." (Emphasis added.)

Because of this action and decision of the Supreme Court, this court did not feel that it had discretion to grant the requested time extension, and it did not do so.

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The board then filed a further desegregation plan on November 17, 1969. The plan was reviewed in the order of December 1, 1969. It was not approved because it rejected the goal of desegregating all the schools or even all the black schools. It proposed to concentrate on methods such as rezoning and freedom of choice and to discard any consideration of pairing, grouping, clustering and transporting or other methods. It proposed to retain numerous all-black schools.

The performance results, set out in previous orders, show that the all-black schools lag far behind white schools or desegregated schools.

The court, in an order dated December 1, 1969, reviewed the recent decisions of courts and laid out specific guidelines for the preparation of a plan which would desegregate the schools. A consultant, Dr. John A. Finger, Jr., was appointed to draft a plan for the desegregation of the schools for use of the court in preparing a final order. The school board was authorized and encouraged to prepare another plan of its own if it wished.

Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans. When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report. The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.

The detailed work on both final plans was done by the school board staff.

The high school plan prepared by the board was recommended by Dr. Finger to the court with one minor change.

This change involved transporting three hundred inner city black children to Independence High School. As to high school students, then, the plan which was ordered by the court to take effect on May 4, 1970 *is* the school board's plan, with transportation added for three hundred students. The proportion of black children in the high schools varies from 17% to 36% under this plan.

For junior high schools, separate plans were prepared by Dr. Finger and by the board. The board plan would have used zoning to desegregate all the black junior high schools except Piedmont, which it would have left 90% black. The Finger plan employed re-zoning as far as appeared feasible, and then provided for transportation between inner city black zones and outlying white schools to desegregate all the schools, including Piedmont.

The court offered the school board the options of (1) re-zoning, or (2) closing Piedmont, or (3) two-way transport of students between Piedmont and other schools, or (4) accepting the Finger plan which desegregates all junior high schools.

The board met and elected to adopt the Finger plan rather than close Piedmont or rearrange their own plan. The Finger plan may require the transportation of more students than the board plan would have required, but it handles the transportation more economically and efficiently, and does the job of desegregating the junior high schools. The percentage of black students in the junior high schools thus constituted will vary from 9% to 33%.

The transportation of junior high students called for in the plan thus adopted by the board pursuant to the court order of February 5, 1970, is essentially the same sort that was adopted without hesitation for 4,245 black children when the seven black inner city schools were closed in 1969.

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For elementary schools the problem is more complicated. Dr. Finger prepared several plans to desegregate the elementary schools and reviewed them with the school staff. It was apparent that even the gerrymandering considered by the board could not desegregate all the elementary schools, and that without transportation there is no way by which in the immediate future the continuing effects of state imposed segregation can be removed. Dr. Finger prepared a plan which proposed re-zoning of as many schools as could be desegregated by re-zoning and which then proposed pairing or grouping of schools. By pairing or grouping, a black school and one or more white schools could be desegregated by having grades one through four, black and white, attend the white schools, and by having grades five and six, black and white, attend the black school, and by providing transportation where needed to accomplish this.

The original Finger plan proposed to group black inner city schools with white schools mostly in the south and southeast perimeter of the district.

The school staff drafted a plan which went as far as they could go with re-zoning and stopped there, leaving half the black elementary children in black schools and half the white elementary children in white schools.

In other words, both the plan eventually proposed by the school board and the plan proposed by Dr. Finger went as far as was thought practical to go with re-zoning. The distinction is that the Finger plan goes ahead and does the job of desegregating the black elementary schools, whereas the board plan stops half way through the job.

In its original form the Finger plan for elementary schools would have required somewhat less transportation than its final form, but would have been more difficult to

put into effect rapidly. The pressure of time imposed by decisions of the Supreme Court and other appellate courts had become such that there was concern lest there be an order from one of the appellate courts for immediate February or March desegregation of the entire system. The school staff therefore, based on Finger's guidelines, prepared a final draft of his plan incorporating pairing, grouping and transporting on a basis which would better allow for early implementation with a minimum of administrative complications, in lieu of his original plan.

The result is that the plan for elementary schools which is known as the "Finger plan" was prepared in detail by the school staff and incorporates the thought and work of the staff on the most efficient method to desegregate the elementary schools.

The time table originally adopted by this court in April of 1969 was one calling for substantial progress in 1969 and complete desegregation by September 1970. However, on October 29, 1969, in *Alexander* v. *Holmes County*, the Supreme Court ordered immediate desegregation of several Deep South school systems and said that the Court of Appeals *"should have denied all motions for additional time."* The Supreme Court adhered to that attitude in all decisions prior to this court's order of February 5, 1970. In *Carter* v. *West Feliciana Parish*, —— U. S. —— (January 14, 1970), they reversed actions of the Fifth Circuit Court of Appeals which had extended time for desegregating hundreds of thousands of Deep South children beyond February 1, 1970. In *Nesbit* v. *Statesville, et al.*, 418 F.2d 1040, the Fourth Circuit Court of Appeals on December 2, 1969, ordered the desegregation by January 1, 1970, of schools in Statesville, Reidsville and Durham, North Carolina. Referring to the *Alexander* v. *Holmes County* decision, the Fourth Circuit said:

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"The clear mandate of the Court is immediacy. *Further delays will not be tolerated in this circuit.*" (Emphasis added.)

In that opinion the Court directed this district court to adopt a plan on December 19, 1969, for the City of Statesville, effective January 1, 1970, which *"must provide for the elimination of the racial characteristics of Morningside School by pairing, zoning or consolidation. . . ."* As to Durham and Halifax, Virginia, courts were ordered to accomplish the necessary purpose by methods including pairing, zoning, reassignment or *"any other method that may be expected to work."*

In *Whittenburg* v. *Greenville County, South Carolina,* —— F.2d —— (January 1970), the Fourth Circuit Court of Appeals, citing *Holmes County* and *Carter* v. *West Feliciana Parish,* said:

"More importantly the Supreme Court said emphatically it meant precisely what it said in *Alexander* that general reorganization of school systems is requisite now, that *the requirement is not restricted to the school districts before the Supreme Court in Alexander, and that Courts of Appeals are not to authorize the postponement of general reorganization until September 1970.*" (Emphasis added.)

As to *Greenville,* in a case involving 58,000 children, the Court said that

"The plan for *Greenville* may be based upon the revised plan submitted by the school board *or upon any other plan that will create a unitary school system.*" (Emphasis added.)

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The Court further said:

> *"The District Court's order shall not be stayed pending any appeal which may be taken to this court,* but, in the event of an appeal, modification of the order may be sought in this court by a motion accompanied by a request for immediate consideration."

Upon rehearing the Fourth Circuit Court of Appeals said on January 26, 1970:

> *"The proper functioning of our judicial system requires that subordinate courts and public officials faithfully execute the orders and directions of the Supreme Court.* Any other course would be fraught with consequences, both disastrous and of great magnitude. *If there are appropritae exceptions,* if the District Courts and the Courts of Appeals are to have some discretion to permit school systems to finish the current 1969-1970 school year under current methods of operation, *the Supreme Court may declare them, but no member of this court can read the opinions in* CARTER *as leaving any room for the exercise by this court in this case of any discretion* in considering a request for postponement of the reassignment of children and teachers until the opening of the next school year.
>
> "For these reasons the petition for rehearing and for a stay of our order must be denied." (Emphasis added.)

The above orders of the Supreme Court and the Fourth Circuit Court of Appeals are the mandates under which this court had to make a decision concerning the plan to be adopted and the time when the plan should be implemented.

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This court conducted hearings on February 2 and February 5, 1970, upon the content and the effective date of the plans for desegregation of the Charlotte-Mecklenburg schools. On February 2nd, Mr. Waggoner, the attorney for the school board, requested the court to adopt a time table under which the elementary schools would be desegregated immediately after Easter (about April 1st) and the junior highs and senior highs would be desegregated in May, about the third week before the end of school. Dr. Self, the school superintendent, requested essentially the same time table.

Dr. Self testified that the job could be done as to all students in the times requested if transportation could be arranged; and he and Mr. Waggoner indicated that by staggering hours of school and by effective use of busses the transportation problem might be solved.

The Supreme Court in *Griffin* v. *Prince Edward County*, 377 U. S. 218 (1964), had held that a school board could and should validly be required by a district court to reopen a whole county school system rather than keep it closed to avoid desegregation, even though levying taxes and borrowing money might be necessary.

In view of the decisions above mentioned and the facts before the court, it appeared to this court that the undoubted difficulties and inconveniences and expense caused by transferring children in mid-year to schools they did not choose would have to be outweighed by the mandates of the Supreme Court and the Fourth Circuit Court of Appeals and that this court had and has a duty to require action now.

On February 5, 1970, therefore, a few days after the second *Greenville* opinion, this court entered its order for desegregation of the schools.

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The time table set in the February 5, 1970 order is precisely the time table suggested by Mr. Waggoner, the attorney for the defendants, in the record of the February 2, 1970 hearing.

Paragraph 16 of the February 5, 1970 order reads:

> "The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*"

The above summary is an outline only of the most significant steps which have brought this case to its present position. Details of all the developments mentioned in this summary appear in previous orders and in the lengthy evidence.

Pursuant to the direction of the Circuit Court, this court has made and is filing contemporaneously herewith supplemental detailed findings of fact bearing on the transportation question.

This the 21st day of March, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Order dated March 25, 1970

In the original order of April 23, 1969, and in the order of August 15, 1969, the projected time for completion of desegregation of the schools was set for September 1970. The court did not then consider and never has at any time considered that wholesale mid-year or mid-term transfers of pupils or teachers were desirable. Furthermore, it was contemplated by all parties that this time table would allow time for orderly development of plans as well as for appeal by all who might wish to appeal.

On October 29, 1960, in *Alexander* v. *Holmes County,* the Supreme Court ordered the immediate desegregation of schools involving many thousands of Mississippi school children. In *Carter* v. *West Feliciana Parish,* —— U. S. —— (January 14, 1970), the Supreme Court reversed the Fifth Circuit Court of Appeals and set a February 1, 1970 deadline to desegregate schools in Gulf Coast states involving many thousands of children. In *Nesbit* v. *Statesville,* 418 F.2d 1040, on December 2, 1969, the Fourth Circuit read *Alexander* as follows:

> "The clear mandate of the Court is immediacy. Further delays will not be tolerated in this circuit."

In *Whittenburg* v. *Greenville County, South Carolina,* —— F.2d ——(January 1970), the Fourth Circuit Court of Appeals read *Alexander* to say that

> ". . . general reorganization of school systems is requisite now, that the requirement is not restricted to the school districts before the Supreme Court in *Alexander,* and that Courts of Appeals are not to authorize the postponement of general reorganization until September 1970.

• • •

Order dated March 25, 1970

> *"The District Court's order shall not be stayed pending any appeal which may be taken to this court, . . .* (Emphasis added.)

On January 26, 1970, on re-hearing, the Fourth Circuit Court of Appeals said:

> "The proper functioning of our judicial system requires that subordinate courts and public officials faithfully execute the orders and directions of the Supreme Court. . . . no member of this court can read the opinions in *Carter* as leaving any room for the exercise by this court in this case of any discretion in considering a request for postponement of the reassignment of children and teachers until the opening of the next school year."

The petition of Greenville for a stay of the order was again denied, and the Greenville schools were desegregated as of February 16, 1970.

The last *Greenville* decision was ten days old at the time of this court's order of February 5, 1970. These were the mandates under which it was ordered that the Charlotte-Mecklenburg schools should be desegregated before the end of the spring term, and that the mandate should not be stayed pending appeal.

Since that time, several suits have been filed in state court seeking to prevent implementation of the February 5, 1970 order, and decision by the three-judge court now considering the constitutionality of the "anti-bussing" law, North Carolina General Statutes, §115-176.1, does not appear likely before April 1, 1970. The appeal of the defendants in the *Swann* case to the Fourth Circuit Court of Appeals is not scheduled to be heard until April 9,

1970, and there is no way to predict when a decision on that appeal will be rendered. There is also no way to predict when a final decision by the Supreme Court will be made on any of these issues, nor what the final decision may be.

Furthermore, notwithstanding the *Holmes County, Greenville, Carter* and *Statesville* decisions, the Fourth Circuit Court of Appeals has now rendered a stay as to certain portions of the February 5, 1970 order, and a petition to vacate that stay has been denied by the Supreme Court. The Fourth Circuit Court of Appeals and the Supreme Court have now demonstrated an interest in the cost and inconvenience and disruption that the order might produce—factors which, though bussing was not specifically mentioned, appear not to have been of particular interest to either the Fourth Circuit Court or the Supreme Court when *Holmes County, Carter, Greenville* and *Statesville* were decided.

The only reason this court entered an order requiring mid-semester transfer of children was its belief that the language of the Supreme Court and the Fourth Circuit above quoted in this order, given its reasonable interpretation, required district courts to direct desegregation before the end of this school year.

The urgency of "desegregation now" has now been in part dispelled by the same courts which ordered it, and the court still holds its original view that major desegregation moves should not take place during school terms nor piecemeal if they can be avoided.

Thereforefore, IT IS ORDERED, that the time table for implementation of this court's order of February 5, 1970 be, and it is hereby modified so that the implementation of the various parts of the desegregation order will not be

required until September 1, 1970, subject, however, to any different decisions that may be rendered by appellate courts and with the proviso that the school board may if they wish proceed upon any earlier dates they may elect with any part or parts of the plan.

This is the 25th day of March, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Further Findings of Fact on Matters Raised by the March 26, 1970, Motions of Defendants dated April 3, 1970

On March 26, 1970, the defendant school board filed "OBJECTIONS AND EXCEPTIONS TO SUPPLEMENTARY FINDINGS OF FACT OF MARCH 21, 1970, AND MOTION FOR MODIFICATION AND CLARIFICATION THEREOF." The court has reviewed the questions raised in that document and makes further findings of fact with reference to certain of its numbered paragraphs as follows:

¶¶ 1, 4, 16, 40. The annual school bus cost per pupil transported, including everything except the original cost of the bus, parking arrangements and certain local administrative costs, for the 1968-69 year, was $19.92. The state reimburses the Charlotte-Mecklenburg school system approximately this $19.92 per pupil. The April 23, 1969, and February 5, 1970, findings of fact estimated the original cost and periodic replacement of the busses themselves at $18 to $20 per pupil per year, which, added to the $19.92, resulted in the estimate of $40 as the total annual per pupil transportation cost. That estimate assumed that the local schools would have to pay for periodic *replacement* of busses as well as for their original purchase. Since it is now clear from the deposition of D. J. Dark that the replacement of worn out or obsolescent busses is *included* in the $19.92 figure, the overall estimate of $40 per pupil per year is far too high. Instead of a *continuing* annual local per pupil cost of $18 or $20 to supply and replace busses, as the court originally understood, the local board will have to bear only administrative and parking expenses, plus the original, one-time purchase of the busses. This cuts the annual cost of bus transportation from nearly $40 per pupil per year as originally estimated, to a figure closer

to $20 per pupil per year, and reduces the capital outlay required of the local board to the one-time purchase of about 138 busses at a cost of about $745,200.00, plus whatever may prove to be actually required in the way of additional parking facilities. Paragraphs 1, 4, 16 and 40 of the supplemental findings of fact are amended accordingly.

¶¶ 2, 4, 11, 34. Although the evidence concerning the 5,000 children currently transported by City Coach Lines lacks clarity, the court agrees with the defendant that it should not be inferred that they are the source of payment for this transportation, and the court specifically corrects the previous finding so as to delete any reference to the source of payment for this transportation.

¶ 21. The school board's July 29, 1969 plan (see pages 457-459 of the record on appeal) proposed the transfer and transportation of over 4,200 black children. The court on November 7, 1969, on the basis of the then evidence, found that the number actually transferred was 1,315. The affidavit of J. D. Morgan dated February 13, 1970 (paragraph 4, page 770 of the record on appeal), indicated that the number of these students being transported was 738, requiring 13 busses. The findings of fact proposed by the defendants gave the number as "over 700." The J. D. Morgan affidavit of March 21, 1970, indicated that the number of busses was 30 instead of 13. From this conflicting evidence the court concluded that "several hundred" was as accurate as could be found under the circumstances.

¶ 33. Paragraph 33 is amended as requested by adding after the word "schools" in the eleventh line of the paragraph:

Further Findings of Fact on Matters Raised by the March 26, 1970, Motions of Defendants dated April 3, 1970

"—and about 5,000 black children, grades one through four, to outlying white schools."

¶ 34(f). The average *straight line* mileage between the elementary schools paired or grouped under the "cross-bussing" plan is approximately 5½ miles. The average bus *trip* mileage of about seven miles which was found in paragraph 34(f) was arrived at by the method which J. D. Morgan, the county school bus superintendent, testified he uses for such estimates—taking straight line mileage and adding 25%.

As to the other items in the document, the court has analyzed them carefully and finds that they do not justify any further changes in the facts previously found.

This the 3rd day of April, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Opinions of Court of Appeals dated May 26, 1970

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,517

No. 14,518

JAMES E. SWANN, *et al.*,

Appellees and Cross-Appellants,

—versus—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Appellants and Cross-Appellees.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

(Argued April 9, 1970. Decided May 26, 1970.)

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, and BUTZNER, Circuit Judges, sitting en banc.*

BUTZNER, Circuit Judge:

The Charlotte-Mecklenburg School District appealed from an order of the district court requiring the faculty and student body of every school in the system to be racially mixed. We approve the provisions of the order deal-

* Judge Craven disqualified himself for reasons stated in his separate opinion.

ing with the faculties of all schools[1] and the assignment of pupils to high schools and junior high schools, but we vacate the order and remand the case for further consideration of the assignment of pupils attending elementary schools. We recognize, of course, that a change in the elementary schools may require some modification of the junior and senior high school plans, and our remand is not intended to preclude this.

I.

The Charlotte-Mecklenburg school system serves a population of over 600,000 people in a combined city and county area of 550 square miles. With 84,500 pupils attending 106 schools, it ranks as the nation's 43rd largest school district. In *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 369 F.2d 29 (4th Cir. 1966), we approved a desegregation plan based on geographic zoning with a free transfer provision. However, this plan did not eliminate the dual system of schools. The district court found that during the 1969-70 school year, some 16,000 black pupils, out of a total of 24,700, were attending 25 predominantly black schools, that faculties had not been integrated, and that other administrative practices, including a free transfer plan, tended to perpetuate segregation.

Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was impermissibly operating a dual system of schools in the

[1] The board's plan provides: "The faculties of all schools will be assigned so that the ratio of black teachers to white teachers in each school will be approximately the same as the ratio of black teachers to white teachers in the entire school system." We have directed other school boards to desegregate their faculties in this manner. See Nesbit v. Statesville City Bd. of Ed., 418 F.2d 1040, 1042 (4th Cir. 1969); cf., United States v. Montgomery County Bd. of Ed., 395 U.S. 225, 232 (1969).

light of subsequent decisions of the Supreme Court, *Green* v. *School Bd. of New Kent County*, 391 U.S. 430, 435 (1968), *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450 (1968), and *Alexander* v. *Holmes County Bd. of Ed.*, 396 U.S. 19 (1969).

The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state, and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property[2] until *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage. The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accommodate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result. The interplay of these policies on both residential and educational segregation previously has been recognized by this and other courts.[3] The fact that similar forces operate in cities

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[2] E.g., Phillips v. Wearn, 226 N.C. 290, 37 S.E.2d 895 (1946).

[3] E.g., Henry v. Clarksdale Munic. Separate School Dist., 409 F.2d 682, 689 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); United States v. School Dist. 151 of Cook County, 404 F.2d 1125, 1130

throughout the nation under the mask of *de facto* segregation provides no justification for allowing us to ignore the part that government plays in creating segregated neighborhood schools.

The disparity in the number of black and white pupils the Charlotte-Mecklenburg School Board busses to predominantly black and white schools illustrates how coupling residential patterns with the location of schools creates segregated schools. All pupils are eligible to ride school buses if they live farther than 1½ miles from the schools to which they are assigned. Overall statistics show that about one-half of the pupils entitled to transportation ride school buses. Only 541 pupils were bussed in October 1969 to predominantly black schools, which had a total enrollment of over 17,000. In contrast, 8 schools located outside the black residential area have in the aggregate only 96 students living within 1½ miles. These schools have a total enrollment of about 12,184 pupils, of whom 5,349 ride school buses.

II.

The school board on its own initiative, or at the direction of the district court, undertook or proposed a number of reforms in an effort to create a unitary school system. It closed 7 schools and reassigned the pupils primarily to increase racial mixing. It drastically gerrymandered school

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(7th Cir. 1968), *aff'g* 286 F. Supp. 786, 798 (N.D. Ill. 1968); Brewer v. School Bd. of City of Norfolk, 397 F.2d 37, 41 (4th Cir. 1968); Keyes v. School Dist. No. One, Denver, 303 F.Supp. 279 and 289 (D. Colo.), *stay pending appeal granted*, —— F.2d —— (10th Cir.), *stay vacated*, 396 U.S. 1215 (1969); Dowell v. School Bd. of Oklahoma City, 244 F.Supp. 971, 975 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967). See generally Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965). But see, Deal v. Cincinnati Bd. of Ed., 419 F.2d 1387 (6th Cir. 1969).

zones to promote desegregation. It created a single athleti league without distinction between white and black school or athletes, and at its urging, black and white PTA council were merged into a single organization. It eliminated school bus system that operated on a racial basis, an established nondiscriminatory practices in other facets o the school system. It modified its free transfer plan t prevent resegregation, and it provided for integration o the faculty and administrative staff.

The district court, after a painstaking analysis of th board's proposals and the relevant authorities, disapprove the board's final plan, primarily because it left ten school nearly all black. In reaching this decision, the district cour held that the board must integrate the student body of ever school to convert from a dual system of schools, which ha been established by state action, to a unitary system.

The necessity of dealing with segregation that exist because governmental policies foster segregated neighbor hood schools is not confined to the Charlotte-Mecklenbur School District. Similar segregation occurs in many othe cities throughout the nation, and constitutional principle dealing with it should be applied nationally. The solutio is not free from difficulty. It is now well settled tha school boards operating dual systems have an affirmativ duty "to convert to a unitary school system in which racia discrimination would be eliminated root and branch." Gree v. School Bd. of New Kent County, 391 U. S. 430, 43 (1968). Recently the Supreme Court defined a unitar school system as one "within which no person is to b effectively excluded from any school because of race o color." Alexander v. Holmes County Bd. of Ed., 396 U. S 19, 20 (1969). This definition, as the Chief Justice noted i Northcross v. Board of Ed. of Memphis, 90 S.Ct. 891, 89

(1970), leaves open practical problems, "including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court."

Several of these issues arise in this case. To resolve them, we hold: first, that not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race. Special classes, functions, and programs on an integrated basis should be made available to pupils in the black schools. The board should freely allow majority to minority transfers and provide transportation by bus or common carrier so individual students can leave the black schools. And pupils who are assigned to black schools for a portion of their school careers should be assigned to integrated schools as they progress from one school to another.

We adopted the test of reasonableness—instead of one that calls for absolutes—because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides a test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering, or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettos so large that integra-

tion of every school is an improbable, if not an unattainable, goal. Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary school system. Ellis v. Board of Public Instruc. of Orange County, No. 29124, Feb. 17, 1970 —— F.2d —— (5th Cir.)

III.

The school board's plan proposes that pupils will be assigned to the system's ten high schools according to geographic zones. A typical zone is generally fan shaped and extends from the center of the city to the suburban and rural areas of the county. In this manner the board was able to integrate nine of the high schools with a percentage of black students ranging from 17% to 36%. The projected black attendance at the tenth school, Independence, which has a maximum of 1400 pupils, is 2%.

The court approved the board's high school plan with one modification. It required that an additional 300 pupils should be transported from the black residential area of the city to Independence School.

The school board proposed to rezone the 21 junior high school areas so that black attendance would range from 0% to 90% with only one school in excess of 38%. This school, Piedmont, in the heart of the black residential area, has an enrollment of 840 pupils, 90% of whom are black. The district court disapproved the board's plan because it maintained Piedmont as a predominantly black school. The court gave the board four options to desegregate all the junior high schools: (1) rezoning; (2) two-way transportation of pupils between Piedmont and white schools; (3) closing Piedmont and reassigning its pupils and (4)

adopting a plan proposed by Dr. John A. Finger, Jr., a consultant appointed by the court, which combined zoning with satellite districts. The board, expressing a preference for its own plan, reluctantly adopted the plan proposed by the court's consultant.

Approximately 31,000 white and 13,000 black pupils are enrolled in 76 elementary schools. The board's plan for desegregating these schools is based entirely upon geographic zoning. Its proposal left more than half the black elementary pupils in nine schools that remained 86% to 100% black, and assigned about half of the white elementary pupils to schools that are 86% to 100% white. In place of the board's plan, the court approved a plan based on zoning, pairing, and grouping, devised by Dr. Finger, that resulted in student bodies that ranged from 9% to 38% black.

The court estimated that the overall plan which it approved would require this additional transportation:

	No. of pupils	No. of buses	Operating costs
Senior High	1,500	20	$ 30,000
Junior High	2,500	28	$ 50,000
Elementary	9,300	90	$186,000
TOTAL	13,300	138	$266,000

In addition, the court found that a new bus cost about $5,400, making a total outlay for equipment of $745,200. The total expenditure for the first year would be about $1,011,200.

The school board computed the additional transportation requirements under the court approved plan to be:

	No. of pupils	No. of buses	Operating costs
Senior High	2,497	69	$ 96,000
Junior High	4,359	84	$116,800
Elementary	12,429	269	$374,000
TOTAL	19,285	422	$586,000

In addition to the annual operating cost, the school board projected the following expenditures:

Cost of buses	$2,369,100
Cost of parking areas	284,800
Cost of additional personnel	166,200

Based on these figures, the school board computed the total expenditures for the first year would be $3,406,700 under the court approved plan.[4]

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[4] The school board computed transportation requirements under the plan it submitted to be:

	No. of pupils	No. of buses	Operating cost
Senior High	1,202	30	$ 41,700
Junior High	1,388	33	$ 45,900
Elementary	2,345	41	$ 57,000
TOTAL	4,935	104	$144,600

The board estimated that the breakdown of costs for the first year of operation under its plan would be:

Cost of buses		$589,900
Cost of parking areas		56,200
Operating expenses of	$144,600	
Plus depreciation allowance of	31,000	
		175,600
Cost of additional personnel		43,000

The estimated total first-year costs are $864,700.

Both the findings of the district court and the evidence submitted by the board are based on estimates that rest on many variables. Past practice has shown that a large percentage of students eligible for bus transportation prefer to provide their own transportation. However, it is difficult to accurately predict how many eligible students will accept transportation on the new routes and schedules. The number of students that a bus can carry each day depends in part on the number of trips the bus can make. Scheduling two trips for a bus generally reduces costs. But student drivers may not be able to spend the time required for two trips, so that adult drivers will have to be hired at substantially higher salaries. It is difficult to accurately forecast how traffic delays will affect the time needed for each trip, for large numbers of school buses themselves generate traffic problems that only experience can measure.

The board based its projections on each 54-passenger bus carrying about 40 high school pupils or 54 junior high and elementary pupils for one roundtrip a day. Using this formula, it arrived at a need of 422 additional buses for transporting 19,285 additional pupils. This appears to be a less efficient operation than the present system which transports 23,600 pupils with 280 buses, but the board's witnesses suggest that prospects of heavier traffic justify the difference. The board also envisioned parking that seems to be more elaborate than that currently used at some schools.

In making its findings, the district court applied factors derived from present bus operation, such as the annual operating cost per student, the average number of trips each bus makes, the capacity of the buses—including permissible overloads, and the percentage of eligible pupils who use other forms of transportation. The district court also found no need for expensive parking facilities or for

additional personnel whose costs could not be absorbed by the amount allocated for operating expenses. While we recognize that no estimate—whether submitted by the board or made by the court—can be absolutely correct, we accept as not clearly erroneous the findings of the district court.

Opposition to the assignment of pupils under both the board's plan and the plan the court approved centered on bussing, which numbers among its critics both black and white parents. This criticism, however, cannot justify the maintenance of a dual system of schools. Cooper v. Aaron, 358 U.S. 1 (1958). Bussing is neither new nor unusual. It has been used for years to transport pupils to consolidated schools in both racially dual and unitary school systems. Figures compiled by the National Education Association show that nationally the number of pupils bussed increased from 12 million in the 1958-59 school year to 17 million a decade later. In North Carolina 54.9% of all pupils are bussed. There the average daily roundtrip is 24 miles, and the annual cost is over $14,000,000. The Charlotte-Mecklenburg School District presently busses about 23,600 pupils and another 5,000 ride common carriers.

Bussing is a permissible tool for achieving integration, but it is not a panacea. In determining who should be bussed and where they should be bussed, a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources. The board should view bussing for integration in the light that it views bussing for other legitimate improvements, such as school consolidation and the location of new schools. In short, the board should draw on its experience with bussing in general—the benefits and the defects—so that it may intelligently plan the part that bussing will play in a unitary school system.

Viewing the plan the district court approved for junior and senior high schools against these principles and the background of national, state, and local transportation policies, we conclude that it provides a reasonable way of elminating all segregation in these schools. The estimated increase in the number of junior and senior high school students who must be bussed is about 17% of all pupils now being bussed. The additional pupils are in the upper grades and for the most part they will be going to schools already served by busses from other sections of the district. Moreover, the routes they must travel do not vary appreciably in length from the average route of the system's buses. The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools.[5]

We find no merit in other criticism of the plan for junior and senior high schools. The use of satellite school zones[6]

[5] These 300 students will be bussed a straight-line distance of some 10 miles. The actual bus routes will be somewhat longer, depending upon the route chosen. A reasonable estimate of the bus route distance is 12 to 13 miles. The principal's monthly bus reports for Independence High School for the month from January 10, 1970 to February 10, 1970 shows the average one-way length of a bus route at Independence is presently 16.7 miles for the first trip. Buses that make two trips usually have a shorter second trip. The average one-way bus route, including both first and second trips, is 11.7 miles. Thus the distance the 300 pupils will have to be bussed is nearly the same as the average one-way bus route of the students presently attending Independence, and it is substantially shorter than the system's average one-way bus trip of 17 miles.

[6] Satellite school zones are non-contiguous geographical zones. Typically, areas in the black core of the city are coupled—but not geographically linked—with an area in white suburbia.

as a means of achieving desegregation is not improper. District Courts have been directed to shape remedies that are characterized by the "practical flexibility" that is a hallmark of equity. See Brown v. Board of Ed., 349 U.S. 294, 300 (1955). Similarly, the pairing and clustering of schools has been approved. Green v. County School Bd. of New Kent County, 391 U.S. 430, 442 n. 6 (1968); Hall v. St. Helena Parish School Bd., 417 F.2d 801, 809 (5th Cir.), *cert. denied,* 396 U.S. 904 (1969).

The school board also asserts that §§ 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000c(b) and -6(a)(2)] forbid the bussing ordered by the district court.[7] But this argument misreads the legislative history of the statute. Those provisions are not limitations on the power of school boards or courts to remedy unconstitutional segregation. They were designed to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the question of whether school boards were obligated to overcome *de facto* segregation. See generally, United States v. School District 151, 404

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[7] Title 42 U.S.C. § 2000c(b) provides that as used in the subchapter on Public Education of the Civil Rights Act of 1964:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Title 42 § 2000c-6(a)(2) states in part:

> "[P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

F.2d 1125, 1130 (7th Cir. 1968); United States v. Jefferson County Board of Ed., 372 F.2d 836, 880 (5th Cir. 1966), *aff'd on rehearing en banc* 380 F.2d 385 (5th Cir.), *cert. denied, sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Keyes v. School Dist. No. One, Denver, 303 F.Supp. 289, 298 (D. Colo.), *stay pending appeal granted,* —— F.2d —— (10th Cir.); *stay vacated,* 396 U.S. 1215 (1969). Nor does North Carolina's anti-bussing law present an obstacle to the plan, for those provisions of the statute in conflict with the plan have been declared unconstitutional. Swann v. Charlotte-Mecklenburg Bd. of Ed., —— F. Supp. —— (W.D.N.C. 1970).[8]

The district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated. Part of the difficulty concerning the elementary schools results from the board's refusal to accept the district court's suggestion that it control experts from the Department of Health, Education, and Welfare. The consultants that the board employed were undoubtedly competent, but the board limited their choice of remedies by maintaining each school's grade structure. This, in effect, restricted the means of overcoming segregation to only geographical zoning, and as a further restriction the board insisted on contiguous zones. The board rejected such legitimate techniques as

[8] The unconstitutional provisions are:

"No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing." N.C. Gen. Stat. § 115-176.1 (Supp. 1969).

pairing, grouping, clustering, and satellite zoning. Moreover, the board sought to impose a ratio in each school of not less than 60% white students. While a 60%-40% ratio of white to black pupils might be desirable under some circumstances, rigid adherence to this formula in every school should not be allowed to defeat integration.

On the other hand, the Finger plan, which the district court approved, will require transporting 9,300 pupils in 90 additional buses. The greatest portion of the proposed transportation involves cross-bussing to paired schools—that is, black pupils in grades one through four would be carried to predominantly white schools, and white pupils in the fifth and sixth grades would be transported to the black schools. The average daily roundtrip approximates 15 miles through central city and suburban traffic.

The additional elementary pupils who must be bussed represent an increase of 39% over all pupils presently being bussed, and their transportation will require an increase of about 32% in the present fleet of buses. When the additional bussing for elementary pupils is coupled with the additional requirements for junior and senior high schools, which we have approved, the total percentages of increase are: pupils, 56%, and buses, 49%. The board, we believe, should not be required to undertake such extensive additional bussing to discharge its obligation to create a unitary school system.

IV.

Both parties oppose a remand. Each side is adamant that its position is correct—the school board seeks total approval of its plan and the plaintiffs insist on implementation of the Finger plan. We are favorably impressed, however, by the suggestion of the United States, which at

our invitation filed a brief as amicus curiae, that the school board should consider alternative plans, particularly for the elementary schools. We, therefore, will vacate the judgment of the district court and remand the case for reconsideration of the assignment of pupils in the elementary schools, and for adjustments, if any, that this may require in plans for the junior and senior high schools.

On remand, we suggest that the district court should direct the school board to consult experts from the Office of Education of the Department of Health, Education, and Welfare, and to explore every method of desegregation, including rezoning with or without satellites, pairing, grouping, and school consolidation. Undoubtedly some transportation will be necessary to supplement these techniques. Indeed, the school board's plan proposed transporting 2,300 elementary pupils, and our remand should not be interpreted to prohibit all bussing. Furthermore, in devising a new plan, the board should not perpetuate segregation by rigid adherence to the 60% white-40% black racial ratio it favors.

If, despite all reasonable efforts to integrate every school, some remain segregated because of residential patterns, the school board must take further steps along the lines we previously mentioned, including a majority to minority transfer plan,[9] to assure that no pupil is excluded from an integrated school on the basis of race.

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[9] The board's plan provides:

"Any black student will be permitted to transfer only if the school to which he is originally assigned has more than 30 per cent of his race and if the school he is requesting to attend has less than 30 per cent of his race and has available space. Any white student will be permitted to transfer only if the school to which he is originally assigned has more than 70 per cent of his race and if the school he is requesting to

Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969), and Carter v. West Feliciana School Bd., 396 U.S. 290 (1970), emphasize that school boards must forthwith convert from dual to unitary systems. In Nesbit v. Statesville City Bd. of Ed., 418 F.2d 1040 (4th Cir. 1969), and Whittenberg v. School Dist. of Greenville County, — F.2d —— (4th Cir. 1970), we reiterated that immediate reform is imperative. We adhere to these principles, and district courts in this circuit should not consider the stays which were allowed because of the exceptional nature of this case to be precedent for departing from the directions stated in *Alexander, Carter, Nesbit,* and *Whittenberg.*

Prompt action is also essential for the solution of the remaining difficulties in this case. The school board should immediately consult with experts from HEW and file its new plan by June 30, 1970. The plaintiffs should file their exceptions, if any, within 7 days, and the district court should promptly conduct all necessary hearings so that the plan may take effect with the opening of school next fall. Since time is pressing, the district court's order approving a new plan shall remain in full force and effect unless it is modified by an order of this court. After a plan has been approved, the district court may hear additional objections or proposed amendments, but the parties shall comply with the approved plan in all respects while the

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attend has less than 70 per cent of his race and has available space."

This clause, which was designed to prevent tipping or resegregation, would be suitable if all schools in the system were integrated. But since the board envisions some elementary schools will remain nearly all black, it unduly restricts the schools to which pupils in these schools can transfer. It should be amended to allow these elementary pupils to transfer to any school in which their race is a minority if space is available.

district court considers the suggested modifications. Cf. Nesbit v. Statesville City Bd. of Ed., 418 F.2d 1040, 1043 (4th Cir. 1969).

Finally, we approve the district court's inclusion of Dr. Finger's consultant fee in the costs taxed against the board. See In the Matter of Peterson, 253 U.S. 300, 312 (1920). We caution, however, that when a court needs an expert, it should avoid appointing a person who has appeared as a witness for one of the parties. But the evidence discloses that Dr. Finger was well qualified, and his dual role did not cause him to be faithless to the trust the court imposed on him. Therefore, the error, if any, in his selection, was harmless.

We find no merit in the other objections raised by the appellants or in the appellees' motion to dismiss the appeal. The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

SOBELOFF, Circuit Judge, with whom WINTER, Circuit Judge, joins, concurring in part and dissenting in part:

Insofar as the court today affirms the District Court's order in respect to the senior and junior high schools, I concur. I dissent from the failure to affirm the portion of the order pertaining to the elementary schools.

I

THE BASIC LAW AND THE PARTICULAR FACTS

All uncertainty about the constitutional mandate of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), was put to rest when in *Green* v. *County School Board of New Kent County* the Supreme Court spelled out a school board's "affirmative duty to take

whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," 391 U.S. 430, 437-438 (1968). "Disestablish[ment of] state-imposed segregation" (at 439) entailed "steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools" (at 442). If there could still be doubts they were answered this past year. In *Alexander* v. *Holmes County Board of Education*, the Court held that "[u]nder explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools," 396 U.S. 19, 20 (1969). The command was once more reaffirmed in *Carter* v. *West Feliciana School Board*, 396 U.S. 290 (1970), requiring "relief that will at once extirpate any lingering vestiges of a constitutionally prohibited dual school system." (Harlan, J., concurring at 292).

We face in this case a school district divided along racial lines. This is not a fortuity. It is the result, as the majority has recognized, of government fostered residential patterns, school planning, placement, and, as the District Court found, gerrymandering. These factors have interacted on each other so that by this date the black and white populations, in school and at home, are virtually entirely separate.

As of November 7, 1969, out of 106 schools in the system 57 were racially identifiable as white, 25 were racially identifiable as black.[1] Of these, nine were all white schools and eleven all black. Of 24,714 black students in the system 16,000 were in entirely or predominantly black schools.

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[1] In the entire system, 71% of the pupils are white, 29% of the pupils are black. The District Judge deemed a school having 86% or greater white population identifiable as white, one with 56% or greater black population identifiable as black.

There are 76 elementary schools with over 44,000 pupils. In November 1969, 43 were identifiable as white, 16 as black, with 13 of the latter 98% or more black, and none less than 65%. For the future the Board proposes little improvement. There would still be 25 identifiably white elementary schools and approximately half of the white elementary students would attend schools 86 to 100% white. Nine schools would remain 83 to 100% black, serving 6,432 students or over half the black elementary pupils.

To call either the past or the proposed distribution a "unitary system" would be to embrace an illusion.[2] And the majority does not contend that the system is unitary, for it holds that "the district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated." The Board's duty then is plain and unarguable: to convert to a unitary system. The duty is absolute. It is not to be tempered or watered down. It must be done, and done now.

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[2] In its application to us for a stay pending appeal, counsel for the School Board relied heavily on Northcross v. Board of Education of Memphis, — —F.2d —— (6th Cir. 1970), as a judicial ruling that school assignments based on residence are constitutionally immune. The defendant tendered us a statistical comparison of pupil enrollment by school with pupil population by attendance area for the Memphis school system.

Since then the Supreme Court in *Northcross* has ruled that the Court of Appeals erred insofar as it held that the Memphis board "is not now operating a 'dual school system' • • • ." 38 L.W. 4219.

II

The Court-Ordered Plan

A. *The Necessity of the Court-Ordered Plan*

The plan ordered by the District Court works. It does the job of desegregating the schools completely. This "places a heavy burden upon the board to explain its preference for an apparently less effective method." *Green, supra* at 439.

The most significant fact about the District Court's plan is that it—or one like it—is the only one that can work. Obviously, when the black students are all on one side of town, the whites on the other, only transportation will bring them together. The District Judge is quite explicit:

> Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (and continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion.

The point has been perceived by the counsel for the Board, who have candily informed us that if the job must be done then the Finger plan is the way to do it.

The only suggestion that there is a possible alternative middle course came from the United States, participating as amicus curiae. Its brief was prefaced by the following revealing confession:

> We understand that the record in the case is voluminous, and we would note at the outset that we have been unable to analyze the record as a whole. Although we have carefully examined the district court's various opinions and orders, the school board's plan, and those pleadings readily available to us, we feel that we are not conversant with all of the factual considerations which may prove determinative of this appeal. Accordingly, we here attempt, not to deal extensively with factual matters, but rather to set forth some legal considerations which may be helpful to the Court.

Nowithstanding this disclaimer, the Government went on to imply in oral argument—and has apparently impressed on this court—that HEW could do better. No concrete solution is suggested but the Government does advert to the possibility of pairing and grouping of schools. Two points stand out. First, pairing and grouping are precisely what the Finger plan, adopted by the District Court, does. Second, in the circumstances of this case, these methods necessarily entail bussing.

I am not "favorably impressed" by the Government's performance. Its vague and noncommital representations do little but obscure the real issues, introduce uncertainty and fail to meet the "heavy burden" necessary to overturn the District Court's effective plan.[3]

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[3] A federal judge is not required to consult with the Department of Health, Education and Welfare on legal issues. What is the constitutional objective of a plan, and whether a unitary system has been or will be achieved, are questions for the court. HEW's interpretation of the constitutional command does not bind the courts.

> [W]hile administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards

B. *The Feasibility of the Plan*

Of course it goes without saying that school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished. There is no genuine dispute on this point. The plan is simple and quite efficient. A bus will make one pickup in the vicinity of the children's residences, say in the white residential area. It then will make an express trip to the inner-city school. Because of the non-stop feature, time can be considerably shortened and a bus could make a return trip to pick up black students in the inner city and to convey them to the outlying school. There is no evidence of insurmountable traffic problems due to the increased

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controlling the actions of states and their subdivisions is peculiarly a judicial function.

Bowman v. County School Board of Charles City County, 382 F.2d 326 (1967).

Although the definition of goals is for the court, HEW may be able to provide technical assistance in overcoming the logistical impediments to the desegregation of a school system. Thus it was quite understandable that at the outset of this case the District Court invited the Board to consult with HEW. Desegregation of this large educational system was likely to be a complex and administratively difficult task, in which the expertise of the federal agency might be of help. However, after a substantial period of time and the beginning of a new school year, it became clear that the Board had no intention of devising a meaningful plan, much less seeking advice on how to do so. At that point (December 1969) with the need for speed in mind, the Judge appointed an expert already familiar with the school system to work with the school staff in developing a plan.

Whether to utilize the assistance of HEW is ordinarily up to the district judge. Consultation in formulating the mechanics of a plan is not obligatory. The method used by the Judge in this case was certainly sufficient. Moreover, now that a plan has been created and it appears that there are no real alternatives, a remand for HEW's advice seems an exercise in futility.

bussing.[4] Indeed, straight line bussing promises to be quicker. The present average one-way trip is over 15 miles and takes one hour and fourteen minutes; under the plan the average one-way trip for elementary students will be less than seven miles and 35 minutes. The cost of all of the additional bussing will be less than one week's operating budget.[5]

C. *The Standard of Review*

In *Brown* II, the Supreme Court charged the district courts with the enforcement of the dictates of *Brown* I.

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[4] The only indication I have encountered that a serious traffic problem will be occasioned by the additional bussing is found in an affidavit by the City Director of Traffic Engineering. His statement is based on the exaggerated bus estimate prepared by the Board and rejected by the District Court. See note 5, *infra*. Moreover, he appears to have relied to a large extent on the erroneous assumption that under the plan busses would pick up and discharge passengers along busy thoroughfares, thus causing "stop-and-go" traffic of slow moving school busses in congested traffic."

A later affidavit of the same official, filed at the request of the District Court, affords more substantial data. It reveals that the total estimated number of automobile trips per day in Charlotte and Mecklenburg County (not including internal truck trips) is 869,604. That the 138 additional busses would gravely aggravate the congestion is dubious, to say the least.

[5] The District Judge rejected the Board's inflated claims, and found that altogether the Finger plan would bus 13,300 new students in 138 additional busses. The Board had estimated that 19,285 additional pupils would have to be transported, requiring 422 additional busses. This estimate is disproportionate on its face, for presently 23,600 pupils are transported in 280 busses. As indicated above, the direct bus routes envisioned by the Finger plan should accomplish increased, not diminished, efficiency. The court below, after close analysis, discounted the Board's estimate for other reasons as well, including the "very short measurements" used by the Board in determining who would have to be bussed, the failure of the Board to account for round-trips, staggering of opening and closing hours, and overloads.

The lower courts were to have "a practical flexibility in shaping * * * remedies." 349 U.S. at 300. Thus, in subsuming these cases under traditional equity principles, the Supreme Court brought the desegregation decree within the rule that to be overturned it "must [be] demonstrate[d] that there was no reasonable basis for the District Judge's decision." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 634 (1953). This court has paid homage to this maxim of appellate review when, in the past, a district Judge has ordered less than comprehensive relief. *Bradley* v. *School Board of the City of Richmond*, 345 F.2d 310, 320 (1965), *rev'd*, 382 U.S. 103 (1965). What is called for here is similar deference to an order that would finally inter the dual system and not preserve a nettlesome residue. As the Supreme Court made clear in *Green*, *supra*, those who would challenge an effective course of action bear a "heavy burden." The Finger plan is a remarkably economical scheme when viewed in the light of what it accomplishes. There has been no showing that it can be improved or replaced by better or more palatable means. It should, then, be sustained.

III

Objections Raised Against the Court-Ordered Plan

A. *The "Illegal" Objective of the Plan*

My Brother Bryan expresses concern about the plan, regardless of cost, because it undertakes, in his view, an illegal objective: "achieving racial balance." Whatever might be said for this view abstractly or in another context, it is not pertinent here. We are confronted in this case with no question of bussing for mere balance unrelated to

a mandatory constitutional goal. What the District Court has ordered is compliance with the constitutional imperative to disestablish the existing segregation. Unless we are to palter with words, desegregation necessarily entails integration, that is to say integration in some substantial degree. The dictum to the contrary in *Briggs* v. *Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955), was rejected by necessary implication by the Supreme Court in *Green, supra*, and explicitly by this court in *Walker* v. *County School Board of Brunswick Co.*, 413 F.2d 53, 54 n.2 (4th Cir. 1969).

As my Brother Winter shows, there is no more suitable way of achieving this task than by setting, at least initially, a ratio roughly approximating that of the racial population in the school system. The District Judge adopted this *ad hoc* measurement as a starting guide, expressed a willingness to accept a degree of modification,[4] and departed from it where circumstances required.

B. *The "Unreasonableness" of the Plan*

The majority does not quarrel with the plan's objective, nor, accepting the findings of the District Court, does it really dispute that the plan can be achieved. Rather, we are told, the plan is an unreasonable burden.

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[4] The District Judge wrote in his December 1 order that

> Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

This notion must be emphatically rejected. At bottom it is no more than an abstract, unexplicated judgment—a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price. This is a conclusion neither we nor school boards are permitted to make.

In making policy decisions that are not constitutionally dictated, state authorities are free to decide in their discretion that a proposed measure is worth the cost involved or that the cost is unreasonable, and accordingly they may adopt or reject the proposal. This is not such a case. Vindication of the plaintiffs' constitutional right does not rest in the school board's discretion, as the Supreme Court authoritatively decided sixteen years ago and has repeated with increasing emphasis. It is not for the Board or this court to say that the cost of compliance with *Brown* is "unreasonable."

That a subjective assessment is the operational part of the new "reasonableness" doctrine is highlighted by a study of the factors the majority bids school boards take into account in making bussing determinations. "[A] school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources." But, as we have seen, distance and time will be comparatively short, the effect on traffic is undemonstrated, the incremental cost is marginal. As far as age is concerned, it has never prevented the bussing of pupils in Charlotte-Mecklenburg, or in North Carolina generally, where 70.9% of all bussed students are elementary pupils.

If the transportation of elementary pupils were a novelty sought to be introduced by the District Court, I could understand my brethren's reluctance. But, as is conceded,

bussing of children of elementary school age is an established tradition. Bussing has long been used to perpetuate dual systems.[7] More importantly, bussing is a recognized educational tool in Charlotte-Mecklenburg and North Carolina. And as the National Education Association has admirably demonstrated in its brief, bussing has played a crucial role in the evolution from the one-room schoolhouse in this nation. Since the majority accepts the legitimacy of bussing, today's decision totally baffles me.

In the final analysis, the elementary pupil phase of the Finger plan is disapproved because the percentage increase in bussing is somehow determined to be too onerous.[8] Why this is so we are not told. The Board plan itself would bus 5,000 additional pupils. The fact remains that in North Carolina 55% of all pupils are now being bussed. Under the Finger plan approximately 47% of the Charlotte-Mecklenburg student population would be bussed. This is well within the existing percentage throughout the state.

The majority's proposal is inherently ambiguous. The

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[7] For some extreme examples, see: School Board of Warren County v. Kelly, 259 F.2d 497 (4th Cir. 1958); Corbin v. County School Bd. of Pulaski County, 117 F.2d 924 (4th Cir. 1949); Griffith v. Bd. of Educ. of Yancey County, 186 F. Supp. 511 (W.D.N.C. 1960); Gains v. County School Bd. of Grayson County, 186 F. Supp. 753 (W.D.a. 1960), *stay denied*, 282 F.2d 343 (4th Cir. 1960). *See also*, Chambers v. Iredell Co., —— F.2d —— (4th Cir. 1970) (dissenting opinion).

[8] The majority calculates the elementary school portion of the plan to mean a 39% increase in bussed pupils, 32% increase in busses; the whole package, it is said, would require a 56% pupil increase and 49% bus increase.

These figures are accurate but do not tell the whole story. If one includes within the number of students presently being transported those that are bussed on commercial lines (5000), the increase in pupils transported would not appear to be as large. Thus the plan for elementary schools would entail a 33% bussed pupil increment, the whole Finger plan, 47%.

court-ordered plan is said to be unreasonable. Yet the School Board's own plan has also been disapproved. Does the decision—that the Finger plan is unreasonable—depend on the premise that an intermediate course is available? Would the amount of segregation retained in the School Board's plan be avowedly sanctioned if it were recognized that nothing short of the steps delineated in the District Court's plan will suffice to eliminate it? Since there is no practicable alternative, must we assume that the majority is willing to tolerate the deficiencies in the Board plan?

These questions remain unresolved and thus the ultimate meaning of the "reasonableness" doctrine is undefined. Suffice it to say that this case is not an appropriate one in which to grapple with the theoretical issue whether the law can endure a slight but irreducible remnant of segregated schools. This record presents no such problem. The remnant of racially identifiable elementary schools, to which the District Court addressed itself, encompasses over half the elementary population. This large fraction cannot be called slight; nor, as the Finger plan demonstrates, is it irreducible.

I am even more convinced of the unwisdom of reaching out to fashion a new "rule of reason," when this record is far from requiring it, because of the serious consequences it would portend for the general course of school desegregation. Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and

deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome.

Moreover, the opinion catapults us back to the time, thought passed, when it was the fashion to contend that the inquiry was not how much progress had been made but the presence or absence of good faith on the part of the board. Whether an "intractable remnant of segregation" can be allowed to persist, apparently will now depend in large measure on a slippery test: an estimate of whether the Board has made "every reasonable effort to integrate the pupils under its control."[1]

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[1] Both in its characterization of the facts and in its treatment of the case the majority implies that the actions of this Board have been exemplary. I feel constrained to register my dissent from this view although on no account do I subscribe to the proposition that the disposition of the case depends on this issue.

On April 23, 1969 the District Judge declared the Charlotte-Mecklenburg School District illegally segregated. He found it unnecessary at that time to decide whether the Board had deliberately gerrymandered to perpetuate the dual system since he believed that the court order to follow would promote substantial changes. The Board was given until May 15 to devise a plan eliminating faculty and student segregation.

A majority of the Board voted not to take an immediate appeal and the school superintendent was directed to prepare a plan. His mandate was hazy. According to the court below—

> No express guidelines were given the superintendent. However, the views of many members expressed at the meeting were so opposed to serious and substantial desegregation that everyone including the superintendent could reasonably have concluded, as the court does, that a "minimal" plan was what was called for, and that the "plan" was essentially a prelude to anticipated disapproval and appeal.
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> The staff were never directed to do any serious work on redrawing of school zone lines, pairing of schools, combining zones, grouping of schools, conferences with the Department of Health, Education and Welfare, nor any of the other

The Supreme Court having barred further delay by its insistent emphasis on an immediate remedy, we should not lend ourselves to the creation of a new loophole by attenuating the substance of desegregation.

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possible methods of making real progress towards desegregation.

The superintendent's plan was submitted to the Board on May It was quite modest in its undertaking. Nevertheless, the Boar "struck out virtually all the effective provisions of the superintendent's plan." The plan ultimately filed by the Board on Ma 28 was "the plan previously found racially discriminatory wit the addition of one element—the provision of transportation fo [majority to minority transfers.]" The Board also added a ru making a student who transfers to a new high school ineligible fo athletics for a year. As the District Judge found,

> [t]he effect of the athletic penalty is obvious—it discriminat against black students who may want to transfer and tal part in sports, and is no penalty on white students who sho no desire for such transfers.

In the meantime the Board for the first time refused to acce a recommendation of the superintendent for the promotion of teacher to principal. The reason avowed was that the teache who was black and a plaintiff in the suit, had publicly express his agreement with the District Court order. The job was wit held until the prospective appointee signed a "loyalty oath."

The District Judge held a hearing on June 16 and ruled June 20. He declined to find the Board in contempt but did no that "[t]he board does not admit nor claim that it has a positive duty to promote desegregation." The Judge also turned to the issue of gerrymandering and found "a long standi policy of control over the makeup of school population whi scarcely fits any true 'neighborhood school philosophy.'"

On July 29, the Board returned with a new plan. The Distri Judge was pleased to learn that "the School Board has revers its field and has accepted its affirmative constitutional duty desegregate pupils, teachers, principals and staff members 'at t earliest possible date.'" In view of this declaration and of t late date, the court "reluctantly" approved for one year only plan whereby seven all black inner-city schools would be clos and a total of 4245 black children bussed to outlying white schoo

Albert V. Bryan, Circuit Judge, dissenting in part:

The Court commands the Charlotte-Mecklenburg Board of Education to provide bussing of pupils to its public schools for "achieving *integration*". (Accent added.) "[A]chieving *integration*" is the phraseology used, but actually, achieving racial *balance* is the objective. Bussing

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The Board was directed to file a plan for complete desegregation in November.

By November, the District Judge was able to survey the results achieved under the plan adopted for the year. He found that "only 1315 instead of the promised 4245 black pupils" had been transferred. (Later information revealed that the number was only 767.) Furthermore, he found that

> The Board has indicated that its members do not accept the duty to desegregate the schools at any ascertainable time; and they have clearly indicated that they intend not to do it effective in the fall of 1970. They have also demonstrated a yawning gap between predictions and performance.

On November 17, the Board filed a plan. It "discarded further consideration of pairing, grouping, clustering and transporting." Ostensibly "to avoid 'tipping,'" the plan provided that white students would not be assigned schools where they would find themselves with less than 60% whites. This was, as the District Court found, a one-way street in view of the fact that the plan contemplated no effort to desegregate schools with greater than 40% blacks. The plan also dropped the earlier provision of transportation for students transferring out of segregated situations. Thus the Board nullified the one improvement it had made in its May 8 plan. It also left those black students who had transferred to outlying schools pursuant to the July 29 plan without transportation. Understandably, the court labeled this "re-segregation."

In the face of this total lack of cooperation on the part of the Board, the court was compelled to appoint an expert to devise a plan for desegregation. The Finger plan was the result.

It appears from the record that on most issues the Board was sharply divided. Of course I mean to cast no aspersions on those members—and there were some—who urged the Board forthrightly to shoulder its duty. But the above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making "every reasonable effort" to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn.

to prevent racial imbalance is not as yet a Constitutional obligation. Therefore, no matter the prior or present utilization of bussing for this or other reasons, and regardless of cost considerations or duplication of the bus routes, I think the injunction cannot stand.

Without Constitutional origin, no power exists in the Federal courts to order the Board to do or not to do anything. I read no authority in the Constitution, or in the implications of Brown v. Board of Education, 347 US 483 (1954), and its derivatives, requiring the authorities to endeavor to apportion the school bodies in the racial ratio of the whole school system.

The majority opinion presupposes this racial balance, and also bussing to achieve it, as Constitutional imperatives, but the Chief Justice of the United States has recently suggested inquiry on whether "any particular racial balance must be achieved in the schools; . . . [and] to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." See his memorandum appended to Northcross v. Board of Education of the Memphis, Tennessee, City Schools, —— US ——, 38 USLW 4219, 4220 (March 9, 1970).*

Even construed as only incidental to the 1964 Civil Rights Act, this legislation in 42 United States Code § 2000c-6 is necessarily revealing of Congress' hostile attitude toward the concept of achieving racial balance by bussing. It unequivocally decried in this enactment "any order [of a Federal court] seeking to achieve a racial balance in any

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* On remand the District Court in *Northcross* has held there was no Constitutional obligation to transport pupils to overcome a racial imbalance. Northcross v. Board of Education of the Memphis City Schools, —— FS —— (W.D.Tenn., May 1, 1970) (per McRae, J.). In the same Circuit, see, too, Deal v. Cincinnati Board of Education, 419 F2d 1387 (6 Cir. 1969).

school by requiring the transportation of pupils or students from one school to another . . . to achieve such racial balance . . . ."

I would not, as the majority does, lay upon Charlotte-Mecklenburg this so doubtfully Constitutional ukase.

WINTER, Circuit Judge, concurring in part and dissenting in part:

I would affirm the order of the district court in its entirety.*

In a school district in which freedom of choice has patently failed to overcome past state policy of segregation and to achieve a unitary system, the district court found the reasons for failure. They included resort to a desegregation plan based on geographical zoning with a free transfer provision, rather than a more positive method of achieving the constitutional objective, the failure to integrate faculties, the existence of segregated racial patterns partially as a result of federal, state and local governmental action and the use of a neighborhood concept for the location of schools superimposed upon a segregated residential pattern. Correctly the majority accepts these findings under established principles of appellate review. To illustrate how government-encouraged residential segregation, coupled with the discriminatory location and design of schools, resulted in a dual system, the majority demonstrates that in this locality busing has been employed as a tool to perpetuate segregated schools.

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* Certainly, if the district court's order with respect to high schools and junior high schools is affirmed, the district court should not be invited to reconsider its order with respect to them. The jurisdiction of the district court is continuing and it may always modify its previous orders with respect to any school upon application and for good cause shown.

In complete compliance with *Carter* v. *West Feliciana School Board*, —— U. S. —— (1970); *Alexander* v. *Holmes County Bd. of Ed.*, —— U. S. —— (1969); *Green* v. *School Bd. of New Kent County*, 391 U. S. 430 (1968), and *Monroe* v. *Bd. of Comm'rs.*, 391 U. S. 450 (1968), the majority concludes that the existing high school and junior high school system must be dismantled and that the constitutional mandate can be met by the use of geographical assignment, including satellite districts and busing.

The majority thus holds that the Constitution requires that this dual system be dismantled. It indicates its recognition of the need to overcome the discriminatory educational effect of such factors as residential segregation. It also approves the use of zones, satellite districts and resultant busing for the achievement of a unitary system at the high school and junior high school levels. Nevertheless, the majority disapproves a similar plan for the desegregation of the elementary schools on the ground that the busing involved is too onerous. I believe that this ground is insubstantial and untenable.

At the outset, it is well to remember the seminal declaration in *Brown* v. *Board of Education (Brown II)*, 349 U. S. 294, 300 (1955), that in cases of this nature trial courts are to "be guided by equitable principles" in "fashioning and effectuating decrees." Since *Brown II* the course of decision has not departed from the underlying premise that this is an equitable proceeding, and that the district court is invested with broad discretion to frame a remedy for the wrongful acts which the majority agrees have been committed. In *Green* v. *School Board of New Kent County*, 391 U. S. at 438, the Supreme Court held that the district courts not only have the "power" but the "duty to render a decree which will, so far as possible, eliminate the dis-

criminatory effects of the past, as well as bar like discrimination in the future." District courts were directed to "retain jurisdiction until it is clear that disestablishment has been achieved." *Raney* v. *Board of Education*, 391 U. S. 443, 449 (1968). Where it is necessary district courts may even require local authorities "to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system." *Griffin* v. *School Board*, 377 U. S. 218, 233 (1964). Thus, the Supreme Court has made it abundantly clear that the district courts have the power, and the duty as well, to fashion equitable remedies designed to extirpate racial segregation in the public schools. And in fashioning equitable relief, the decree of a district court must be sustained unless it constitutes a clear abuse of discretion. *United States* v. *W. T. Grant Co.*, 345 U. S. 619 (1953).

Busing is among the panoply of devices which a court of equity may employ in fashioning an equitable remedy in a case of this type. The district court's order required that "transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about reduction of segregation, and who lives farther from the school to which they are assigned than the Board determines to be walking distance." It found as a fact, and I accept its finding, that "there is no way" to desegregate the Charlotte schools in the heart of the black community without providing such transportation.

The district court's order is neither a substantial advance nor extension of present policy, nor on this record does it constitute an abuse of discretion. This school system, like many others, is now actively engaged in the business of transporting students to school. Indeed, busing is a widespread practice in the United States. U. S. Commission on

Civil Rights, *Racial Isolation in the Public Schools* 180 (1967). Between 1954 and 1967 the number of pupils using school transportation has increased from 9,509,699 to 17,271,718. National Education Association, National Commission on Safety Education, *1967-68 Statistics on Pupil Transportation* 3.

Given its widespread adoption in American education, it is not surprising that busing has been held an acceptable tool for dismantling a dual school system. In *United States* v. *Jefferson County Board of Education*, 380 F.2d 385, 392 (5 Cir.) (en banc), *cert. den.* sub. nom. *Caddo Parish School Bd.* v. *United States*, 389 U. S. 840 (1967), the court ordered that bus service which was "generally provided" must be routed so as to transport every student "to the school to which he is assigned" provided that the school "is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules." Similarly, in *United States* v. *School Dist. 151*, 286 F. S. 786, 799 (N.D. Ill. 1968), *aff'd.*, 404 F.2d 1125 (7 Cir. 1968), the court said that remedying the effects of past discrimination required giving consideration to "racial factors" in such matters as "assigning students" and providing transportation of pupils. In addition, the Eighth Circuit in *Kemp* v. *Beasley*, —— F.2d —— (8 Cir. 1970), recognized that busing is "one possible tool in the implementation of unitary schools." And, finally, *Griffin* v. *School Board, supra*, makes it clear that the added cost of necessary transportation does not render a plan objectionable.

I turn, then, to the extent and effect of busing of elementary school students as ordered by the district court.

Presently, 23,600 students—21% of the total school population—are bused, excluding some 5,000 pupils who travel to and from school by public transportation. The school

board operates 280 buses. The average cost of busing students is $39.92 per student, of which one-half is borne by the state and one-half by the board. Thus, the average annual cost to the board is about $20.00 per student. The total annual cost to the board for busing is approximately $500,000.00 out of a total operating budget of $51,000,000.00. The cost of busing is thus less than 1% of the total operating budget and an even smaller percentage of the $57,700,000.00 which this school district expends on the aggregate of operations, capital outlay and debt service and this cost also represents less than 2% of the local funds which together with state and federal money constitute the revenue available annually to the school board.

The total number of elementary school pupils presently bused does not appear, but under the district court's order an additional 9,300 elementary school pupils would be bused. The additional operating cost of busing them would not exceed $186,000.00 per year. They would require not more than 90 additional buses, and the buses would require an additional capital outlay of $486,000.00. The increased operating cost of the additional elementary school pupils required to be bused amounts to less than 1% of the board's school budget, and the one-time capital outlays for additional buses amounts to less than 1% of the board's total budget. The combined operational and capital cost represents less than 1.2% of the board's total budget. I am, therefore, unable to see how the majority could consider the additional cost unbearable.

Perhaps more importantly, the tender years of elementary school students requires a consideration of the impact of the district court's order on the average student. While this board transports 21% of the total school population, it is providing transportation to a far lower per-

centage of pupils than the average North Carolina school board. In North Carolina 54.9% of the average daily attendance in the public schools was transported by bus during the 1968-69 school year.

The average distance traveled by elementary school pupils presently bused does not appear, but the district court found overall with respect to the children required to be bused by its order that they "will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported * * *." While the district court did not make separate findings with regard to the average length of travel for the additional elementary school pupils required to be bused, it did find that the average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. In contrast, the court found that under its plan the average one-way trip for elementary school students would be less than 7 miles and would require not over thirty-five minutes.

When I consider that busing has been widely used in this system to perpetuate segregation, that some busing was proposed even under the unacceptable board plans, that the cost of additional busing to the system as required by the court's order, both in absolute terms and in relation to its total expenditures is so minimal, and that the impact on the elementary school pupils is so slight, I discern no basis for concluding that the district court abused its discretion with respect to the elementary school.

Two other aspects of the majority's opinion require my comment.

First, the majority attempts to answer the query of the Chief Justice in his separate opinion in *Northcross* v. *Board*

of Ed. of Memphis, —— U. S. —— (1970), as to whether "any particular racial balance must be achieved in the schools" by holding "that not every school in a unitary school system need be integrated • • •." To me, the holding is premature and unwise. There is not in this case either the intractable problem of a vast urban ghetto in a large city or any substantial basis on which it may be said that the cost or the impact on the system or on the pupils of dismantling the dual system is insupportable.

The district court wisely attempted to remedy the present dual system by requiring that pupil assignment be based "as nearly as practicable" on the racial composition of the school system, 71% white and 29% black. The plan ordered fell short of complete realization of this remedial goal. While individual schools will vary in racial composition from 3% to 41% black, most schools will be clustered around the entire system's overall racial ratio. It would seem to follow from *United States* v. *Montgomery Board of Education*, 395 U. S. 225, 232 (1968), that the district court's utilization of racial ratios to dismantle this dual system and remedy the effects of segregation was at least well within the range of its discretion. There the Supreme Court approved as a requirement of faculty integration that "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system." It did so recognizing that it had previously said in *New Kent County*, 391 U. S. at 439, "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." If in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason

why the same should not be true to achieve pupil integration, especially where, as here, some wide deviations from the overall ratio have been permitted to accommodate circumstances with respect to particular schools.

In addition to *Montgomery*, the same conclusion can be deduced from the mandate of *West Feliciana* and *Holmes County* to dismantle immediately a dual system. Schools cease to be black or white when each reflects the overall pupil racial balance of the entire system. What imbalances may be justified after a unitary system has once been established, and what departures from an overall pupil racial balance may be permitted to accommodate special circumstances in the establishment of a unitary system, should be developed on a case-by-case basis and the facts of record which each case presents.

The other aspect of the majority's opinion which troubles me greatly is its establishment of the test of reasonableness. My objections to this test do not spring from any desire to impose *un*reasonable, irrational or onerous solutions on school systems; I, too, seek "reasonable" means with which to achieve the constitutionally required objective of a unitary system.

My objections are two-fold.

First, this is an inappropriate case in which to establish the test. On this record it cannot be said that the board acted reasonably or that there is any viable solution to the dismantling of the dual system other than the one fashioned by the district court. Neither the board nor HEW has suggested one. So that, again, I think the majority is premature in its pronouncement and I would find no occasion to discuss reasonableness when there is no choice of remedies.

Second, the majority sets forth no standards by which to judge reasonableness or unreasonableness. The majority

approves the district court's plan as to high schools and junior high schools, yet disapproves as to elementary schools. The only differences are increased busing with attendant increased cost, time and distance. The majority subjectively concludes that these costs are too great to permit the enforcement of the constitutional right to a unitary system. I would find them neither prohibitive nor relatively disproportionate. But, with the absence of standards, how are the school boards or courts to know what plans are reasonable? The conscientious board cannot determine when it is in compliance. The dilatory board receives an open invitation to further litigation and delay.

Finally, I call attention to the fact that "reasonableness" has more than faint resemblance to the good faith test of *Brown II*. The 13 years between *Brown II* and *New Kent County* amply demonstrate that this test did not work. Ultimately it was required to be rejected and to have substituted for it the absolute of "now" and "at once." The majority ignores this lesson of history. If a constitutional right exists, it should be enforced. On this record the constitutional rights of elementary school pupils should be enforced in the manner prescribed by the district court, because it is clear that the district court did not abuse its discretion.

Judge Sobeloff authorizes me to say that he joins in these views.

Judgment of Court of Appeals dated May 26, 1970

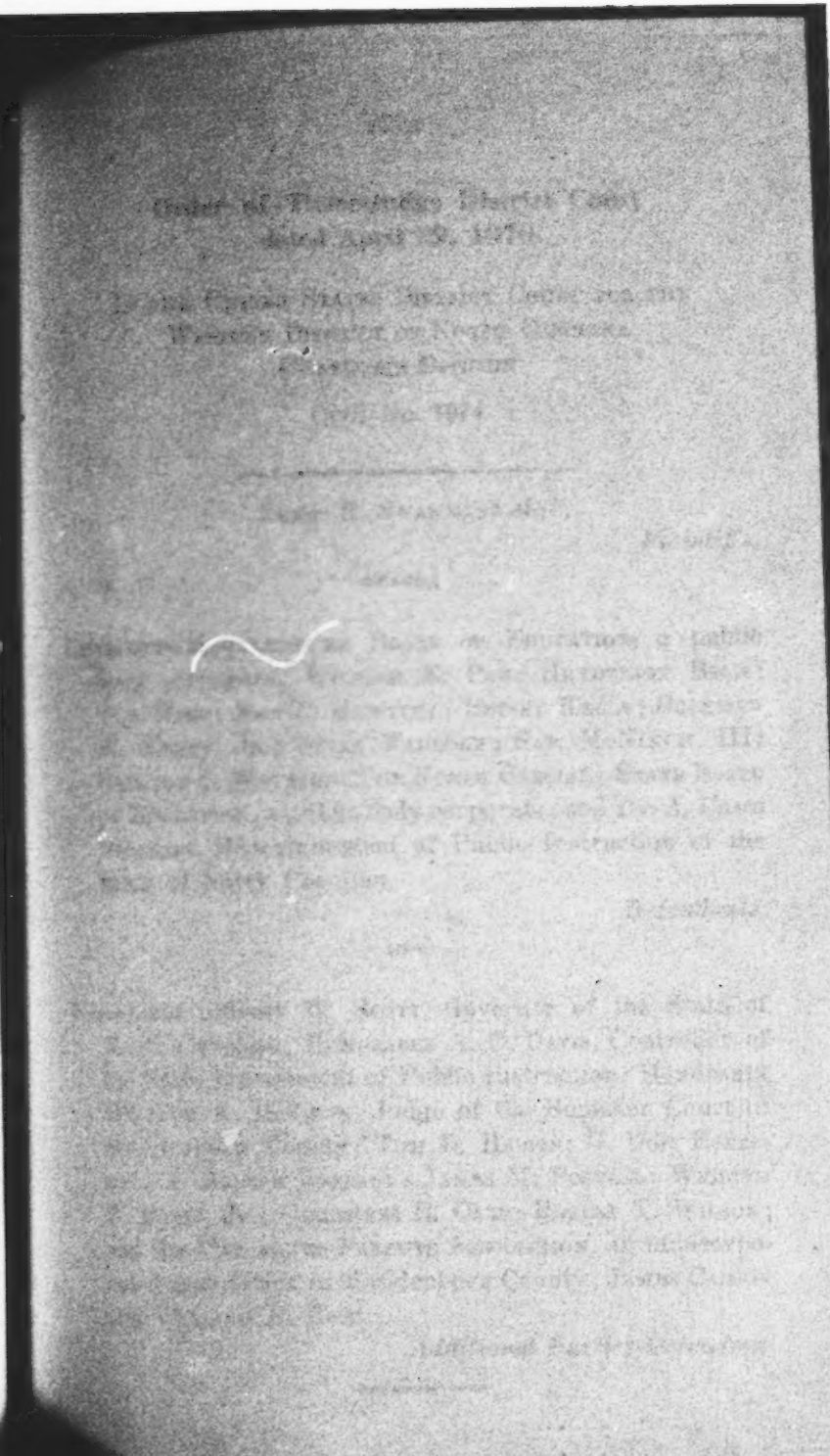
This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED that the judgment of the District Court appealed from, in this case, be, and the same is hereby, vacated; and the case is remanded to the United States District Court for the Western District of North Carolina, at Charlotte, for further proceedings.

Judge Bryan joins Haynsworth, C.J. and Boreman, J. in voting to vacate the judgment of the District Court, and to remand the case in accordance with the opinion written by Butzner, J. He does so for the sake of creating a clear majority for the decision to remand. It is his hope that upon reexamination the District Court will find it unnecessary to contravene the principle stated in Judge Bryan's dissent herein, to which he still adheres. Screws v. United States, 325 US 91, 135 (1945).

By direction of the Court.

SAMUEL W. PHILLIPS
Clerk



Order of Three-Judge District Court dated April 29, 1970

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

Civil No. 1974

JAMES E. SWANN, *et al.*,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSEY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM MCNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

and

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. MCLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Order of Three-Judge District Court dated April 29, 1970

Civil No. 2631

MRS. ROBERT LEE MOORE, *et al.*,

Plaintiffs,

versus

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION and WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg Public Schools,

Defendants.

THREE-JUDGE COURT

(Heard March 24, 1970 Decided April 29, 1970.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

CRAVEN, Circuit Judge:

This three-judge district court was convened pursuant to 28 U.S.C. § 2281, et seq. (1964), to consider a single aspect of the above-captioned case: the constitutionality and impact of a state statute, N. C. Gen. Stat. § 115-176.1 (Supp. 1969), known as the antibussing law, on this suit brought to desegregate the Charlotte-Mecklenburg school system. We hold a portion of N. C. Gen. Stat. § 115-176.1 unconstitutional because it may interfere with the school board's performance of its affirmative constitutional duty under the equal protection clause of the Fourteenth Amendment.

I.

On February 5, 1970, the district court entered an order requiring the Charlotte-Mecklenburg School Board to de-

segregate its school system according to a court-approved plan. Implementation of the plan could require that 13,300 additional children be bussed.[1] This, in turn, could require up to 138 additional school buses.[2]

Prior to the February 5 order, certain parties filed a suit, entitled *Tom B. Harris, G. Don Roberson, et al.* v. *William C. Self, Superintendent of Charlotte-Mecklenburg Schools and Charlotte-Mecklenburg Board of Education,* in the Superior Court of Mecklenburg County, a court of general jurisdiction of the State of North Carolina. Part of the relief sought was an order enjoining the expenditure of public funds to purchase, rent or operate any motor vehicle for the purpose of transporting students pursuant to a desegregation plan. A temporary restraining order granting this relief was entered by the state court, and, in response, the *Swann* plaintiffs moved the district court to add the state plaintiffs as additional parties defendant in the federal suit, to dissolve the state restraining order, and to direct all parties to cease interfering with the federal court mandates. Because it appeared that the constitutionality of N. C. Gen. Stat. § 115-176.1 (Supp. 1969) would be in question, the district court requested designation of this three-judge court on February 19, 1970. On February 25, 1970, the district judge granted the motion to add additional parties. Meanwhile, on February 22, 1970, another state suit, styled *Mrs. Robert Lee Moore, et al.* v. *Charlotte-*

[1] On March 5, 1970, the Fourth Circuit Court of Appeals stayed that portion of the district court's order requiring bussing of students pending appeal to the higher court.

[2] There is a dispute between the parties as to the additional number of children who will be bussed and as to the number of additional buses that will be needed. For our purposes, it is immaterial whose figures are correct. The figures quoted are taken from the district judge's supplemental findings of fact, filed March 21, 1970.

Mecklenburg Board of Education and William C. Self, Superintendent of Charlotte-Mecklenburg Schools, was begun. In this second state suit, the plaintiffs also requested an order enjoining the school board and superintendent from implementing the plan ordered by the district court on February 5. The state court judge issued a temporary restraining order embodying the relief requested, and on February 26, 1970, the *Swann* plaintiffs moved to add Mrs. Moore, *et al.*, as additional parties defendant in the federal suit. On the same day, the state defendants filed a petition for removal of the *Moore* suit to federal court. On March 23, 1970, the district judge requested a three-judge court in the removed *Moore* case, and this panel was designated to hear the matter. All the cases were consolidtaed for hearing, and the court heard argument by all parties on March 24, 1970.

II.

N. C. Gen. Stat. § 115-176.1 (Supp. 1969) reads:

> Assignment of pupils based on race, creed, color or national origin prohibited.—No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.
>
> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a

specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the school board, require assignment or reassignment.

The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

It is urged upon us that the statute is far from clear and may reasonably be interpreted several different ways.

(A) Plaintiffs read the statute to mean that the school board is prevented from complying with its duty under the Fourteenth Amendment to establish a unitary school system. See, *e.g.*, *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430, 439 (1968). In

support of this contention, plaintiffs argue that the North Carolina General Assembly passed § 115-176.1 in response to an April 23, 1969, district court order, which required the school board to submit a plan to desegregate the Charlotte schools for the 1969-70 school year. Under plaintiffs' interpretation of the statute, the board is denied all desegregation tools except non-gerrymandered geographic zoning and freedom of choice. Implicit in this, of course, is the suggestion that zoning and fredom of choice will be ineffective in the Charlotte context to disestablish the asserted duality of the present system.

(B) The North Carolina Attorney General argues that the statute was passed to preserve the neighborhood school concept. Under his interpretation, the statute prohibits assignment and bussing inconsistent with the neighborhood school concept. Thus, to disestablish a dual system the district court could, consistent with the statute, *only* order the board to geographically zone the attendance areas so that, as nearly as possible, each student would be assigned to the school nearest his home regardless of his race. Implicit in this argument is that any school system is *per se* unitary if it is zoned according to neighborhood patterns that are not the result of officially sanctioned racial discrimination. Although the Attorney General emphasizes the expression of state policy by the Legislature in favor of the neighborhood school concept, he recognizes, of course, that the statute also permits freedom of choice if a school board voluntarily adopts such a plan. Thus, the plaintiffs and the Attorney General read the statute in much the same way: that it limits lawful methods of accomplishing desegregation

to nongerrymandered geographic zoning and freedom of choice.

(C) The school board's interpretation of the statute is more ingenious. The board concedes that the statute prohibits assignment according to race, assignment to achieve racial balance, and involuntary bussing for either of these purposes, but contends that the facial prohibitions of the statute only apply to prevent a school board from doing more than necessary to attain a unitary system. The argument is that since the statute only begins to operate once a unitary system has been established, it in no way interferes with the board's constitutional duty to desegregate the schools. Counsel goes on to insist that Charlotte-Mecklenburg presently has a unitary system and, therefore, that the state court constitutionally applied the statute to prevent further unnecessary racial balancing.

(D) Plaintiffs in the *Harris* suit contend (1) that in 42 U.S.C. §§ 2000c(b) and 2000c-6(a)(2) (1964)[3]

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[3] § 2000c:

As used in this subchapter—

* * * * *

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

§ 2000c-6(a):

(2) [P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

Congress expressly prohibited assignment and bussing to achieve racial balance, (2) that to compel a child to attend a school on account of his race or to compel him to be involuntarily bussed to achieve a racial balance violates the principle of *Brown* v. *Bd. of Ed. of Topeka,* 347 U.S. 483 (1954), and (3) that N. C. Gen. Stat. § 115-176.1 merely embodies the principle of the neighborhood school in accordance with *Brown* and the Civil Rights Act of 1964. We may dispose of the first contention at once. The statute "cannot be interpreted to frustrate the constitutional prohibition [against segregated schools]." *United States* v. *School Dist. 151 of Cook Co.,* 404 F.2d 1125, 1130 (7th Cir. 1968).

(E) Plaintiffs in the *Moore* suit argue that the district court order of February 5, 1970, was in contravention of *Brown* and, therefore, that the state court order in their suit was justified. However, the *Moore* plaintiffs also argue that certain parts of the second and third paragraphs in the state statute are unconstitutional because they give the school board the authority to assign children to schools for whatever reasons the board deems necessary or sufficient. The *Moore* plaintiffs interpret these portions of the statute as permitting assignment and bussing on the basis of race contrary to *Brown* and the Fourteenth Amendment.

III.

Federal courts are reluctant, as a matter of comity and respect for state legislative judgment and discretion, to strike down state statutes as unconstitutional, and will not do so if the statute reasonably can be interpreted so as not

to conflict with the federal Constitution. But to read the statute as innocuously as the school board suggests would, we think, distort and twist the legislative intent. We agree with plaintiffs and the Attorney General that the statute limits the remedies otherwise available to school boards to desegregate the schools. The harder question is whether the limitation is valid or conflicts with the Fourteenth Amendment. We think the question is not so easy, and the statute not so obviously unconstitutional, that the question may lawfully be answered by a single federal judge, see *Turner* v. *City of Memphis*, 369 U.S. 350 (1962); *Bailey* v. *Patterson*, 369 U.S. 31 (1962), and we reject plaintiffs' attack upon our jurisdiction. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965); C. Wright, Law of Federal Courts § 50 at 190 (2d ed. 1970).

In *Green* v. *County School Bd. of New Kent Co.*, 391 U.S. 430 (1968), the Supreme Court declared that a school board must take effective action to establish a unitary, nonracial system, if it is not already operating such a system. The Court neither prohibited nor prescribed specific types of plans, but, rather, emphasized that it would judge each plan by its ultimate effectiveness in achieving desegregation. In *Green* itself, the Court held a freedom-of-choice plan insufficient because the plan left the school system segregated, but stated that, under the circumstances existing in New Kent County, it appeared that the school board could achieve a unitary system either by simple geographical zoning or by consolidating the two schools involved in the case. 391 U.S. at 442, n. 6. Under *Green* and subsequent decisions, it is clear that school boards must implement plans that work to achieve unitary systems. *Northcross* v. *Bd. of Ed. of the Memphis City Schools*, —— U.S. ——, 38 L.W. 4219 (1970); *Alexander* v. *Holmes*

Co. Bd. of Ed., 396 U.S. 19 (1969). Plans that do not produce a unitary system are unacceptable.[4]

We think the enunciation of policy by the legislature of the State of North Carolina is entitled to great respect. Federalism requires that whenever it is possible to achieve a unitary system within a framework of neighborhood schools, a federal court ought not to require other remedies in derogation of state policy. But if in a given fact context the state's expressed preference for the neighborhood school cannot be honored without preventing a unitary system, it is the former policy which must yield under the Supremacy Clause.

Stated differently, a statute favoring the neighborhood school concept, freedom-of-choice plans, or both can validly limit a school board's choice of remedy only if the policy favored will not prevent the operation of a unitary system. That it may or may not depends upon the facts in a particular school system. The flaw in this legislation is its rigidity. As an expression of state policy, it is valid. To the extent that it may interfere with the board's perfor-

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[4] The reach of the Court's mandate is not yet clear:

> [A]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.

Northcross v. Bd. of Ed. of the Memphis City Schools, —— U.S. ——, 38 L.W. at 4220 (1970) (Chief Justice Burger, concurring). For our purposes, it is sufficient to say that the mandate applies to require "reasonable" or "justifiable" solutions. *See generally* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965).

mance of its affirmative constitutional duty to establish a unitary system, it is invalid.

The North Carolina statute, analyzed in light of these principles, is unconstitutional in part. The first paragraph of the statute reads:

> No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

There is nothing unconstitutional in this paragraph. It is merely a restatement of the principle announced in *Brown* v. *Bd. of Ed. of Topeka,* 347 U.S. 483 (1954) (*Brown* I).

The third paragraph of the statute reads:

> The provisions of this article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or circumstances which, in the sole discretion of the school board, require assignment or reassignment.

This paragraph merely allows the school board noninvidious discretion to assign students to schools for valid administrative reasons. As we read it, it does not relate to race at all and, so read, is constitutional.

The fourth paragraph provides:

> The provisions of this article shall not apply to an application for the assignment or reassignment by the parent, guardian or person standing in loco parentis

> of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education of an administrative unit.

This paragraph relieves school boards from compliance with the statute where they are implementing voluntarily adopted freedom-of-choice plans within their systems. It does not require the boards to adopt freedom of choice in any particular situation, but leaves them free to comply with their constitutional duty by any effective means available, including, where it is appropriate, freedom of choice. So interpreted, the paragraph is constitutional.

The second paragraph of the statute contains the constitutional infirmity. It reads:

> Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students

in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The first sentence of the paragraph presents no greater constitutional problem than the third and fourth paragraphs of the statute, discussed above. It allows school boards to establish a geographically zoned neighborhood school system, but it does not require them to do so. Consequently, this sentence does not prevent the boards from complying with their constitutional duty in circumstances where zoning and neighborhood school plans may not result in a unitary system. The clause in the first sentence permitting assignment for "any other reason" in the board's "sole discretion" we read as meaning simply that the school boards may assign outside the neighborhood school zone for noninvidious administrative reasons. So read, it presents no difficulty. The second and third sentences are unconstitutional. They plainly prohibit school boards from assigning, compelling, or involuntarily bussing students on account of race, or in order to racially "balance" the school system. *Green* v. *School Bd. of New Kent Co.*, 391 U.S. 430 (1968), *Brown* v. *Bd. of Ed. of Topeka*, 349 U.S. 294 (1955) (*Brown* II), and *Brown* v. *Bd. of Ed. of Topeka*, 347 U.S. 483 (1954) (*Brown* I), require school boards to consider race for the purpose of disestablishing dual systems.

The Constitution is not color-blind with respect to the affirmative duty to establish and operate a unitary school system. To say that it is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction

that boards must take steps adequate to abolish dual systems. See *Green* v. *School Bd. of Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking affirmative steps to desegregate its systems, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear, see *Northcross* v. *Bd. of Ed. of the Memphis City Schools*, —— U.S. ——, 38 L.W. at 4220 (1970) (Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system.

Although we hold these statutory prohibitions unconstitutional as violative of equal protection, it does not follow that "bussing" will be an appropriate remedy in any particular school desegregation case. On this issue we express no opinion, for the question is now on appeal to the United States Court of Appeals for the Fourth Circuit and is not for us to decide.

It is clear that each case must be analyzed on its own facts. See *Green* v. *School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article 2 of the Constitution).

V

As we have no cause to doubt the sincerity of the various defendants, the plaintiffs' motion to hold them in contempt for interference with the district court's orders and their request for an injunction against enforcement of the statute will be denied. We believe the defendants, including the state court plaintiffs, will, pending appeal, respect this court's judgment, which applies statewide with respect to the constitutionality of the statute.

Several of the parties have moved to be dismissed from the case, alleging various grounds in support of their motions. Because of the view we take of this suit and the limited relief we grant, the motions to dismiss become immaterial. The school board is undeniably a proper party before the court on the constitutional issue, since it is a party to the desegregation suit. We can, therefore, consider and adjudge the validity of the statute, regardless of the position of the other parties. That we consider the substantive arguments of all the parties in no way harms those who have moved to be dismissed.

An appropriate judgment will be entered in accordance with this opinion.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

JAMES E. SWANN, ET AL., PETITIONERS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c–6, 2000d in the area of school desegregation. The outcome of this case will affect that enforcement responsibility. The government participated below as *amicus curiae* at the invitation of the court of appeals, and the United States Department of Health, Education and Welfare is now preparing desegregation plans for Charlotte-Mecklenburg as recommended by the court of appeals.

389-264—70

STATEMENT

The school system here involved comprises the urban area of Charlotte, North Carolina, as well as the more rural Mecklenburg County. The system serves approximately 82,500 students, of whom about 23,200 are black and 59,300 are white (123a–128a), attending 106 schools. This school district has been in desegregation litigation since 1965.

The issue raised by the plaintiffs' petition relates primarily to nine elementary schools attended by about one-half of the black elementary students, who reside in the urban area in the northwest quadrant of Charlotte. The plan proposed in the district court by the school board, while fully desegregating some other all-Negro schools, would have resulted in virtually all-Negro student bodies in these nine schools. That plan, relying solely on geographic zoning and based on the premise that no Negro school should be desegregated unless it could be at least 60 percent white, was rejected by the district court—a decision approved by the Fourth Circuit. The district court approved a plan, drawn by an educational expert recommended by the plaintiffs, based on the premise that there should be no Negro-majority schools in the entire system. The plan used the technique of noncontiguous pairing or "satellite" zoning so that black schools in northwest Charlotte would be paired with predominately white schools in suburban areas.

The court of appeals affirmed as to the high schools and junior high schools and disapproved the elementary school plan. It held:

> first, that not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race. * * * [189a]

The court approved such techniques for achieving desegregation as rezoning, "pairing, grouping, clustering, and satellite zoning" (198a) but held that the elementary school plan required by the district court was beyond constitutional requirements and inappropriate in the circumstances of this case.

Accordingly, inasmuch as implementation of all parts of the district court-approved plan had been stayed (135a, 177a) and the 1969–1970 school year was at an end, the court of appeals remanded the case with instructions to require, on an expedited schedule, the formulation of additional alternative plans for elementary schools. On remand, the Fourth Circuit suggested, "the district court should direct the school board to consult experts from the Office of Education of the Department of Health, Education, and Welfare

and to explore every method of desegregation, including rezoning with or without satellites, pairing, grouping, and school consolidation" (199a). The board is to submit a new plan by June 30, 1970 (200a).

DISCUSSION

While we believe that the court of appeals was correct in its formulation of the school board's obligation, we agree with the petitioners that this case presents issues of national importance requiring resolution by this Court. But we think that, in the posture of this case, determination of the merits by this Court is not appropriate at this time.

As the court of appeals noted, "Similar segregation occurs in many other cities throughout the nation, and constitutional principles dealing with it should be applied nationally" (188a). The question of the appropriate remedial standard for school districts covering large urban areas is now being presented to a number of appellate courts. Cases have recently been decided or are now pending involving Orlando and Tampa, Florida; Mobile, Alabama; Houston, Texas; Jackson, Mississippi; Little Rock, Arkansas; Oklahoma City and Tulsa, Oklahoma; Norfolk, Virginia; Alexandria, Louisiana; Memphis, Tennessee; and Cincinnati, Ohio, among others. Appellate decisions to date have not uniformly adopted a single remedial standard; and the issues as framed by the petitioners would ask this Court to address some of the questions posed by Mr. Chief Justice Burger

concurring in *Northcross* v. *Board of Education,* 397 U.S. 232, 237.

The issue here focuses on the appropriate remedies for school segregation in the context of an urban school district characterized by racial residential segregation. In view of the large number of students who would continue to attend virtually all-Negro schools under the school board's plan and the board's quite artificial limitations on that plan, namely, that no technique but rezoning would be used and that no integrated school should be less than 60 percent white, both of the courts below held that the school board's plan was not an adequate remedy. We fully agree with that conclusion.

The court of appeals declined, however, to endorse as to elementary schools the alternative plan adopted by the district court. To be sure, district courts have wide discretion in formulating appropriate remedies in school-desegregation cases. See, *e.g., Brown* v. *Board of Education,* 349 U.S. 294, 299–300; *United States* v. *Montgomery County Board of Education,* 395 U.S. 225; *Green* v. *County School Board,* 391 U.S. 430, 438 n. 4, 439, 442 n. 6; *Griffin* v. *School Board,* 377 U.S. 218, 232–234; cf. *Carter* v. *Jury Commission,* 396 U.S. 320, 336–337; *Turner* v. *Fouche,* 396 U.S. 346, 355. Indeed, this Court has authorized requiring implementation of educator-devised desegregation plans although recognizing that the particular plans were not the exclusive means of satis-

fying constitutional mandates. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290. But holding that, "if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation * * * should not void an otherwise exemplary plan for the creation of a unitary school system" (190a), the Fourth Circuit, in effect, remanded the case to determine whether, in view of HEW alternatives,[1] remaining segregation could be eliminated by a more limited use of the available techniques. In its remand, the court of appeals did not direct, as had the district court (116a), that all schools must be majority white. For that reason, the plaintiffs seek review by this Court.

Yet, because of the importance of the question, we think the record in this case should be supplemented before this Court decides the issue. New plans will be filed in the district court by June 30, 1970. It can be anticipated that those submissions will be the subject of an evidentiary hearing held on an expedited basis and will be accorded full consideration by the district court and perhaps also the court of appeals. Those plans, in conjunction with the plans already in the record, will no doubt reflect the full range of possibilities available to desegregate this school district. Ac-

[1] Cf., *e.g.*, *Alexander* v. *Holmes County Board of Education*, *supra*; *Carter* v. *West Feliciana Parish School Board*, *supra*, at 291–293 (Harlan, J., concurring). *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (C.A. 5) (en banc) (per curiam); *Clark* v. *Board of Education of the Little Rock School District*, No. 19,795 (C.A. 8, May 13, 1970) (en banc).

cordingly, the plans may provide the indispensable context in which to review the Fourth Circuit's rule that "school boards must use all reasonable means to integrate the schools in their jurisdiction" (189a). It would seem inadvisable to resolve the issues of this significant case only in the abstract and without the benefit of a complete record (cf. *Northcross* v. *Board of Education, supra*), and we, therefore, suggest that plenary consideration of the merits of the case by this Court would be premature at this time.

Although we believe, as previously explained, that the court of appeals' order remanding the case for further proceedings in conformity with its opinion was proper, we recognize that the district court's decree constituted one means of accomplishing a unitary school system in the respondent district. Consequently, in accordance with this Court's opinion in *Alexander* v. *Holmes County Board of Education, supra,* that decree might well remain in effect until replaced by a modified decree also establishing a unitary system, even though there appears to be ample time for the formulation of such a modified decree prior to the re-opening of school.

We suggest, therefore, that the petition for a writ of certiorari should be granted, and that the judgment of the court of appeals should be left undisturbed insofar as it remands the case to the district court for further proceedings but that the district court's prior judgment should remain in effect pending those proceedings. In the alternative, if this Court should decide to grant plenary review at this time, we suggest

that it direct the filing with the Clerk of this Court of all plans, pleadings, proceedings, findings of fact, and conclusions of law from the district court.

Respectfully submitted.

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JUNE 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1718~~ 281

JAMES E. SWANN, et al., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents*

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

In Support of the Motion to Advance and the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

and

BRIEF AMICI CURIAE

for the United Negro College Fund, Inc., the National Urban Coalition, the League of Women Voters of the United States, the League of Women Voters of the State of North Carolina, the League of Women Voters of Charlotte-Mecklenburg, North Carolina, the Mississippi Educational Resources Center, the Harvard Center for Law and Education and the Washington Research Project of the Southern Center for Studies in Public Policy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

JAMES E. SWANN, et al., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents*

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF THE MOTION TO ADVANCE AND THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The following organizations—the United Negro College Fund, Inc., the National Urban Coalition, the League of Women Voters of the United States, the League of Women Voters of the State of North

Carolina, and the League of Women Voters of Charlotte-Mecklenburg, North Carolina, the Mississippi Educational Resources Center, the Harvard Center for Law and Education, and the Washington Research Project of the Southern Center for Studies in Public Policy—hereby move pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief *amici curiae* in the above-entitled cause. Petitioners have consented to the filing.[1] Consent has not been granted by the respondents.

The United Negro College Fund, Inc., is an organization consisting of 34 member colleges, all but one of them in the South, which was established in 1943 to raise funds and provide other assistance to member colleges. The Fund and its members have an important and direct interest in assuring that elementary and secondary school students are well prepared for college and thus have a continuing concern about the persistence of segregated public schools.

The National Urban Coalition is an organization whose purpose is to improve opportunities and conditions of life for citizens living in urban areas of the nation. Founded in 1967, it has 47 affiliated local coalitions and representation from corporations, unions, religious, and civil rights organizations. The improvement of educational opportunity is among its prime purposes and to that end it has sponsored educational research and participated as *amicus curiae* in a case involving the equal distribution of educational resources.

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[1] The written consent of the petitioners has been filed with the Clerk.

The League of Women Voters of the United States, the League of Women Voters of North Carolina, and the League of Women Voters of Charlotte-Mecklenburg, North Carolina, are three organizations with common aims and principles but with independent decision-making powers. Founded in 1920, the national League now has 156,000 members in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. As part of its overall program of encouraging informed and active participation of citizens in government, the national League has placed major emphasis upon the quality of public education and in 1970 reaffirmed its pledge to support efforts to end racial discrimination in education. The North Carolina and Charlotte-Mecklenburg Leagues have conducted studies of the quality of educational opportunity in their respective areas. Like the national League, they are committed to work for equality of opportunity in education.

The Mississippi Educational Resources Center is a private organization established in 1969 to represent professional, parent, and community groups throughout the State of Mississippi. Its membership is predominantly black. Its purpose is to assist communities and school districts in overcoming problems incident to the school desegregation process and to assure that desegregation takes place and in an orderly and positive manner.

The Harvard Center for Law and Education is an educational institution established in 1969 by Harvard University and the United States Office of Economic Opportunity to "promote reform in American education by working in the area of social policy and law." To carry out its aims, the Center has sponsored and

conducted research on various aspects of the educational process. It has also served as *amicus curiae* in several cases involving issues within the area of its expertise.

The Washington Research Project, established in 1968, is a research organization located in Washington, D. C., and affiliated with the Southern Center for Studies in Public Policy of Clark College in Atlanta, Georgia. The principal aim of the project is to assist in the establishment of equality of opportunity for all citizens through negotiation and monitoring of administrative agency programs and litigation. It is deeply concerned with educational issues, particularly with alleviating the continuing effects of racial discrimination in public schools. It has conducted a study of the impact of Federal aid to education programs on minority children and maintains a continuing effort to monitor such programs to ensure that they are conducted without discrimination.

Each of the movant organizations consists of black and white citizens. While their activities vary, all are bound together by a common commitment to strengthen public education in this country and to work for an end to racial segregation in the schools. All of the movant organizations, moreover, share a common commitment to the maintenance of the Rule of Law in this nation. They believe that the Rule of Law is threatened by continuing violations of the rights of Negro school children declared by this Court in 1954.

Movant organizations seek leave to enter this case for the purpose of supporting fully the position of the petitioners. Movants believe, however, that—by virtue of their breadth, their special interest in education and

the scope of their activities in conducting and sponsoring research on issues of education and civil rights and in evaluating the progress of school desegregation under Federal civil rights laws—they are well equipped to inform the Court with respect to issues which may not otherwise be fully explored by the parties. Specifically, movant organizations believe that they can provide information as to the impact that the decision of the court below may have upon the process of school desegregation throughout the nation and as to the educational impact upon children of the various forms of relief that are in issue in this case.

Accordingly, movant organizations respectfully request that the Court grant leave to file the attached brief *amici curiae* and that the Court consider their brief together with the petition for writ of certiorari, the petitioners' motion to advance, and with other papers in the case.

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Dated: June 23, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

JAMES E. SWANN, et al., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents*

BRIEF AMICI CURIAE

for the United Negro College Fund, Inc., the National Urban Coalition, the League of Women Voters of the United States, the League of Women Voters of the State of North Carolina, the League of Women Voters of Charlotte-Mecklenburg, North Carolina, the Mississippi Educational Resources Center, the Harvard Center for Law and Education and the Washington Research Project of the Southern Center for Studies in Public Policy.

I.

INTEREST OF AMICI

Amici, as is more fully set forth in the Motion for Leave to File a Brief Amici, are all organizations with a deep interest in maintaining and improving the quality of education available to children of all

races. As a part of this interest, they have all committed themselves to work for the elimination of racial segregation and other forms of discrimination in education.

Several amici have conducted or sponsored research on problems of establishing equal educational opportunity. Others have supported and appeared in litigation involving the public schools and discrimination. Still others have undertaken to work for the full and fair enforcement of civil rights laws by Executive departments and agencies of the Federal Government.

All have a commitment to the maintenance of the Rule of Law and a deep concern about the continuing denial of constitutional rights of black school children.

II.

SUMMARY OF ARGUMENT

This is a case of crucial importance. Only a prompt hearing and disposition of the case can prevent harm from being done to thousands of black students in many areas of the nation. Unless such action is taken, when schools open in the fall these students will be assigned to segregated schools pursuant to the erroneous decision of the court below.

The refusal of the court below to sustain a workable plan for desegregating the schools of Charlotte-Mecklenburg denied the constitutional rights of petitioners. The ruling conflicts with the decision of this Court in *Brown* v. *Board of Education* and other cases. In holding that a school board must do only what is "reasonable" rather than what is necessary to desegregate the schools, the court below created a new loophole, one which would allow the rights of many black children

to be indefinitely deferred or denied completely. Even if a "reasonableness" test were permissible, the district court plan was by any standard "reasonable." It promised to remedy the harm now being inflicted on black children in segregated schools without causing harm to any child in the Charlotte-Mecklenburg school system. The alternatives to desegregation suggested by the court below would allow harm to continue to be inflicted on petitioners.

III.

ARGUMENT

A. This case must be expedited to prevent irreparable harm to petitioners and to thousands of black children in other school districts.

The holding of the court below violates the rights of petitioners and requires the earliest reversal in order to prevent the assignment of thousands of black children this fall to segregated schools in violation of the Fourteenth Amendment. Expedited action by this Court is essential to avoid massive confusion and inconsistency among desegregating districts and among various agencies enforcing school desegregation as to standards permissible under the Fourteenth Amendment.

Three times since *Brown* v. *Board of Education,* 347 U.S. 483, this Court advanced hearings or otherwise accelerated disposition of school desegregation cases to prevent circumvention or delay in vindicating the constitutional rights of black school children. *Aaron* v. *Cooper,* 358 U.S. 27; *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19; *Carter* v. *W. Felici-*

ana Parish School Board, 396 U.S. 290.[1] Amici submit that the instant case is of equal importance and warrants the earliest possible decision to avoid still further delay of a desegregated education to black school children denied rights over sixteen years.

The "reasonable means" test promulgated by the court below permits school boards to continue to assign black children to all-black, or virtually all-black, schools even where it is undisputed that such segregation resulted from official public action. Such a test portends grave consequences for school desegregation this fall and hereafter. We agree with Judge Sobeloff that:

> "Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not 'reasonably' eradicable." (Plaintiffs' App., at p. 212a)

That this new rule of reasonableness is nothing more than a "new loophole" and "catapults us back" to a time when "good-faith" rather than concrete desegregation was considered the appropriate test of compli-

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[1] In *Aaron* v. *Cooper, supra,* it was necessary for the Court to convene a Special Term during the summer recess to hear and decide the case. Other cases in which hearings have been advanced under Rule 43(4) include *United Steel Workers* v. *United States,* 361 U.S. 878; *Hannah* v. *Larche,* 361 U.S. 910, 363 U.S. 420; *Power Authority* v. *Tuscarora Indian Nation,* 360 U.S. 915, 361 U.S. 892, 362 U.S. 99; *Lurk* v. *United States,* 365 U.S. 832, 366 U.S. 712; *Katzenbach* v. *McClung,* 379 U.S. 294; *Williams* v. *Rhodes,* 393 U.S. 23.

ance seems clear (p. 213a). And to permit this decision to stand will undercut the slow progress already made, will result in further litigation and confusion, and will delay still more the endlessly delayed rights of thousands of black children to a desegregated education now. We can think of little that is "reasonable" in denying or delaying complete desegregation after sixteen years.

Hundreds of school desegregation cases are now pending in various stages of negotiation and enforcement proceedings at the Department of Health, Education and Welfare (hereinafter HEW) and in the courts.[2] The United States, which urged a position similar to that adopted by the court below, can be expected to urge similar positions in its administrative proceedings and has already begun to do so.

Several of these pending administrative cases illustrate the importance of early consideration and reversal by this Court. In Richland School District, Columbia, South Carolina,[3] HEW considered desegregation plans

[2] As of May 28, 1970, 205 school districts were involved in HEW compliance proceedings, 61 of which had undergone fund cutoffs for noncompliance. [These were all cases exclusive of those pending in the courts.] Forty-two involved districts which had received a notice of intention to initiate formal enforcement procedures; hearings had been conducted in 37 cases; in 12 a decision of noncompliance had been rendered following a hearing or default proceeding; 32 districts had an appeal pending before a reviewing authority; 19 districts had been found not to be in compliance by the reviewing authority; one had a report of the final decision filed with Congressional committees (61 had completed Title VI appeal procedures and had had their funds terminated in previous years). In addition to these 205 cases, at least 80 others were in pre-enforcement negotiations.

[3] HEW Docket No. CR 589.

for a district of 40,122 pupils, 53.3 percent of them white and 46.7 percent black. The Reviewing Authority decision of February 25, 1970, reversed a determination of the hearing examiner approving the plan filed by the school board, pointing out that there were available alternatives that were more effective. On June 5, 1970, after the decision by the court below, the Director of HEW's Office for Civil Rights reversed the Reviewing Authority and reinstated the school board's plan, which permitted 15 of the 43 elementary schools to remain more than 80 percent black and 11 schools to remain more than 80 percent white. While these segregated schools could have been eliminated by some busing, the approved school board plan excluded busing except in a few cases to relieve overcrowding.

There is grave danger of similar results being reached in other cases. A Title IV plan was submitted March 24, 1969, in Newport News, Virginia,[4] for a district of 31,138 students, 64 percent white and 36 percent black. The plan, involving pairing of schools, would have reduced the proportion of black students at two virtually all-black high schools and two virtually all-black junior high schools to 50 percent at each high school and 48 percent and 55 percent at the two junior high schools. The school board objected that the plan required "involuntary" busing and was therefore "unreasonable." The case is now pending before the HEW Reviewing Authority where, as matters now stand, it is likely to be decided under the broad "reasonableness" standard in the instant case.

In Raleigh, North Carolina,[5] a recent decision of the

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[4] HEW Docket No. CR 669.

[5] HEW Docket No. CR 612.

Reviewing Authority refused to accept a plan which provided no busing and under which only 22 percent of the black students attended integrated schools. This decision is now subject to challenge on grounds that alternative plans involving busing would be "unreasonable." The Austin, Texas[6] school district serves 52,724 students, 65 percent white, 19 percent Mexican-American, and 16 percent black. Of the 70 schools in operation, 9 are more than 94 percent black. HEW's Title IV plan permits four elementary schools to continue a combined black and Mexican-American population of more than 94 percent. The government's brief in the HEW proceeding, at p. 8, stated that "the [Title IV] team operated under guidelines which prevented them from making any recommendations which would require busing across town in order to desegregate the Negro schools." This case is now pending before a hearing examiner and in present circumstances may well be influenced by the decision in Charlotte-Mecklenburg.

The decision of the court below is also likely to influence pending judicial proceedings. In *Beckett* v. *School Board of Norfolk,* 308 F. Supp. 1274 (E.D. Va. 1969) an appeal has been taken from a decision permitting the continuation of a substantial number of all-black schools. In oral argument before the Fourth Circuit sitting *en banc* on June 5, 1970, attorneys for the United States stated that in light of the "reasonable means" test in Charlotte-Mecklenburg, the government would no longer insist on the plan for desegregation it had previously urged.

While amici do not wish to prejudge the outcome of these cases, we cannot ignore the already clear im-

[6] HEW Docket No. CR 902.

pact of Charlotte-Mecklenburg on these other pending cases, and on the rights of black children in those districts.

If, as we believe, the "reasonable means" standard is unconstitutional, this will mean that as long as the decision stands unreversed, plans will be approved that unconstitutionally assign many thousands of black children to segregated schools. And if such plans are put into effect in the fall it will undoubtedly require all or the greater part of the school year 1970-1971 or longer to undo the harm done.

B. The refusal of the court below to sustain a district court decision eliminating segregated schools denied petitioners their constitutional rights.

1. The decision of the court below that school boards may lawfully continue to operate *de jure* segregated schools indefinitely conflicts with previous decisions of this Court.

This is not a case of *de facto* segregation. This is a case of segregated public schools continuing sixteen years after *Brown, supra,* directly as a result of discriminatory governmental action.[7] This is a case where it is possible to completely disestablish segregated

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[7] The district court found that segregation in the public schools resulted from policies of the respondent school board and other governmental officials who helped establish patterns of residential segregation. The policies of school officials included the selection of school sites in a manner which perpetuated racial segregation. Actions of other government officials included judicial enforcement of racially restrictive covenants until ruled unconstitutional in *Shelley* v. *Kraemer,* 334 U.S. 1, discriminatory implementation of zoning ordinances in white and black residential areas, and discriminatory relocation of citizens through urban renewal programs. (pp. 13a-14a, 86a-87a)

schools and provide every school child a desegregated education.[8]

Despite these clear facts and the circuit court's explicit adoption of the findings of the district court of these facts, it nevertheless concludes "that not every school in a unitary system need be integrated" (p. 189a). This is in patent error and violates standards for school desegregation established by this Court in *Green* v. *County School Board of New Kent County, Va.*, 391 U.S. 430, 437-38 (1968), where this Court unanimously declared that school boards were "clearly charged with the affirmative duty to take *whatever steps may be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch" (emphasis added). See also *United States* v. *Montgomery County Board of Education*, 395 U.S. 225, 230 (1969). Both cases expressed a concern that no schools be racially identifiable.[9]

The holding of the court below cannot be squared with these decisions.

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[8] The opinion of the court below indicates that the plan prepared by Dr. Finger, an expert appointed by the district court, and which was adopted by the district court would eliminate all segregated schools. Judge Sobeloff found that:

> "The plan ordered by the district court works. It does the job of desegregating the schools completely . . . The point has been perceived by the counsel for the Board, who have candidly informed us that if the job must be done then the Finger plan is the way to do it." (p. 204a)

[9] And in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969), this Court stated bluntly:

> "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter *only unitary schools*" (emphasis added).

2. The constitutional rights of petitioners cannot be conditioned upon a "reasonable means test."

We can conceive of little, if anything, that is "reasonable," which after sixteen years denies or further delays the Fourteenth Amendment rights of black school children. Nor can we square the rights of each individual black child to a desegregated education with a result that leaves some of them—be it 100 or 10,000—in segregated black schools under a guise of reasonableness. As to them, is the Constitution not to apply?

This "rule of reason" contravenes the mandate in *Green, supra,* that imposes upon school boards the duty to take whatever steps are necessary to establish a unitary system eliminating racial discrimination *"root and branch,"* 391 U.S. 430, 438 (emphasis added). There were no qualifications placed on this mandate. It is no excuse that "vindication of these rights was rendered difficult or impossible by actions of other state officials," *Cooper* v. *Aaron,* 358 U.S. 1, 16. And, indeed, the discriminatory action of other government officials does not prevent the school board from fulfilling its duties under *Green.*

We have had "all deliberate speed" and "good faith" for sixteen years. These doctrines have been used by school boards to evade, delay and deny black children constitutional rights.[10] To be faced in 1970 with a

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[10] Indeed, this Court formally disapproved the standard of "all deliberate speed" in *Alexander* for precisely this reason. *Cf.* the opinion of Mr. Justice Black on application to vacate the 5th Circuit's order in *Alexander,* 90 S.Ct. 14 (1969):

> " 'All deliberate speed' has turned out to be only a soft euphemism for delay."

Earlier in his opinion, he stressed the danger of the vagueness in such a standard:

new and undefined doctrine of "reasonableness" can only portend another decade of litigation, evasion, delay and denial of vital rights protected by the Constitution. This is impermissible where such important rights are at stake.

The court below mistakes the duty of the school board and offers the board such broad discretion as to violate Fourteenth Amendment rights. In its only effort to supply a standard for the doctrine of reasonableness, the court said:

> "The board should view busing for integration in the light that it views busing for other legitimate improvements, such as school consolidation and the location of new schools" (p. 194a).

This is clearly erroneous. The demands of the Constitution cannot be relegated to the same level as other educational improvements which, while desirable, are not constitutionally required.

> "Federal courts have ever since [*Brown II*] struggled with the phrase 'all deliberate speed.' Unfortunately this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated."

Id.

It is instructive that these opinions were written in 1969. As early as 1964, this Court had disapproved the phrase:

> "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia."

Griffin v. *County School Board of Prince Edward County*, 377 U.S. 218, 234 (1964). In 1968, this Court stated again, in *Green*, 391 U. S. at 438, that "[t]he time for mere 'deliberate speed' has run out."

3. Even if the Constitution permits a "reasonable means" test, the court below erred in rejecting as unreasonable a sound desegregation plan approved by the district court and adopting a plan perpetuating segregated schools.

This is not a case involving arbitrary and unreasonable action by a district court. This is not a case involving a hastily drafted or ineffective desegregation plan but one developed by the district court after much deliberation with the help of an expert in consultation with the school board. This is not a case of a school district unable to comply with the district court's plan. Nowhere is this contended. This is a case where the school district has had every possible opportunity to comply with *Brown, supra,* and *Green, supra.* This is a case where the school district took no action to desegregate between 1954 and 1965, took in adequate action in 1965 and then in 1969 and 1970 failed to submit an acceptable plan after ten months and four opportunities to do so (ftn. 9, p. 213a). This is a case of a school board seeking to do the minimum to comply when alternative and more effective means exist to fully and constitutionally comply with this Court's mandates.

We believe that the constitutional duty of a school board is not simply to use "reasonable means" but to do whatever is necessary to convert a dual school system into a unitary one. But, assuming *arguendo,* that it was not inappropriate for the court below to employ such a standard, the judgment requires reversal because (a) the plan approved by the district court did not exceed the bounds of "reasonableness" and (b) respondents did not meet the burden of proof required

of a school board that seeks to overturn an effective school desegregation plan.

a. Under the school board's plan, more than half of the black elementary school students in Charlotte-Mecklenburg would be assigned to schools 86 per cent to 100 per cent black and about half of the white elementary school students would be assigned to schools 86 per cent to 100 per cent white. Under the district court's plan, the racial composition of all elementary schools would range from 9 per cent to 38 per cent black (p. 191a). The court-approved plan required busing of 13,300 additional students, 8,000 more than under the school board's plan (p. 191a).

To conclude properly that the court-approved plan was "unreasonable" the court below would have to show more harm to black and white children as a result of busing than that suffered by black children who would otherwise remain in segregated schools. In fact, the court was not able to find that children would suffer *any* harm as a result of busing.

Instead, the court below attempted to judge the approved plan in light of factors which it did not relate to impact upon school children, e.g., the amount of busing, its cost in relation to the board's resources, the age of the pupils involved and distance and time (p. 194a). But here, "unreasonableness" is not shown with respect to any of these factors. Judge Sobeloff concluded that "distance and time will be comparatively short, the effect on traffic is undemonstrated, the incremental cost is marginal" (p. 210a).[11]

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[11] The 13,300 additional children to be bused when added to the 23,600 already bused would mean total busing of 47 per cent of the school population, far less than the 55 per cent average proportion

In sum, the record makes no showing that the busing under the district court's plan is unreasonable in light of national, state, or local practices of busing or will harm pupils in any way. Nor does the record show undue burden to the school board in implementing the district court's plan.

b. In *Green,* this Court held that the availability of a plan that promises to be more effective than another plan "places a heavy burden upon the board to explain its preference for an apparently less effective method." 391 U.S. at 439. And in *Montgomery County,* 395 U.S. 225 (1969), and *Carter* v. *W. Feliciana Parish School Board,* 396 U.S. 290 (1970), this Court reversed decisions by courts of appeals which had imposed desegregation requirements which were less stringent than

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of pupils now being bused to schools in North Carolina (p. 211a).

The court below accepted the findings of the district court as to transportation costs which, as Judge Winter pointed out in his dissent, would amount to less than 1.2 per cent of the respondent board's total budget when operating and capital costs are combined (p. 221a). In fact, the district court's estimate of 138 buses required under its plan was also adopted by the court below (pp. 191a, 194a) and exceeded the school board's estimate of 104. The average one-way trip for elementary students bused under the court-approved plan would be less than seven miles and 35 minutes (p. 207a), compared with an average one-way trip of 15 miles and one hour and fourteen minutes for students now being bused in Charlotte-Mecklenburg (p. 207a) and an average roundtrip of 24 miles for all students now bused in North Carolina (p. 194a). The court below made no findings as to the age of children to be bused or as to the impact upon traffic but it appears from the record that substantial numbers of elementary school students are already being bused in Charlotte-Mecklenburg (pp. 210a-211a) and that the possibility that the court-approved plan would cause a problem of traffic congestion is negligible (pp. 206a-207a).

those in plans available.[12] And in *Carter,* Mr. Justice Harlan, in a concurring opinion joined by Mr. Justice White, stated that school districts must demonstrate "beyond question" the unworkability of an effect proposal, 396 U.S. 290, 292. In addition, while the court below properly limited its power of review to factual questions it found "clearly erroneous" (p. 194a), it improperly rejected the district court's determination as to the burden of compliance. In *Brown II,* 349 U.S. at 299, primary responsibility for implementing school desegregation decrees is placed in the district courts. And recently in *Northcross* v. *Board of Education of Memphis, Tennessee,* 397 U.S. 232, the court of appeals was held in error for substituting its findings for that of the district court as to whether a dual school system had been effectively dismantled when the district court's findings were "supported by substantial evidence."

Under the facts of this case and in light of the District Judge's careful findings supported by the record, and this Court's previous decisions, the court below must be reversed.

C. The harm suffered by black children in segregated schools cannot be vitiated by steps short of integration.

The arguments preceding are sufficient to warrant the granting of the relief sought by petitioners. It is not necessary to argue the harm that will be suffered by the black children in the Charlotte-Mecklenburg school district who under the decision of the court below will

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[12] In *Montgomery County,* the more effective plan had, as here, been adopted by the district court. In *Alexander* and *Carter,* the U.S. Department of Health, Education and Welfare had prepared the plans.

continue to attend segregated schools. That issue w
settled in *Brown* v. *Board of Education,* 347 U.S. 4
494 where this Court concluded:

> "To separate them [Negro children in grade a
> high school] from others of similar age and qua
> fications solely because of their race generates
> feeling of inferiority as to their status in the co
> munity that may affect their hearts and minds
> a way unlikely ever to be undone."

The court below did not dispute the applicability
this conclusion in *Brown* to the instant case, and
deed in upholding the determination of the distr
court that the segregation was of a *de jure* charac
it implicitly acknowledged that the findings of *Bro*
applied here. Nevertheless, the court strongly impli
that the harm suffered by the black children in seg
gated schools could be vitiated by remedies other th
total desegregation. Specifically, the court reco
mended that the defendants (1) employ "spec
classes, functions and programs on an integrate
basis, and (2) ensure "that pupils who are assigned
black schools for a portion of their school careers" a
assigned to integrated schools as they progress to high
grades.[13]

There was, however, no evidence to support a co
clusion that either of these steps, whether taken sing
or together, will prevent or undo the harm that bla
children suffer in segregated schools. In fact, ava

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[13] The only other alternative suggested by the court was a
jority to minority transfer plan which allowed free volunt
transfer of blacks "to any school in which their race is a mino
if space is available." An identical provision had not worked
fore in Charlotte-Mecklenburg, and there is no reason to believ
can now have any meaningful impact.

able research on this issue leads to a contrary conclusion—that black children will continue to suffer harm so long as they are assigned to segregated schools, even if they are permitted to participate in special interracial programs and even if part of their educational experience is in integrated schools.

The fashioning of special programs, functions and classes conducted on an integrated basis for children who attend segregated schools is not a new technique. It has been tried before, usually as an aspect of compensatory programs designed to improve the quality of education for disadvantaged children. Generally, the effort is made to broaden the horizons of poor children by giving them access to activities not ordinarily within their reach—activities such as short-term exchanges of teachers and students between schools and visits and field trips to concerts and museums. In its Report on Racial Isolation in the Public Schools in 1967, the United States Commission on Civil Rights examined the results of compensatory programs and concluded that:

> "Evaluations of programs of compensatory education conducted in schools that are isolated by race and social class suggest that these programs have not had lasting effects in improving the achievement of the students. The evidence indicates that Negro children attending desegregated schools that do not have compensatory education programs perform better than Negro children in racially isolated schools with such programs." [14]

A more recent comprehensive report summarizing evaluations of compensatory programs, prepared by the New York State Education Department, reached

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[14] Racial Isolation in the Public Schools (1967) at 205.

similar conclusions. It found that the programs "failed to show any real promise in reducing the intellectual and achievement deficits of disadvantaged children" and that in contrast comparative studies "showed integration to be superior." [15] Indeed, temporary or *ad hoc* arrangements to provide some interracial contact between students attending segregated schools may even have a counterproductive effect. The U.S. Civil Rights Commission Report noted:

> "Indeed, in one community the Commission was told that the contrasts afforded by inter-school trips between white and Negro students under compensatory programs heightened the sense of inferiority felt by the Negro students." [16]

The second alternative step put forward by the court below is the assurance that children who are assigned to segregated schools will attend integrated schools at some point in their career. In practice this means that the substantial number of black children who would attend segregated elementary schools (more than half of all black children under the respondents' plan) would then go on to integrated junior and senior high schools. Black students who attend the segregated junior high schools presumably would be assured an integrated high school experience.

It is clear, however, that the harm inflicted upon Negro children in segregated elementary schools is not undone by providing integrated schooling later on. In its Racial Isolation Report, the U.S. Commission on

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[15] Racial and Social Class Isolation in the Schools, A Report to the Board of Regents of the University of the State of New York (1969) at 374.

[16] Racial Isolation in the Public Schools (1967) at 138.

Civil Rights examined the cumulative effects of segregation and desegregation upon student attitudes and achievement. Employing data compiled by a major survey conducted by the United States Office of Education, the report noted that the average grade-level performance for 9th grade Negro students was consistently higher when their earliest grade of attendance in desegregated schools was the 1st, 2nd or 3rd grade than when it was later.[17] The Commission concluded:

> "Both the academic performance and attitudes of Negro students, then, are affected by the duration of their school contact with whites. Students whose first contact with whites was late in elementary or early in secondary schools are at a distinct disadvantage when compared with Negroes who have had school contact with whites since the early grades."[18]

The fact that all of the available research demonstrates that the alternative steps proposed by the court will not undo the harm caused by segregation underscores the incorrectness of its decision and the danger to black children in the adoption of loose standards of "reasonableness" that permit something less than prompt and complete compliance.

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[17] Racial Isolation in the Public Schools (1967) at 106-108. The Office of Education survey itself made a similar finding—that pupils who first entered integrated schools in the early grades recorded consistently higher scores than other groups. Office of Education, U. S. Department of Health, Education and Welfare, Equality of Educational Opportunity (1966) at 20, 32.

[18] Racial Isolation in the Public Schools at 108.

IV.

CONCLUSION

Prompt action is needed in this case if irreparable harm is not to be inflicted on petitioners and thousands of other black children. The decision below cannot stand because it allows school boards to continue to segregate schools merely because an effective remedy might cause some burden or inconvenience.

It would be tragic irony, if, after years of massive resistance, evasion, and delay the rights of black children were now denied or further delayed on grounds that ending segregation is "unreasonable."

Amici believe that under the authority of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, a stay of the order of the Court below would be appropriate relief. But neither a stay nor the injunction *pendente lite* sought by petitioners would be an adequate substitute for an expedited hearing and disposition of the case. Only a prompt decision of this case on the merits can avert harm to thousands of black children in other districts.

Accordingly, amici urge that the Court grant the petition for writ of certiorari, and petitioners' motion to advance during the current term or if need be during such special or extended terms as may be convenient.

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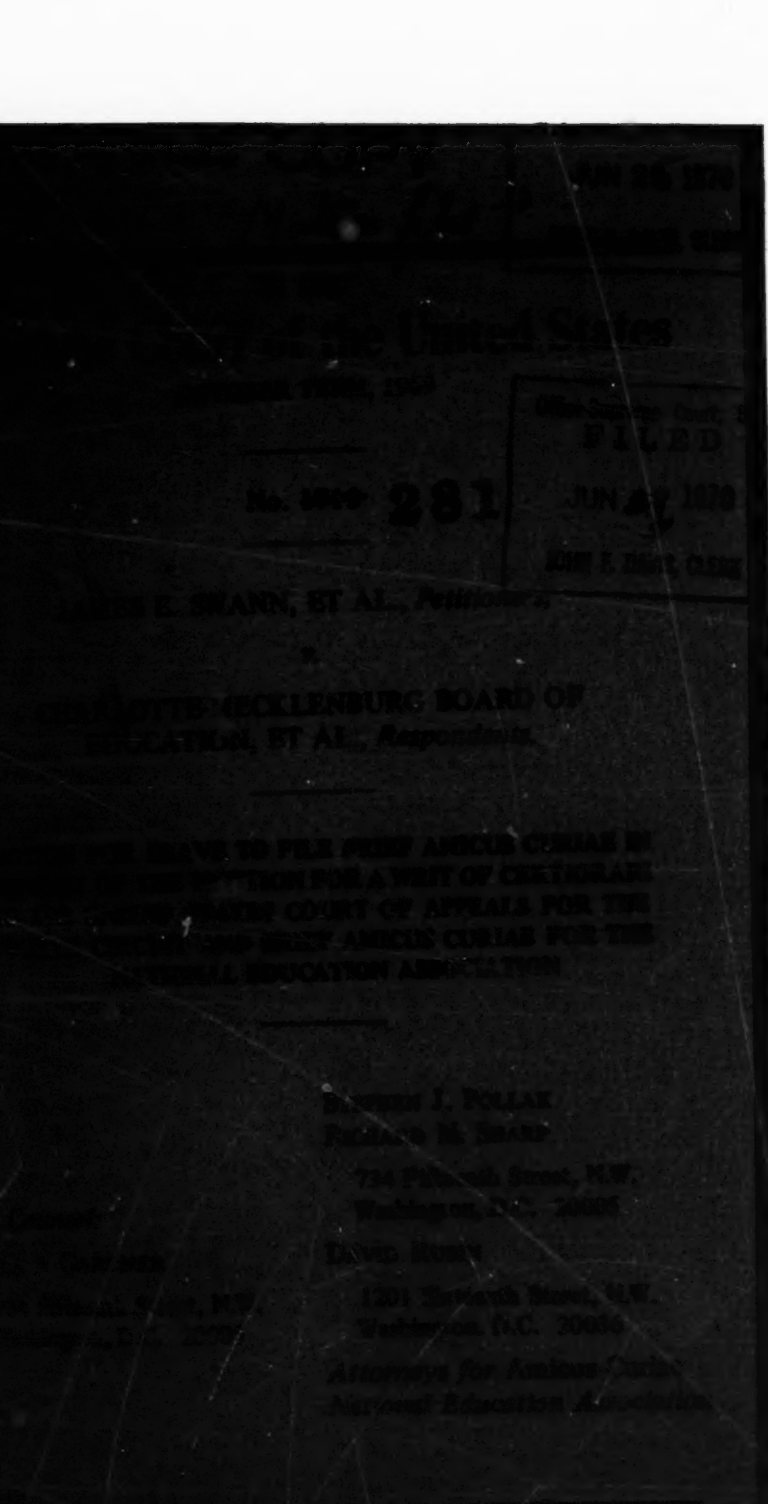


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1713

JAMES E. SWANN, ET AL., *Petitioners,*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents.*

MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The National Education Association hereby moves, pursuant to Rule 42 of the Rules of the Supreme Court, for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari filed June 18, 1970, in behalf of James E. Swann, et al., in the above-entitled cause. Consent to the filing of the brief has been sought from the petitioners and from the Charlotte-Mecklenburg Board of Education and members thereof, respondents. Petitioners have consented.[1] No response has been received to date to the requests made of the Charlotte-Mecklenburg Board of Education and the members of the Board.

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[1]The written consent of the petitioners has been filed with the Clerk.

The National Education Association (hereinafter NEA) is an independent, voluntary organization of educators open to all professional teachers, supervisors and administrators. It presently has over one million regular members, and is the largest professional organization in the world. NEA was first organized in 1857 and was chartered by a special act of Congress in 1906. Its statutory purpose is (34 Stat. 805)–

> to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States.

The overall policies of NEA are determined by its Representative Assembly, a body composed of approximately 7,000 delegates representing affiliated local and state education associations.

NEA has conducted detailed studies of the educational implications of the maintenance of dual school systems based upon race. It has long been committed to the principle that racial segregation in education adversely affects the quality of the education received by both black and white students. Reflecting this position, the Representative Assembly at the June 1969 Convention adopted a formal continuing resolution providing, in part (NEA Handbook 1969-70, p. 66):

> The Association endorses the decision of the U.S. Supreme Court in Brown v. Board of Education and urges compliance with subsequent federal laws and regulations in this area . . . .

On March 20, 1970, the Executive Committee of the Association adopted a more specific resolution on desegregation in the public schools and recommended it to the Board of Directors and the 1970 Representative Assembly:

> The NEA believes it is imperative that desegregation of the nation's schools be effective. Policies and guideline statements for school desegregation in all parts of the nation must be strengthened and must comply with *Brown v. Board of Education* and subsequent judicial decisions and with civil rights legislation and decisions.

> The Association recognizes that acceptable desegregation plans will include a variety of devices such as geographic realignment, pairing of schools, grade pairing and satellite schools. These arrangements often require that some students be bussed in order to implement desegregation plans which comply with established guidelines adhering to the letter and spirit of the law.

It has long been settled that complete disestablishment of formerly *de jure* segregated school systems is required by the Constitution. This case presents to the court important issues concerning the meaning of a school board's responsibility to convert from a dual to a unitary school system and the steps which it may be required to take to accomplish that conversion. As the principal association of educators in this country, NEA can draw upon a breadth of experience to inform the court as to the reasonableness of the requirements for desegregation framed by the district court's order of February 5, 1970, when judged from the standpoint of educational considerations as well as the practices and expenditures of other school systems. Pursuant to leave granted by the court of appeals, NEA filed a brief *amicus curiae* in the proceedings below (see, *e.g.*, Appendix to Petition for Certiorari, pp. 194a, 211a) and, upon invitation, presented oral argument.[2]

Accordingly, the National Education Association respectfully requests that this Court grant leave to file the attached

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[2]The NEA and its State associations have participated as *amicus curiae* in other major proceedings involving issues of education and race. See *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Carter v. West Feliciana Parish School Board*, No. 29745 (5th Cir. 1970); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Lee v. Macon County Board of Education*, 283 F. Supp. 194 (M.D. Ala. 1968).

brief *amicus curiae* in support of the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit.

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June 25, 1970

IN THE

Supre eme Court of the United States

OCTOBER TERM, 1969

No. 1713

JAMES E. SWANN, ET AL., *Petitioners,*

C v.

HARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents.*

BRIEF
AS AM
A WRI FOR THE NATIONAL EDUCATION ASSOCIATION
OF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR
IT OF CERTIORARI TO THE UNITED STATES COURT
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INTEREST OF THE NATIONAL EDUCATION ASSOCIATION

The N lational Education Association (hereinafter NEA) is an indep
cators. supervis endent, voluntary organization of professional edu-
Charter, t has over one million members, including teachers,
the interns, and administrators. As stated in the Association
cause of its purpose is "to elevate the character and advance
and its ests of the profession of teachers and to promote the
cation re education in the United States." Both the NEA
the deci embers have a deep interest in the quality of edu-
347 U.S. ceived by the children of all races. NEA endorses
segregati ion of this Court in *Brown v. Board of Education*,
tive. In 483 (1954), and considers it imperative that de-
conduct n of the nation's schools be complete and effec-
tion in pursuit of these purposes NEA has recently
d investigations of the problems of race and educa-
he school systems of Wilcox County, Alabama;

Baltimore, Maryland; some 22 counties in Louisiana; Detroit, Michigan; some 30 counties in Mississippi; Hyde County, North Carolina; and the region of East Texas. NEA has also participated in several school desegregation cases, including the appeal proceedings before the Fourth Circuit in the instant case, and in numerous others has actively supported efforts to secure judicial relief.

STATEMENT

1. **Description of the Charlotte-Mecklenburg School System.** The Charlotte-Mecklenburg School System is the forty-third largest in the United States, educating more than 84,500 pupils in 106 schools, including 76 elementary schools, 20 junior high schools, and 10 senior high schools. While the system covers the county's 550 square miles, over 50,000 of the students reside within the City of Charlotte. (Appendix to Petition for Certiorari, pp. 9a-10a, 18a, 85a-86a, 123a.)[1] The 1969-70 budget was $57,711,344, of which nearly $51,000,000 represented operational expenses (139a).[2]

Of the 84,500 students, about 29 percent, or 24,714, are Negro, and about 71 percent, or 59,828, are white (10a, 85a). Approximately 21,000 of the system's 24,714 black students attend schools within the City of Charlotte (57a). The predominant percentage of the system's black students live in a triangular area, four or five miles on a side, in the northwestern quadrant of the city. This area is almost exclusively Negro. (1a, 12a, 14a, 142a-144a.)

2. **History of Desegregation.** The Charlotte-Mecklenburg Board of Education has operated a dual system of schools based upon race (185a). A suit for desegregation was initiated in 1965 (1a), and the district court ordered into effect

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[1]The Appendix will be cited hereinafter by page number only.

[2]Expenditures for construction of school buildings are not included in these budget figures (139a).

a plan proposed by the School Board based upon geographic zoning with a free transfer provision which was approved by the court of appeals (185a). In September 1968, following the decisions of this Court in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), *Raney v. Board of Education*, 391 U.S. 433 (1968), and *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968), the petitioners filed a motion for further relief which sought greater speed in desegregation and elimination of other racial inequities (1a). Following a hearing, the district court concluded that the "manner in which the Board has located schools and operated the pupil assignment system has continued and in some situations accentuated patterns of racial segregation in housing, school attendance, and community development" (28a); that the Board has created or controlled school zones so as to promote segregation of black students (54a); and that the Board has an affirmative duty to promote faculty desegregation and desegregation of pupils, and to deal with the problem of the all-black schools (29a). The district court ordered the Board to submit by May 15, 1969, a plan for complete desegregation of teachers to be effective with the 1969-70 school year, and for desegregation of pupils to be predominantly effective in the fall of 1969 and to be completed by the fall of 1970 (30a, 31a).

Pursuant to this and subsequent orders of the district court, the Board submitted two plans, neither of which was considered adequate by the court (51a, 55a, 68a, 69a). On August 15, 1969, because of the shortness of time before the opening of school, the district court approved an interim plan for the 1969-70 school year and directed the Board to present, on November 17, 1969, a plan for complete faculty and student desegregation for 1970-71 (70a-71a). The 1969-70 plan proposed to close seven black inner-city schools and to transfer their 3,000 students to suburban schools, all but one of which were white (83a). It also proposed to transfer 1,245 black students from eight over-crowded black or predominantly black schools to white suburban schools (64a, 83a). The Board, however,

did not carry out the plan (83a). Only 1,315 of the promised 4,245 black students were transferred to white schools (84a).

The Board's November 17, 1969 plan was disapproved by the district court which found that "it contains no promise nor likelihood of desegregating the schools" (93a). Among other provisions, the plan provided that no white students would be assigned to schools with less than 60 percent whites; and that where schools were to be desegrated, the ratio of black to white students would not exceed 60 percent white–40 percent black (94a-95a). Seven all-black elementary schools were to remain that way (94a).

The district court thereupon designated a consultant to prepare a desegregation plan in accordance with nineteen principles drawn from the decisions of this Court and the lower federal courts and set forth in the opinion and order (103a-108a). The court invited the Board to submit a further plan of its own (110a-111a).

3. The Desegregation Plan Ordered by the District Court on February 5, 1970. Reviewing the results of almost four and one-half years of court-ordered desegregation, the district court found in November 1969 that the Charlotte-Mecklenburg schools "are still in major part segregated or 'dual' rather than desegregated or 'unitary' " (86a). "Of 24,714 Negro students, something above 8,500 are attending 'white' schools or schools not readily identifiable by race"; 13,945 were still in 90-100 percent black schools;[3] and 9,216 of these were in 100 percent black schools. Of 59,828 white students, over 45,000 were attending schools which were 86-100 percent white (85a-86a). Ninety-eight of the 106 schools in the System continued to be "readily and obviously identifiable by the race of the heavy majority of their faculties" (84a).

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[3]The court found that more than 16,000 black students were attending schools which were between 56 percent and 100 percent black (85a).

The district court found that these student assignment patterns reflected the segregation of Mecklenburg County's residential areas (86a). This segregation, it said, "is the result of a varied group of elements of public and private action, all deriving their basic strength originally from the public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school buses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods" (86a-87a; see also 12a-14a). Based upon these findings, the district court ruled, "[t]here is so much state action embedded in and shaping these events that the resulting segregation is not innocent or '*de facto*,' and the resulting schools are not 'unitary' or desegregated" (87a).

Faced with these conditions, the district court, on February 5, 1970, framed a desegregation plan using, where it could, portions of the plan submitted by the School Board (see 119a-121a). The court held that an acceptable plan would have to be consistent with sixteen requirements set forth in the order (117a). Some of the requirements were expressed in mandatory terms, such as number five "[t]hat no black school be operated with an all-black or predominantly black student body." Others, although framed as requirements, were drawn to allow leeway for practical considerations incident to the operation of the school system. These included number six calling for the assignment of pupils so that "as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students," and number seven providing that transportation be offered on a uniform non-racial basis to children who live farther from the school to which they are assigned "than the Board determines to be walking distance."

The district court then approved a desegregation plan in four separate parts, one each for the senior high schools, for the junior high schools, for 27 elementary schools for which new zones were defined, and for 34 elementary schools which were paired and assigned noncontiguous zones. For the senior high schools, the court approved a zoning plan submitted by the Board which integrated nine of the system's ten schools with percentages of black students ranging from 17 percent to 36 percent. The court ordered one modification: it required that 300 pupils be transported from the black residential area of the city to the Independence School which would have been 2 percent black and under-capacity under the Board's plan (190a, 123a).

The court disapproved the Board's rezoning plan for the junior high schools because it left the Piedmont School 90 percent black, and offered the Board various alternatives which would desegregate all the junior high schools. The Board chose to adopt the plan proposed by the court's consultant which combined zoning and satellite districts and which left the junior high schools from 9 percent to 33 percent black (125a, 190a-191a).

The Board's plan for the elementary schools was based entirely upon zoning. It would have left more than half the black elementary pupils in nine schools 86 to 100 percent black and would have assigned about one-half the white elementary pupils to schools 86 to 100 percent white (191a). Rejecting that proposal, the court adopted a plan offered by its consultant which drew new zones for 27 schools and paired 34 others, each of which was assigned noncontiguous zones. Approximately 22,400 of the 44,000 elementary pupils would attend the paired schools, 10 of which are in the city and 24 of which are outlying suburban white schools. Children in grades 1-4 from the zones surrounding all 34 schools would attend the 24 suburban schools, while those in grades 5-6 would attend the 10 city schools (133a). The racial make-up of the elementary schools would vary from 3 percent to 41 percent black (129a-131a).

Under the court-approved plan, no schools would remain all-black or predominantly black. The pairing and grouping of schools, as well as rezoning provided for in the plan, would, the court found, add a maximum of 13,300 children who "may conceivably require transportation" to the 23,600 pupils transported daily on school buses and the 5,000 whose fares on public coach lines are paid by the Board (138a, 155a). Of these 13,300 children, 1,500 would be at senior high level, 2,500 at junior high, and 9,300 at elementary school level (155a). One hundred thirty-eight additional buses would be required, 90 for the elementary students (155a). The cost of implementing the plan would be $266,000 for bus operations ($186,000 of this for the elementary school phase) and a one-time expenditure of $745,200 for additional buses ($486,000 for the elementary phase) (156a-157a, 182a, 191a).[4]

4. **The Decision of the Court of Appeals.** The court of appeals, by a vote of four to two, vacated the district court's judgment.[5] The court carefully analyzed and specifically accepted the district court's finding "that residential

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[4]The district court did not consider the plan immutable. It stated that "the duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, . . . *are illustrations of means or partial means to that end*. [Footnote omitted.] The defendants are encouraged to use their full 'know how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or the plan, but the *results*." The court stated its intention "to leave maximum discretion in the Board to choose methods that will accomplish the required result." (118a-119a, 121a.)

[5]Chief Judge Haynsworth and Judge Boreman concurred in an opinion of Judge Butzner. Judge Bryan wrote a separate opinion dissenting in part but joined in voting to vacate the judgment of the district court in accordance with the opinion of Judge Butzner "for the sake of creating a clear majority for the decision to remand" (226a). Judges Sobeloff and Winter concurred in part and dissented in part (201a). Judge Craven disqualified himself (184a).

patterns leading to segregation in the schools resulted in part from federal, state, and local governmental action" (186a). It concluded that "[p]redominantly black schools were the inevitable result" of the School Board's policy of locating schools and fixing their size to fit these segregated residential patterns (186a). The court of appeals recognized that this condition was not unique to Charlotte; that "[s]imilar segregation occurs in many other cities throughout the nation, and constitutional principles dealing with it should be applied nationally" (188a).

The court of appeals then declared three general principles which it would apply to resolve the issues in the case: "first, not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race" (189a).[6] It held bussing to be "a permissible tool for achieving integration," but declared that "[i]n determining who should be bussed and where they should be bussed, a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources" (194a).

Applying these principles, the court of appeals approved the desegregation plan for junior and senior high schools, holding that "it provides a reasonable way of eliminating all segregation in these schools" (195a). The appellate court also affirmed the district court's disapproval of the School Board's elementary plan because it left about one-half of

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[6]The court identified such "further steps" to include special classes, functions and programs on an integrated basis to be made available to pupils in the black schools, majority to minority transfers with transportation provided, and assignment to an integrated school for a later portion of a black student's career (189a).

both black and white pupils in schools that were nearly completely segregated (197a).[7] However, the court of appeals found the elementary plan approved by the district court unacceptable, holding that "[t]he board . . . should not be required to undertake such extensive additional bussing to discharge its obligation to create a unitary school system" (198a).[8]

REASONS FOR GRANTING THE WRIT

1. **Introduction.** The decision of the Court of Appeals for the Fourth Circuit presents two issues of fundamental importance to the future course of school desegregation. The first issue is whether a school board, in fulfilling its obligations to establish a unitary system, must disestablish the identity of all "black" and "white" schools by reassigning students, and providing transportation where necessary, even though this will require the board to bear financial and other burdens.[9] The second issue, which arises only if this

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[7]The court of appeals also approved the provisions of the district court's order dealing with faculties (185a).

[8]The court's use of the phrase "such extensive additional bussing" followed a recitation of the following facts: the plan would require transporting 9,300 pupils in 90 additional buses; the greatest portion would involve cross-bussing; the average daily round trip would approximate 15 miles through central city and suburban traffic; the additional elementary pupils would represent an increase of 39 percent over all pupils presently being bussed and would require an increase of about 30 percent in the present fleet of buses; and, when added to the additional bussing required under the junior and senior high plans, the total percentage increases would be: pupils, 56 percent; and buses, 49 percent (198a).

[9]As we show *infra*, pp. 16-17, the true basis of the conclusion of the court of appeals that the elementary school plan was unreasonable had to be the financial cost entailed in purchasing and operating the 90 additional buses required to transport the 9,300 additional children required to be bussed. The reasonableness of the plan judged upon the basis of the other measures referred to by the court of appeals—age of pupils, time and distance required for transportation and effect on traffic—appears clear on this record.

Court should conclude that the constitutional obligation to establish a unitary system may be circumscribed by the costs and other burdens its fulfillment would require a school board to assume, is what standards school boards and district courts should apply in framing acceptable desegregation plans.

As the court itself recognized (186a-187a), the duty of virtually every school board with responsibility for an urbanized area of any size will hinge upon the resolution of these issues. Undoubtedly too, the principle announced by the Fourth Circuit, if allowed to stand, would significantly influence the future course of desegregation of rural systems as well.[10] Thus, the case is truly one of national significance.

2. **The Duty to Disestablish Racially Identifiable Schools.** The court of appeals quite properly affirmed the district court's conclusion that the predominantly black schools in the Charlotte-Mecklenburg system are the "inevitable result" of state action (186a).[11] Having so ruled, the primary question, then, was whether, under the Equal Protection Clause of the Fourteenth Amendment, the School Board was required to reassign students so as to disestablish the racial identity of these schools.

Until this case, it was recognized that the constitutional duty of a school board under such circumstances was to terminate all vestiges of its dual system "at once and to operate now and hereafter only unitary schools." *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20

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[10]The considerations on which the duty to disestablish the racial identity of predominantly black schools would depend—cost, for example—(see discussion, *infra*, pp. 16-17) are not unique to urban systems. History teaches that rural systems would urge them as grounds for relief from the constitutional mandate to operate unitary schools. Indeed, the court of appeals suggested that the constitutional principles "should be applied nationally" wherever segregation exists because government policies fostered segregated neighborhood schools (188a).

[11]The findings of the district court and their affirmance by the court of appeals are set forth in the Statement, *supra*, pp. 9, 11-12.

(1969). And a unitary school system had been understood to be one without schools which are racially identifiable by reason of their student bodies, *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), or their faculties, *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969). A number of other lower courts, including the Fourth Circuit itself, have interpreted these rulings to bar neighborhood student assignment plans which freeze in the effects of residential segregation resulting from state action.[12] This was the conclusion of the district court which held that an acceptable desegregation plan must provide "[t]hat no school be operated with an all-black or predominantly black student body" (Order of February 5, 1970; 116a).

3. **The Irrelevance of Monetary Costs.** Like the district court, the court of appeals recognized the obligation of the School Board to reassign students to disestablish the racial identity of the schools (189a). However, it held that where "black residential areas are so large that not all the schools

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[12] *Henry v. Clarksdale Munic. Sep. School District*, 409 F.2d 682, 689 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); *United States v. Greenwood Munic. Sep. School District*, 406 F.2d 1086, 1093 (5th Cir. 1969); *Valley v. Rapides Parish School Bd.*, No. 29237 (5th Cir. March 6, 1970); *United States v. Baldwin County*, No. 28880 (5th Cir. March 9, 1970); *Kemp v. Beasley*, No. 19072 (8th Cir. March 17, 1970); *United States v. School Dist. 151*, 286 F. Supp. 786, 798 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); *Dowell v. School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *Spangler and United States v. Pasadena City Bd. of Ed., No.* 68-1438-R (C.D. Calif. March 12, 1970); *Keyes v. School District No. 1, Denver*, 303 F. Supp. 279, 289 (D. Colo. 1969), *stay pending appeal granted*, ___ F.2d ___ (10th Cir. No. 432-69, Aug. 27, 1969), *stay vacated*, 396 U.S. 1215; see *Cato v. Parham*, 302 F. Supp. 129 (D. Ark. 1969). In *Brewer v. School Board of City of Norfolk*, 397 F.2d 37, 41-42 (4th Cir. 1968), the court of appeals went further, saying that it is immaterial that the residential patterns are the result of private discrimination: "The school board cannot build its exclusionary attendance areas upon private racial discrimination."

can be integrated by using reasonable means," the school board may leave those schools black.[13] The court, we believe, correctly recognized that "bussing is a permissible tool for achieving integration" (194a). *Kemp v. Beasley*, No. 19782, p. 14 (Slip Op.) (8th Cir. March 17, 1970); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 898 (5th Cir. 1966); *United States v. School District No. 151, Cook County*, 286 F. Supp. 786, 799 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968). It said, however, that in determining the part bussing may reasonably play in a unitary school system "a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources" (194a).

Viewing the plan for junior and senior high schools against these principles and the background of national, state and local transportation policies, the court found "it provides a reasonable way of eliminating all segregation in these schools" (195a). The court, however, reached the opposite conclusion with respect to the elementary plan. As we now show, a review of the plan against the five measures the court said should be taken into consideration compels the conclusion that the plan was rejected because the court of appeals found the financial cost of the bussing "unreasonable."[14]

Thus, with respect to the measures of time, distance, and traffic, the district court found that the children required to be bussed by its order "will not as a group travel as far,

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[13]The steps the court indicated the Board might take to satisfy its constitutional duty are set forth, *supra*, p. 12, n. 6.

[14]At the most, the elementary school plan would have entailed an annual expenditure of $186,000 to operate the buses plus a one-time investment of $486,000 for the 90 additional buses (191a). In aggregate, the first-year expense would be just slightly above one percent of the system's annual budget (139a). From this there should be subtracted the value of the improvement in the education available to black children which is significant, although not easily quantifiable in dollars.

nor will they experience more inconvenience than the more than 28,000 children who are already being transported . . ." (143a), and this finding was not disturbed by the court of appeals. The average one-way bus trip per elementary pupil would be seven miles (153a), compared to an average of between 15 and 17 miles per child in the system today (153a, 195a) and 12 to 13 miles under the plan for senior high pupils (195a). The average time would be 35 minutes as against nearly an hour and a quarter today per child in the system (153a).

Insofar as the age of the pupils to be bussed is concerned, the district court found that the plan would require bussing of an additional 9,300 elementary students. This figure is just under 70 percent of the 13,300 additional students of all ages required to be bussed by the plan. Statewide in North Carolina 70.9 percent of all pupils bussed are elementary students (137a).

Thus, the reasonable inference is that cost alone was the basis for the conclusion of the court of appeals that the elementary plan was unreasonable. That this was the sole basis for rejection of the plan is confirmed by the court's statement that "[t]he board . . . should not be required to undertake such extensive additional bussing . . ." (198a).

The court of appeals has thus announced a new constitutional principle governing school desegregation: that the duty to disestablish all racially identifiable schools is a conditional one depending upon the financial costs involved. This principle conflicts with the well considered holdings of this Court which establish that "[t]he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969). In *Green v. County School Board*, 391 U.S. 430, 442 (1968), the Court, adopting the language of the Court of Appeals for the Fifth Circuit, defined a unitary system as "a system without a 'white' school and a 'Negro' school, but just schools."

To date, this Court has never held, or even suggested, that this constitutional mandate may be avoided by showing that performance would entail monetary costs. In *Green*, this Court held that the school board was under an "affirmative duty to take *whatever steps* might be necessary to convert to a unitary system," 391 U.S. at 437-38 (emphasis added).[15] There was no suggestion that a "unitary system" was not a fixed goal established by the Constitution. Indeed, the words chosen by the Court indicated that a unitary system is one "in which racial discrimination would be eliminated root and branch." *Id.*, at 437-38. Under the decision of the court of appeals, the constitutional objective, the unitary system, would vary according to the cost of the steps available to the school board.

The interpretation given the Constitution by the court of appeals cannot withstand analysis: Thus, no State could be heard to justify a denial of a jury trial or due process of law on the grounds that fulfillment of these rights costs too much. The right to equal protection of the laws stands on the same footing. Thus, "[t]he State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." *Schlesinger v. Wisconsin*, 270 U.S. 230, 240, (1926). Certainly factors such as "convenience and expediency" do not exempt the state or other governmental agencies from the requirements of the Fourteenth Amendment. *Ohio Bell Telephone Company v. Commissioner*, 301 U.S. 292, 305 (1937); *Russell-Newman Manufacturing Company v. National Labor Relations Board*, 370 F.2d 980, 984, (5th Cir. 1967); *Cella v. United States*, 208 F.2d 183, 789 (7th Cir. 1953).[16] The right to equal

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[15]See *Griffin v. County School Board*, 377 U.S. 218 (1964), where this Court held that a school board may be ordered to spend whatever is necessary to afford the pupils in its jurisdiction desegregated education equal to that being afforded pupils in other systems throughout the State.

[16]The ruling of the court of appeals also seems inconsistent with the well recognized rule that states may not casually deprive a class of individuals of a constitutional right because of some remote admin-

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child on, moreover, is a right personal to each individual. Linco*v. Painter*, 339 U.S. 629, 635 (1950); *Missouri ex* and n*ies v. Canada*, 305 U.S. 337, 351 (1958). A black tution signed to a black school such as Double Oaks or studer Heights (126a, 127a) is afforded little consolation—

The indication of his "personal and present" [17] consti- warra right—by the fact that the Board is affording other grated an integrated education.

an int ourt below suggested that where costs of bussing for th certain "other steps"—the offering of special inte- decisi asses, freedom of transfer with transportation, and *supra* rated school assignment later on—may be substituted *of Ja* elimination of predominantly black schools. The tution of this Court in *Green v. County School Board*, this C nd *Monroe v. Board of Commissioners of the City* transf *on*, 391 U.S. 450 (1968), demonstrate the consti- schoo inadequacy of these alternatives. In those cases deseg rt disapproved freedom of choice and freedom of

To plans because they left Negro students in all-black gated and placed upon them the burden of choosing a is me ated experience.

tion a
to co stpone assignment of black students to a desegre- their hool until a later "portion of their school careers" be "e to hold out the hope of a morsel of desegrega- cause to ignore the rule that token desegregation fails *of Ed* ly with the constitutional requirement. During mentary school years these black students would

istrati ctively excluded" from desegregated schools be- 542-4 their race. *Alexander v. Holmes County Board* dition *ition*, 396 U.S. 19, 20 (1969). Beyond these icemer time o 47 (1

[17] S enefit to the state. *Harman v. Forssenius*, 380 U.S. 528, 965) (requirement of a certificate of residence as a precon- oting); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (serv- rmitted to vote only in the county of residence at the try into service); *Oyama v. California*, 332 U.S. 633, 646-

tt v. Painter, supra, 339 U.S. at 635.

constitutional considerations, the unreasonableness of such an alternative is shown by the fact that maximum benefits from desegregated education come only if pupils are assigned to integrated schools at an early age. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 106 204 (1967).

4. The Reasonableness of the District Court's Plan for Desegregation of the Elementary Schools. NEA believes that the Court should reaffirm its ruling in *Green* that the school board is under an "affirmative duty to take whatever steps are necessary to convert to a unitary system," 391 U. S. at 437-438; and that it should reject the suggestion that the duty to disestablish separate schools based upon race may be avoided because its fulfillment will cost money. Such a ruling would dispose of this case.

However, if the court should accept the rule framed by the court of appeals, a significant issue would still remain: the court of appeals purported to apply a "rule of reason," but it did not indicate the standards it applied in reaching the judgment that the "undertakings" incident to the plans for desegregation of the senior and junior high schools were reasonable but those required for the elementary schools were not. In essence, that court struck down the elementary school plan because of the "extensive additional bussing" (198a) it would require, but failed to indicate the criteria it applied in determining how much bussing was too much—and why.[18]

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[18]Since *Brown v. Board of Education*, 349 U.S. 294 (1955), it has been recognized that the district courts are invested with broad powers to frame relief from racial discrimination in the public schools. Indeed, the Court has declared that the district court not only has the "power" but in fact "the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1968), quoted in *Green, supra*, at 438 n.4. In our view, the district court properly fulfilled this duty and did not abuse its discretion in framing the elementary school plan.

School boards and lower federal courts are left at large by the appellate court's ruling. The vast discretion inherent in the rule is an open invitation to circumvent the constitutional right of black children to equal educational opportunity–an invitation which the 16-year history since *Brown* demonstrates is all too likely to receive wide acceptance.[19]

CONCLUSION

From *Brown* to *Alexander*, the question was one of "all deliberate speed"–the timing of transition from separate to equal schools. This case presents the question whether, now that the Court has declared the transition period closed, the constitutional objective itself is to be realized. If the decision below is allowed to stand, it forecasts a host of separate black schools in every urban community which, for the forseeable future, will be impregnable to constitutional attack.

NEA urges the Court to grant the petition for a writ of certiorari filed in behalf of James E. Swann, et al., and to

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[19]The decisions In *Kemp v. Beasley*, No. 19072 (8th Cir. March 17, 1970); *United States v. School District No. 151 of Cook County*, 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); *Spangler and United States v. Pasadena City Board of Education*, Civ. No. 68-1438 (M.D. Calif. March 12, 1970); and *Keyes v. School District No. 1, Denver*, 303 F. Supp. 279 (D. Colo. 1969),___ F.2d ___ (10th Cir. No. 432-69, August 27, 1969), 396 U.S. 1215 (1969), indicate that, with the increasing focus on integration of urban schools, the need to make bussing a part of such plans will be increasingly at issue. Paradoxically, while the appellate court's decision creates a wide ambit for the exercise of discretion to limit desegregation, it severely, and NEA believes unwarrantedly, restricts the traditional discretion of the district court to frame a plan which will secure the constitutional objective. Review now by this Court will insure that no such unwarranted restriction survives.

establish an expedited schedule for briefs and argument which will permit a decision at the earliest practicable time.

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FILE COPY

AUG 13 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the courts below are as follows:[1]

1. Opinion and order of April 23, 1969, reported at 300 F. Supp. 1358 (285a).
2. Order dated June 3, 1969, unreported (370a).
3. Order adding parties, June 3, 1969, unreported (374a).
4. Opinion order of June 20, 1969, reported at 300 F. Supp. 1381 (448a).

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[1] Earlier proceedings in the same case are reported as *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (W.D. N.C. 1965), affirmed, 369 F.2d 29 (4th Cir. 1966).

5. Supplemental Findings of Fact, June 24, 1969, reported at 300 F. Supp. 1386 (459a).
6. Order dated August 15, 1969, reported at 306 F. Supp. 1291 (580a).
7. Order dated August 29, 1969, unreported (593a).
8. Order dated October 10, 1969, unreported (601a).
9. Order dated November 7, 1969, reported at 306 F. Supp. 1299 (655a).
10. Memorandum Opinion dated November 7, 1969, reported at 306 F. Supp. 1301 (657a).
11. Opinion and Order dated December 1, 1969, reported at 306 F. Supp. 1306 (698a).
12. Order dated December 2, 1969, unreported (717a).
13. Order dated February 5, 1970, reported at 311 F. Supp. 205 (819a).
14. Amendment, Correction, or Clarification of Order of February 5, 1970, dated March 3, 1970, unreported (921a).
15. Court of Appeals Order Granting Stay, dated March 5, 1970, unreported (922a).
16. Supplementary Findings of Fact dated March 21, 1970, unreported (1198a).
17. Supplemental Memorandum dated March 21, 1970, unreported (1221a).
18. Order dated March 25, 1970, unreported (1255a).
19. Further Findings of Fact on Matters raised by Motions of Defendants dated April 3, 1970, unreported (1259a).

20. The opinions of the Court of Appeals filed May 26, 1970, not yet reported, are as follows:

    a. Opinion for the Court by Judge Butzner (1262a).

    b. Opinion of Judge Sobeloff (joined by Judge Winter) concurring in part and dissenting in part (1279a).

    c. Opinion of Judge Bryan dissenting in part (1293a).

    d. Opinion of Judge Winter (joined by Judge Sobeloff) concurring in part and dissenting in part (1295a).

21. The judgment of the Court of Appeals appears at 1304a.

22. The opinion of a three-judge district court in an ancillary proceeding in this case dated April 29, 1970, not yet reported, appears at 1305a.

23. The Memorandum of Decision and Order dated August 3, 1970, unreported of the district court entered following the further proceedings directed by the Court of Appeals (1278a-1279a) and authorized by this Court (1320a) is appended to this brief.[2]

Jurisdiction

The judgment of the Court of Appeals was entered on May 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The petition for a writ of certiorari was filed in this Court on June 18, 1970, and was granted on June 29, 1970 (1320a).

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[2] The appendix to the brief containing the decision on remand is herein designated "Br. A——." The other matters, including all other previous opinions are printed in separate appendix volumes and are herein designated "——a."

The Memorandum dated August 7, 1970, unreported is printed at Br. A39.

Questions Presented

1. Whether the trial judge correctly decided he was required to formulate a remedy that would actually integrate each of the all-black schools in the northwest quadrant of Charlotte immediately, where he found that government authorities had created black schools in black neighborhoods by promoting school segregation and housing segregation.

2. Whether, where a district court has made meticulous findings that a desegregation plan is practical, feasible and comparatively convenient, which are not found to be clearly erroneous, and the plan will concededly establish a unitary system, and no other acceptable plan has been formulated despite lengthy litigation, the Court of Appeals has discretion to set aside the plan on the general ground that it imposes too great a burden on the school board.

Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

1. *Introduction*

This Court has granted review[3] of an en banc[4] decision of the United States Court of Appeals for the Fourth Cir-

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[3] The defendants have filed a cross petition for writ of certiorari which is pending. (Oct. Term 1970, No. 349.)

[4] Prior to argument, Judge Craven entered an order disqualifying himself. He had decided the case as a district judge in 1965 (243 F. Supp. 667) and was of the opinion that this previous participation barred him from hearing the case as a circuit judge. 28 U.S.C. §47.

cuit setting aside certain portions of an order of Judge James B. McMillan of the Western District of North Carolina which had required the complete desegregation of the Charlotte-Mecklenburg County public school system. Three members of the court, in a plurality opinion written by Judge Butzner, agreed with the lower court that the school board had an affirmative duty to employ a variety of available methods, including busing, to disestablish its dual school system and approved the portions of the order providing for the desegregation of the junior and senior high schools. As to the plan ordered for the elementary schools, however, they thought that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system (1271a)." Judges Sobeloff and Winter viewed Judge McMillan's decision as appropriate in all respects and would have affirmed the decision in its entirety (1279a, 1295a). Judge Bryan who would have reversed the entire order expressed disapproval of busing to achieve racial balance which he found the order to require for junior and senior high school students as well as elementary (1293a).[5]

2. *Proceedings Below*

Black parents and students brought this action in 1965 against the local school board to desegregate the consolidated school district of Charlotte City and Mecklenburg County, North Carolina pursuant to 28 U.S.C. §1343 and 42 U.S.C. §1983. The North Carolina Teachers Association, a black professional organization, intervened seeking de-

[5] This is essentially the position of the defendants as stated in their cross petition for writ of certiorari. See note 3, supra. They not only argue that the Court of Appeals erred in approving Judge McMillan's plan for junior and senior high schools, but also disagree with the Court's conclusion that the board's elementary plan is unconstitutional.

segregation of the faculties on behalf of the black teachers in the school system. More recently, other defendants have been added, including the State Board of Education, the State Superintendent of Public Instruction and the individual members of the local board (464a, 374a, 901a). This current phase[6] of the litigation began in 1968 when the plaintiffs, relying upon the *Green* trilogy,[7] reopened the case seeking the elimination of all vestiges of the dual system (2a).

Judge McMillan first heard testimony in March, 1969 and entered his initial opinion the following month (300 F. Supp. 1358; 285a) judging the school system to be illegally segregated and requiring the board to submit a plan for desegregation. Extensive proceedings followed over the

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[6] The case was first tried in the summer 1965. (243 F. Supp. 667 (1965).) The plaintiffs challenged an assignment plan where initial assignments were made pursuant to geographic zones from which students could transfer to schools of their choice. Plaintiffs complained that many of the zones were gerrymandered and that the zones of ten rural and concededly inferior black schools which the board claimed would be abandoned within a year or two overlapped white school zones. They also attacked a free transfer policy which had resulted in the transfer of each white child initially assigned to black schools as had the previous policy allowing for minority to majority transfers. Also under attack was the board's policy looking to the "eventual" non racial employment and assignment of teachers. Underlying plaintiffs' specific grievances was their general assertion that the Constitution required the school board to take active affirmative steps to integrate the schools.

The district court approved the assignment plan but required "immediate" non-racial faculty practices.

The court of appeals affirmed. (369 F.2d 29 (1966).) The decision noted that the 10 black schools were closed at the end of the 1965-66 school year. The court held, as it did the following year in *Bowman* v. *The School Board of Charles City County*, 382 F.2d 326 (1967), rev'd sub nom. *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), that the school board had no affirmative duty to disestablish the dual system.

[7] *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); and *Raney* v. *Board of Education*, 391 U.S. 443 (1968).

next twelve months.[8] He rejected the first plan submitted and called for another, found the second plan inadequate but "reluctantly" accepted it as an interim measure for the 1969-70 school year, again required a new plan which after review was also found unacceptable.[9] On December 1, 1969, following the court's patient but unavailing efforts to secure from the board an acceptable plan, the failure of the board to carry out its minimal interim plan for 1969-70 and the mandate of this Court[10] that schools are to be desegregated "at once", Judge McMillan decided to appoint an educational consultant to assist him in devising a desegregation plan (698a). The following day, the court appointed Dr. John A. Finger, Jr., a Professor of

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[8] Judge McMillan has provided an excellent summary of the proceedings in the district court prior to the decision of the court of appeals in his Supplemental Memorandum of March 21, 1970 (1221a).

[9] The first plan was rejected on June 20, 1969 (448a). The Court found that the board had sought from the staff a "minimal" and inadequate plan, that the staff produced such a plan and the board thereupon eliminated its only effective provisions before submitting it to the court.

The court found the second plan inadequate on August 15, 1969 (580a) but accepted it for the 1969-70 school year only because it promised some measure of desegregation and there did not appear to be sufficient time prior to the opening of the new school term for the development and implementation of a more effective plan. The failure of the board to accomplish what the plan had promised was determined on November 7, 1969 (657a).

The third "plan" was simply a statement of guidelines as to how the board intended to produce a plan. The guidelines promised no particular results and were thus rejected on December 1, 1970 (698a).

Judge Sobeloff traces this history in an extensive footnote (1291a, n. 9). He concludes "[T]he above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making 'every reasonable effort' to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn."

[10] *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19.

Education at Rhode Island College who was directed to work with the administrative staff to prepare a plan for the court's consideration (717a). The board was again invited to submit another plan (698a).

On January 20, 1970, plaintiffs requested that Dr. Finger promptly present his plan so that the schools could be desegregated "at once" (718a).[11] The Finger plan (835a-839a) and a fourth board plan (726a) were filed with the court in early February. Judge McMillan held further hearings and entered an order on February 5 directing the desegregation of the students and teachers of the elementary schools by April 1, 1970, and of the junior and senior high schools by May 4, 1970 (819a).[12] The order was based upon the plans submitted by the board and Dr. Finger.

The school board appealed (904a) and sought a stay in the court of appeals. On March 5, 1970, the court of appeals

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[11] Plaintiffs' request followed the controlling decisions of *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970); and *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969).

This was not the first request by plaintiffs for immediate relief. In September of 1969 the plaintiffs' motion for a finding of contempt and for immediate desegregation (596a) had led to the court's finding in November that the board had not accomplished, during the 1969-70 school year, what it had been ordered to do (655a).

The plaintiffs were required to file a variety of other motions as well, such as motions for contempt (596a, 914a), objections to patently defective plans (e.g. 692a), a motion to enjoin school construction (324a), motions to vacate state court orders (see 925a), motions to add new defendants (840a, 906a) and motions to enjoin state officials from interfering with orders of the court (840a, 906a, 914a). Despite these and other efforts in the district court, the court of appeals and this Court, there has yet to be any more desegregation in the Charlotte-Mecklenburg school system than when this round of litigation commenced.

[12] The order was slightly modified on March 3, 1970 (921a).

stayed a portion of the order relating to the elementary schools and directed that the district court make additional findings concerning the cost and extent of the bussing required by the February 5 Order (922a). The plaintiffs applied to this Court to have the partial stay rescinded; the application was denied.

The district court received additional evidence pursuant to the directives of the court of appeals and entered a supplemental Memorandum (1221a) and Supplemental Findings of Fact (1198a)[13] on March 21, 1970.[14]

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[13] The supplemental findings were amended in certain respects on April 3, 1970 (1259a), in response to a motion by defendants (1239a).

[14] During this period there were also proceedings concerning the North Carolina anti-bussing law:

> "In June of 1969, pursuant to the hue and cry which had been raised about 'bussing,' Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called 'anti-bussing' statute, N.C.G.S. 115-176.1 [supp. 1969]" (1223a).

Plaintiffs were granted leave to file a supplemental complaint in July, 1969 and to add the State Board of Education and State Superintendent of Public Instruction as defendants to attack the statute (464a). At that time the statute did not appear to the court to be a barrier to school desegregation (579a, 585a).

However, in the spring of 1970, the Governor and other state officials directed that no public funds be expended for the transportation of students pursuant to the district court order of February 5 and several state judges issued *ex parte* orders of similar effect acting under color of the state statute. (See 1305a, 1307a, 1308a).

At the plaintiff's request Judge McMillan added the Governor, other state officials and one group of state court plaintiffs as defendants (901a). He, thereafter determined that the constitutionality of the state statute was at issue and, therefore, requested and the Chief Circuit Judge appointed a three-judge court. The court convened in Charlotte on March 24. On April 29, 1970, the court entered its decision (1305a) declaring unconstitutional the portions of the statute prohibiting the assignment of any students "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national

The opinions and judgment of the court of appeals were filed on May 26, 1970. The court decided by a vote of 4 to 2 to vacate and remand the judgment of the district court for further proceedings. A majority for the judgment was created by the vote of Judge Bryan joining with the three members of the court subscribing to the plurality opinion written by Judge Butzner, although Judge Bryan dissented from the views expressed in the plurality opinion (1304a).[15]

3. *Proceedings Pending Certiorari*

Judge McMillan conducted hearings from July 15 through July 24, 1970 in accordance with the order of this Court of June 29, 1970 granting certiorari, authorizing the remand directed by the Court of Appeals for further proceedings and reinstating the district court's judgment.

The school board had filed, but did not support, a plan prepared by the Department of Health, Education and Welfare (hereinafter HEW) and a plan prepared by four of the five members of the school board.

The Department of Justice appeared at the hearing as *amicus curiae* to present the HEW plan. Testimony was therefore directed to the comparative advantages and disadvantages to these plans and another plan which had been prepared by Dr. Finger during his tenure as court consultant.

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origins," the "involuntary bussing of students in contravention of [the statute]" and the use of "public funds . . . for any such bussing."

The state and the local defendants have noted appeals to this Court.

[15] The judgment was vacated in its entirety. Judge Butzner's reason for this action was to give greater flexibility to the development of a new elementary plan (1263a). Judges Winter and Sobeloff thought it was improper to invite the reconsideration of the portions of the plan already found acceptable (1295a, n.*). The judgment expressed Judge Bryan's hope that "upon re-examination the District Court will find it unnecessary to contravene the principle stated . . ." in his dissent (1304a).

The Court entered a Memorandum of Opinion and Order (Br. A1) on August 3, 1970 in which it: rejected again the majority board plan; rejected the HEW plan as unconstitutional, and unreasonable in the context of Charlotte; accepted as constitutional and reasonable the originally ordered plan, the minority board plan and the preliminary Finger plan; and continued in effect his previous order of February 5, 1970 but allowing the board to choose to operate under one of the other plans found acceptable by the court if such a decision were made and presented to the court in writing before noon on August 7, 1970.[16]

The school board, at a meeting on August 6, 1970 decided not to exercise any of the options offered by the order of August 3 and to appeal and seek a stay in this Court and in the court of appeals (Br. A40). Upon receiving the report the court ordered the court ordered plan of February 5 be implemented (Br. A39).

4. *The Charlotte-Mecklenburg County School System in 1968-69*

In March of 1969, the plaintiffs presented to the district court detailed evidence about the school system, such as the number and location of the schools, the grades served, the kinds of programs offered, the achievement of the students in the different schools, the racial distribution of students and faculties in the system, and the changes which had occurred over the years. The plaintiffs also showed by expert testimony the rigid racial segregation of the population in Charlotte and in Mecklenburg County and its causes.[17]

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[16] The court also allowed the board to close rather than integrate the Double Oaks School (black). There had been evidence presented at the hearing that it is difficult to get buses to the school although buses served the school during the 1969-70 school year.

[17] See the testimony of Charles L. Green (15a-27a), Daniel O. Henningan (28a-57a), Paul R. Leonard (57a-64a) and Yale Rabin (174a-241a). And see the testimony of defendants' witness, William E. McIntyre (251a-284a).

The court carefully analyzed the voluminous evidence before it. Over the course of the litigation below, the district court made extensive findings of fact.[18] Each succeeding order reflects a comprehensive analysis of new submissions of evidence by the parties and the cumulative evidence already before the court. The court of appeals has accepted the district court's findings (1262a).[19]

Judge McMillan's first opinion on April 23, 1969, gave a detailed description of the school system, the community which it serves and the extent of racial segregation within the schools (285a). We only summarize here some of the salient facts contained in the April opinion.

The Charlotte-Mecklenburg school system serves more than 84,000 pupils residing in the city of Charlotte and Mecklenburg County. In April, 1969, there were 107 schools, including 76 elementary schools (grades 1-6), 20 junior high schools (grades 7-9) and 11 senior high schools (grades 10-12). The system employed approximately 4,000 teachers and nearly 2,000 other employees. The racial composition of the students in the system was approximately 71% white and 29% black. The residential patterns of the county were sufficiently integrated so that most of the county school zones included both black and white students. No all-black schools remained in the County. In the City, however, the

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[18] Significant findings are contained in eight of the orders leading to the decision of the court of appeals: Opinion and Order, April 23, 1969 (285a); Opinion and Order, June 20, 1969 (448a); Order, June 24, 1969 (459a); Order, August 15, 1969 (579a); Memorandum Opinion, November 7, 1969 (657a); Opinion and Order, December 1, 1969 (698a); Order, February 5, 1970 (819a); Supplemental Findings of Fact, March 21, 1970 (1198a); and Further Findings, etc. (1259a).

See also the most recent Memorandum of Opinion and Order, August 3, 1970 (Br. A1).

[19] The most recent findings (Br. A1), of course, have not been reviewed by the court of appeals.

residential areas were and are generally segregated by race,[10] and most schools were racially identifiable.

During the 1968-69 school year, students were assigned to the schools under the same plan as approved by the district court in 1965—initial assignments by geographic zones with freedom of transfer restricted only by school capacities.

The court found that 14,000 of the 24,000 black students in the system were attending schools which were at least 99% black (303a).[11] The court further found that most of the desegregated city schools were in transition from a previously all-white enrollment to all-black (302a). Seven schools which served 5,502 white pupils and no black pupils in 1954, served 5,010 pupils of which 35% were black in 1965. In 1968 they served 5,757 students, 81% of whom were black.

The school system had been growing at approximately 3,000 students per year, requiring an on-going school construction program. With few exceptions, the size and place-

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[10] Most of the evidence concerning residential segregation was produced at the March 1969 hearings. (See note 17, *supra*.) The April order describes the housing patterns and some of the forces which created them. The matter was examined again in subsequent orders, particularly the Order of November 7, 1969 (657a). The court's conclusion was that housing segregation in Charlotte has been substantially determined by governmental action.

[11] In June, after further analysis of the data, the court concluded that approximately 21,000 of the 24,000 black students in the system lived within the city of Charlotte and that nearly 17,000 of them were attending black or nearly all-black schools (459a). The court also found that nearly 19,000 of the more than 31,000 white elementary students attended schools which were nearly all-white. (There are only 150 black students attending these schools.) More than one-half of the 14,741 white junior high school students attended schools with a total black population of 193 (453a).

ment of the recently constructed schools produced either all-white or all-black new schools.[22]

The court found faculties segregated. The great majority of the 900 black teachers were teaching in black schools. There was less than one white teacher per black elementary school. The two black high schools had teaching staffs more than 90% black.

The court concluded that the board's policies of zoning, free transfer and its school placement had contributed to and continued an unlawfully segregated public school system. It also concluded that the faculties had not been desegregated as required by the 1965 order. The board was directed to produce plans for the active desegregation of the pupils and faculties by May 15, 1969.

On appeal, Judge Butzner agreed that the system was unlawfully segregated in April of 1969:

> "Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was operating a dual system of schools in the light of subsequent decisions of the Supreme Court . . ." (1263a-1264a).[23]

The district court further found that the impact of segregation on black students in the system had resulted in the denial of equal educational opportunities. Comparative test results showed a wide disparity in achievement between students attending all-black schools and students attending

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[22] The new black schools were generally "walk-in" schools while the white schools were placed some distance from the areas which they serve (1203a-1204a).

[23] Both Judges Sobeloff and Winter concurred in this conclusion (1279a, 1295a).

white and integrated schools (857a-859a, 702a-704a, 1206a-1207a).[24]

The court also found that the residential segregation was far from benign or de facto. The school board by gerrymandering zone lines (455a-456a) and other practices, together with the activities of other governmental agencies, had had a significant impact upon the creation of Charlotte's ghetto. Again, the three circuit judges subscribing to the plurality opinion and Judges Sobeloff and Winter concurred in these findings. As Judge Butzner summarized:

> The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property [footnote omitted] until *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage.
>
> The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accom-

[24] The court reviewed the most recent data in July, 1970 and found wide disparities again (Br. A1).

modate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result (1264a).

In addition to the activities of the governmental agencies producing the discriminatory zoning (297a, 1229a) and the urban renewal programs (297a, 1229a) mentioned by Judge Butzner, there was substantial evidence showing that long range planning by the City Council projects present segregation into the future (1229a), that public housing officials had overtly discriminated until recent years and have reinforced racial segregation by their site selection (1229a) and that those officials responsible for planning and building streets and highways have created racial barriers. (See, generally testimony of Yale Rabin (174a-241a)).

There was also significant testimony concerning "private" individual and institutional forces which have kept blacks out of white residential areas. The Rev. Daniel O. Hennigan, a black realtor testified at length concerning the enormous difficulties he had experienced over a period of four years in becoming the first—and so far only—black member on the Charlotte Board of Realtors. He finally secured membership by agreeing not to seek participation in Charlotte's multiple listing service. He also told of instances where he had negotiated the purchase of land in white areas but was unable to proceed because funds were denied his clients by the lending institutions (28a-57a).

5. *The Schools in 1969-70*

During the 1969-70 school year the schools were again operated under the board's 1965 desegregation plan as modified in its submission to the court in July 1969. The modifications provided for the transportation of 4,245 inner-city black students to outlying white schools. Of these

children 3,000 were to come from 7 schools which were to be closed and 1,245 from overcrowded black schools. The board also proposed some further faculty desegregation but would retain all other racially discriminatory features as found by the court in April. The board did propose, however, to study its building programs and such measures as altering attendance lines, pairing, clustering and other techniques in order to develop a comprehensive desegregation plan for the future.

The plaintiffs had objected to the proposal on the grounds that it left many schools segregated for yet another year and placed the full burden of desegregation upon black children.

The court, in an order entered on August 15, 1969 (579a), approved the proposed pupil reassignments for the 1969-70 school year "only (1) with great reluctance, (2) as a one year temporary arrangement and (3) with the distinct reservation that 'one-way bussing' plans for the years after 1969-70 will not be acceptable." The board was ordered to file a third plan by November 17, 1969, "making full use of zoning, pairing, grouping, clustering, transportation and other techniques . . . having in mind as its goal for 1970-71 the complete desegregation of the entire system to the maximum extent possible" (591a).[25]

Upon application of defendants, the court modified the August 15 order on August 29 to allow for the reopening of a black inner-city school to serve up to 600 inner-city children who chose not to be transported to suburban white schools (593a).

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[25] The board explicitly refused to follow these directives. Each of the next two plans submitted by the board rejected the techniques of "pairing, grouping [and] clustering." See n. 29, *infra*. A similar directive of the court of appeals has also been ignored (Br. A1).

The plan did not accomplish what was promised. The court later found that "the 'performance gap' is wide" (659a).

> In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now [March 21, 1970] only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board (1226a).

In the November, 1969 Memorandum Opinion (657a) the court set out in detail the racial characteristics of the school system during the 1969-70 school year (658a-663a). The court concluded that there had been no real improvement from the segregated situation found during the previous school year.

> Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.
>
> The schools are still in major part segregated or "dual" rather than desegregated or "unitary" (661a).

Analyzing the same figures in a later order (698a) the court pointed out that "Nine-tenths of the faculties are still obviously 'black' or 'white.' Over 45,000 of the 59,000 white students still attend schools which are obviously white" (702a).

The court also determined that the free transfer provision in the board's plan negated any progress which the

July plan might have produced (662a).[26] It also found that attempts to desegregate the schools by altering attendance lines would continue to fail as long as students could exercise a freedom of choice (662a-663a).

The court of appeals shared Judge McMillan's view that the system was still segregated during the 1969-70 school year (1266a, 1275a).

6. *The Plan Ordered by the District Court in Feburary, 1970*[27]

In the decision of December 1, 1969 (698a) in which the court announced that an educational consultant would be appointed, 19 principles were stated for his guidance (708a-713a). Dr. Finger's instructions included "all the black and predominantly black schools in the system are illegally segregated . . ." (711a); "efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but . . . variations from that norm

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[26] The court had made similar findings in June:

> Freedom of transfer increases rather than decreases segregation. The School Superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished (453a).

Moreover, during the choice period prior to the 1969-70 school year, just two white students out of 59,000 elected to transfer to black schools and only 330 black students out of 24,000 chose to transfer to white schools (*Id.*).

[27] A portion of the February order was stayed by the court of appeals on March 5 (922a) and the remainder by the district court on March 25 (1255a).

The order was reinstated by this Court on June 29 (1320a) pending further proceedings in the district court.

On August 3, 1970 the district court continued this Court's order in effect subject to options made available to the board for elementary school assignments if exercised on or before August 7, 1970 (Br. A1). Since the board declined to exercise any of the options, the court, on August 7, 1970 directed the court ordered plan of February 5 be implemented (Br. A39).

may be unavoidable" (710a); "bus transportation to eliminate segregation [and the] results of discrimination may validly be employed" (710a); and "pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools" (712a).

Dr. Finger's work is described in the Supplemental Memorandum of March 21, 1970 (1221a):

> Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans.[28] When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report.[29] The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.
>
> The detailed work on both final plans was done by the school board staff (1231a).

Both plans were presented to the court.[30]

a. *High Schools*—The school staff had developed a plan which produced a white majority of at least 64% in each

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[28] One of his preliminary plans was introduced and described at the July, 1970 hearing (Br. A1).

[29] The board's two most significant limiting factors were: (1) Rezoning was the only method to be employed; the board rejected such techniques as pairing, grouping and clustering; (2) a school sought to be desegregated would be at least 60% white; thus, the board's plan for elementary schools produced some schools between 57% and 70% white, eight schools 1% to 17% white, two schools 0% white and no schools between 18% and 58% white.

The court of appeals found as the district court had that these limiting factors were improper (1275a-1276a).

[30] Description of the plans are found in several of the decisions below. See, Order, February 5, 1970 (819a, 825a-827a) and tables

of the ten high schools including the all-black West Charlotte High School (see Exhibit B, 829a). The board accomplished this result by restructuring attendance lines. Dr. Finger's proposal used the board's new zones and assigned an additional 300 pupils from a black residential area to Independence High School which would have had only 23 black students under the board's plan. Judge McMillan adopted the Finger modification. This portion of the plan was approved on appeal. Judge Butzner wrote:

> The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools (1273a).

b. *Junior High Schools*—During the 1969-70 school year the board operated 19 junior high schools. Five were all or predominantly black; eight were more than 90% white. (See Exhibit D, 830a.) The board, by rezoning eliminated several of the black schools. One school, however, Piedmont, remained 90% black. Additionally, four schools would be more than 90% white.[11]

Dr. Finger devised a plan which would integrate all the junior high schools. Twenty of the schools would have white populations ranging from 67% to 79% and the re-

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(829a-839a); Supplemental Findings, March 21, 1970 (1198a, 1208a-1214a); Supplemental Memorandum, March 21, 1970 (1221a, 1231a-1234a); Opinion of Court of Appeals (1262a, 1268a-1269a). See also the Memorandum of Opinion and Order, August 3, 1970 (Br. A1).

[11] Two new junior high schools are scheduled to open for the 1970-71 school year. Both proposed plans contemplate assigning students to these new schools. It is significant that under the board plan one of the schools would be 100% white and the other 91% white (830a).

maining school would be 91% white. The plan employed rezoning and satellite zones.[32]

The district court approved of the board's plan except as to Piedmont, and gave the board four options: (1) rezoning to eliminate the racial identity of the remaining black school, (2) two-way transportation of pupils between Piedmont and white schools, (3) closing Piedmont, or (4) adopting the Finger Plan. The board reluctantly chose to employ the Finger Plan.

Judge Butzner found the plans for junior and senior high schools by use of satellite zones together with transportation "a reasonable way of eliminating all segregation in these schools" (1273a).

c. *Elementary Schools*—The board in restructuring attendance lines for the 76 elementary schools was unable to affect a majority of the students attending racially identifiable schools. As the court of appeals observed, "Its proposal left more than half the black elementary pupils in nine schools that remained 86% to 100% black, and assigned about half of the white elementary pupils to schools that are 86% to 100% white" (1269a; see Exhibit H, 832a-834a).

The Finger Plan also employed the board's rezoning. 27 schools were rezoned, and 34 schools were desegreated by clustering and pairing with transportation.[33] Judge McMillan described the plan:

> Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black

[32] A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding the school.

[33] The designated clusters are shown in Exhibit K (838a-839a). The zones of ten schools remained substantially unchanged.

inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.

The "Finger Plan" itself . . . was prepared by the school staff. . . . It represents the combined thought of Dr. Finger and the school administrative staff as to a valid method for promptly desegregating the elementary schools. . . ." (1212a-1213a)

Under the plan the elementary schools would be from 60% to 97% white with most of the schools about 70% white. (See Exhibit J, 835a-837a.)

Judge McMillan found the board plan to be inadequate and directed that the Finger Plan or some other plan which would accomplish similar results be implemented.

The court of appeals agreed that the board plan was unacceptable. "The district court properly disapproved the school board's elementary school proposal because it left about one-half of both black and white elementary pupils in schools that were nearly completely segregated" (1275a). The court of appeals, however, decided that the board should not be required to undertake the additional transportation necessitated by the Finger Plan (1275a) and directed further proceedings for the development of another plan (1277a).

d. *Transportation*—The district court's order required additional transportation to be provided. The plurality opinion approved of the increments of transportation to accomplish the junior and senior high assignments (1273a) but determined that the elementary school busing appeared too extensive (1276a).

During the 1969-70 school year, the board operated 280 school buses transporting 24,737 of its 84,000 students.[34]

[34] Judge McMillan made detailed and elaborate findings concerning the extent and cost of busing in the Charlotte system, the state

The board reported (619a) the number of children transported, by grade level, as follows:

Pre-school	599
Elementary	10,441
Junior High	8,989
Senior High	4,708

Another 5,000 students rode public transportation at a reduced fare (1214a). The average annual cost per child was about $20.00 or about $475,000.00 out of a total budget of about 57 million dollars, almost all of which was reimbursed by the state.[35] The buses averaged 1.8 one-way trips

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and the country, in his Supplemental Findings of March 21, 1970 (1198a). (See also Further Findings, etc. of April 3, 1970 (1259a)). The court had examined the transportation system in previous decisions as well (306a-307a, 449a-450a, 822a-823a).

Similar evidence was presented at the July, 1970 hearing with resulting findings by the court (Br. A1). These additional findings are discussed below.

[35] See Further Findings, etc., April 3, 1970 (1359a-1260a). The district court had originally understood the average cost to be about $40.00 per pupil (306a-307a, 1200a). The state reimburses local school boards for operating expenses for transportation for those students who are eligible under state law. The original cost of the bus is borne by the local board but the state replaces worn out buses (1259a-1260a).

During 1969-70 and previous years, pupils eligible for transportation were those children who lived more than 1½ miles from school and who lived either in the county or in portions of the city which had been annexed since 1957. Additionally, the state paid the transportation costs for children who lived within the pre-1957 city limits who attended schools outside of the pre-1957 limits (1203a).

For the 1970-71 school year, as a result of a decision in an unrelated case, *Sparrow* v. *Gill*, 304 F. Supp. 86 (M.D. N.C. 1969) (3-judge court), the State Board of Education has directed each school system either to offer transportation (at state rather than local expense) to *all* city children living more than 1½ miles from the school to which they are assigned or to *no* children living within the city limits.

Thus all of the children to be bused under the court approved plan would be eligible for transportation at state, rather than local expense. (See, Br. A1).

per day carrying an average of 83.2 students, averaging 40.8 miles (1200a).[36]

Judge McMillan's Findings in March (which were reaffirmed after 8 days of hearings in July, 1970) as accepted by the court of appeals show the added transportation under the plan ordered on February 5 to be:

	No. of Pupils	*No. of Buses*	*Operating*[37] *Costs*
Senior High	1,500	20	$ 30,000
Junior High	2,500	28	50,000
Elementary	9,300	90	186,000
Total	13,00	138	$266,000

The initial one-time[38] capital outlay to purchase new buses would be $745.200.[39] However, it was discovered at

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[36] The overall figures for the state show a higher percentage of students riding buses than in Charlotte. During the 1968-69 school year about 55% of all students in North Carolina rode buses to school; 70.9% were elementary students (1199a). (Elementary students are defined by the state for these purposes as students in grades 1 through 8.)

[37] These operating cost figures are as determined by the court of appeals (1269a) by applying the district court's Further Findings, etc. of April 3, 1970 (1259a) to its Supplemental Findings of March 21, 1970 (1198a). Operating costs are reimbursed by the state.

The board had claimed much greater increases in the extent and cost of additional busing, but the district court, after carefully analyzing the data, found the board's figures to be exaggerated (see "Discount Factors," (1214a-1216a). The court's findings are also consistent with the transportation requirements projected by the board for its plan to transport 3,000 Negro children to the suburbs for the 1969-70 year (Exhibit E, 491a).

[38] Obsolete buses are replaced by the state. See note 35, *supra*.

[39] The district court observed that there was at least 3 million dollars worth of vacant school property which had been abandoned pursuant to the 1969-70 desegregation plan (1219a) and which, as the board had pointed out in its report in the summer of 1969, could be disposed of to produce necessary "desegregation" funds (Exhibit E, 491a).

the recent hearings that the board has on hand 107 buses not now being used to transport children to school.

14. Up until the July 15, 1970 hearings, the defendants had allowed the court to believe they only had 280 busses plus a few spares. On the last day of the hearing, however (July 24, 1970), some amazing testimony was developed on cross-examination of the witness J.W. Harrison, the Transportation Superintendent. He testified and the court finds as facts that *in addition to* the 280 "regular" busses, the Board's bus assets include at least the following:

(i)	Spare busses	20
(ii)	Activity busses (each driven less than 1,000 miles a year)	20
(iii)	Used busses replaced by new ones in 1969-70	30
(iv)	New busses currently scheduled for replacement purposes and expected to be delivered in near future	28
	Total:	107

(Br. A 18).

Moreover, the court found that since "early 1970 . . . there were 75 new busses available to the local school system if they wanted them, out of the 400 new busses then held by the state" and that the 400 second-hand busses in the state are "available on loan, without cost, for local school boards to use in 1970-71" that "could be safely used" (Br. A 1).

Thus no initial capital expenditures for busses is required of the local board.

"No capital outlay will be required this year to comply with the court's order. The School Board and the county government have ample surplus and other funds on hand to replace with new busses as many of the used busses as 1970-71 experience may show they actually need" (Br. A 1).

And, again, operating costs are borne by the state.

The board itself had proposed the busing of 4,200 black inner-city children for the 1969-70 school year to outlying suburban schools as a desegregation measure (584a-586a). The board's February 2 plan proposes to bus approximately 5,000 additional students, about half of whom are elementary pupils. A major portion of this busing is within the City (1217a, 1270a, n. 4). Moreover, there is nothing novel about city children riding school busses. Children living in the city but outside of the 1957 city limits have been bused. Many city boards of education, such as Greensboro, have provided transportation for all city children living more than 1½ miles from school with local funds. The present State Superintendent of Public Instruction, his predecessor and the prestigious 1969 Report of the Governor's Study Commission on the Public School System of North Carolina had all recommended that transportation be provided for children, city as well as rural, on an equal basis (1201a-1202). State policy for the 1970-71 school year is that all city children living more than 1½ miles from school will be eligible for transportation at state expense.

The bus trips required for the paired elementary schools would be straight-line non-stop trips (1205a), would be shorter and would take less time than the average bus trip in the sytem or in the state (1199a, 1205a).

34. . . .

(f) The average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. The average length of the one-way trips required under the court approved plan for elementary students is less than seven miles, and would appear to require not over 35 minutes at the most, because no stops will be necessary between schools (1215a).[46]

Busing was a technique employed by the board to maintain its dual system as recently as 1966 (1200a); even today, school buses transport white students to outlying white schools while Negro students walk to their all-black schools (1203a-1204).

Judge McMillan's most recent memorandum includes significant findings concerning transportation. The exhaustive evidence on transportation presented in July verified beyond question the court's conclusions of March. It also revealed, even more clearly, the gross exaggerations of the Board's transportation estimates for all desegregation plans. Among the more pertinent findings are:

1. "In North Carolina the school bus has been used for half a century to transport children to *segregated consolidated schools*" (Br. A16).

2. The state now authorizes transportation at state expense for all city children living more than a mile

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[46] The court later explained how these figures were developed:

The average *straight line* mileage between the elementary schools paired or grouped under the "cross-bussing" plan is approximately 5½ miles. The average bus trip mileage of about seven miles which was found in paragraph 34(f) was arrived at by the method which J. D. Morgan, the county school bus superintendent, testified he uses for such estimates —taking straight line mileage and adding 25%. (Emphasis in original; 1215a.)

and a half from school, causing a significant increase in the number of children riding school busses in North Carolina from the 55% who were bussed during the 1968-69 school year (Br. A16).

3. "School bus transportation is safer than any other form of transportation for school children" (Br. A16).

4. There were 17 busses carrying 700 four and five year old children to child development centers on one-way trips ranging from seven to thirty-nine miles during the 1969-70 school year (Br. A18, A24).

5. The Board's cost " 'estimates,' when heard against the actual facts, border on fantasy!" (Br. A24). Its projections do not, as claimed, reflect the Board's experience in transporting inner-city black children to outlying white schools for the 1969-70 school year.

> "[T]he evidence [shows] for example . . . that one [such] 'desegregation bus' (Bus #23, Exhibit 54) transported 99 children daily among schools as remote as Northwest Charlotte (9th and Bethune) on the one hand and Sharon Elementary and Beverly Woods Elementary on the other, with the driver then going on in the bus to South High School" (Br. A22).[41]

6. There is an emple supply of busses, new and used, money and drivers to implement the court order (Br. A18-A20, A26).[42]

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[41] The defendants estimate for all plans are based upon the assumption that one bus will make one trip to one school with one load of 45 or less children (Br. A21-A22).

[42] The court also found to be without basis the Board's claim that: elementary children should not ride buses ("There may be more first graders than children of any other age riding school busses" (Br. A24)); that additional buses will unduly clog traffic in Charlotte (Br. A25); and that it would unduly disrupt the system if

7. *Other Elementary Plans Reviewed by the District Court in July, 1970*[42a]

Judge McMillan reviewed and compared five elementary plans at the hearings in July, 1970: (1) The majority board plan which he had rejected in February and which the court of appeals had rejected; (2) the Finger plan as ordered in February, 1970; (3) the minority board plan supported by four of the nine members of the board; (4) another plan which Dr. Finger had prepared when acting as court consultant; and (5) the HEW plan.

a. *The Majority Board Plan*—The court was of the opinion that the court of appeals had required the board to prepare and present another plan. The board chose not to do so, but relied again upon its February submission. Judge McMillan was not persuaded that he could approve a plan which left over half of the black and white elementary children in racially identifiable schools and which had been rejected by the court of appeals (Br. A27).

b. *The HEW Plan*—This plan was developed by a team of four HEW officials. They did not consult with or seek the assistance of the local staff in the preparation of the plan. The team was lead by Mr. Henry Kemp, recently hired by HEW, who had no previous experience as an educator with a school system of over 6,000-7,000 students. Charlotte was Mr. Kemp's first assignment by HEW to prepare a desegregation plan. His principal assistant was

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it were necessary to stagger the hours of school to simplify transportation problems ("The schools already operate on staggered schedules. . . . The court finds that staggered opening and closing hours for elementary schools, and arrangement of class schedules of bus drivers for late arrival and early departure are facts of life which will not be eliminated by desegregation of the schools" (Br. A25-A26).)

[42a] At the time of the preparation of this brief, the July, 1970 proceedings have not yet been transcribed.

Mr. John Cross, a young lawyer who also had never worked upon a complete desegregation plan for a city or metropolitan school system.

The plan used the newly created zones of the majority board and Finger plans and then created several contiguous clusters each containing a black school with two or more rezoned desegregated schools with each school serving all the students within the cluster for 1, 2 or 3 grades. It left two schools all black.[43] The schools which had been desegregated by rezoning would therefore have a significantly greater black student population than under the Finger plan.

Both plaintiffs and defendants objected strenuously to the plan for substantially the same reasons. The Board's position on the HEW plan was unanimous.[44] The court described the HEW plan:

> 2. The HEW plan.—This plan proposes to adopt the basic zoning program of parts of the Board majority plan, and then to re-zone some of the black schools with some white schools, mostly in low and middle income areas, and by clustering, pairing, grouping and transportation, to produce a substantial de-

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[43] One of these schools, Double Oaks, is in a *cul-de-sac* which was built to serve a segregated public housing project which surrounds it. Dr. Finger testified that if he were forced to decide which of the black children in Charlotte would be desegregated and which would not, he would seek initially to offer the children at Double Oaks a desegregated education.

[44] It was noted at the hearing that the Board's rejection of the HEW plan was the first unanimous action taken by the Board on a desegregation issue in a long time. Four members of the Board supported a minority plan at the July hearing which was designed to desegregate all the elementary schools so that each school would be approximately 70% white and 30% black; five supported the board plan of February which left 10 black or predominantly black schools.

segregation of the most of the black schools. The faults of the plan are obvious.

It leaves two schools (Double Oaks and Oaklawn) completely black; it leaves more than a score of other schools completely white; it would withdraw from numerous white schools the black students who were transported to those schools during the 1969-70 school year. The clusters proposed by HEW would for the most part continue to be thought of as "black" in this county because the school populations of most of the clusters would vary from 50% to 57% black and the lowest black percentage in any cluster is 36%. Recommended HEW faculty assignments to these clusters of schools contemplated faculties which in the main would be less than half white, and this would be another retrogression from the arrangements already made by the School Board for the fall term! Contrary to the orders of the district court and the Circuit Court, the HEW people limited their zoning to contiguous areas.

All witnesses except the HEW representatives themselves joined in hearty criticism of the HEW plan because of its ignorance of local problems, because of its threat of resegregation, and because it tends to concentrate upon the black and low- or middle-income community a race problem that is county wide.

In other days and other places the HEW plan would have looked good; and in those districts where black students are in the majority, much of such a plan could well be reasonable today. However, "reasonableness" has to be measured in the context; and in this context the HEW plan does not pass muster. It also on the facts of this case would fail to comply with the Constitution (Br. A28-A29).

c. *The Finger Plan, the Board Minority Plan and the Preliminary Finger Plan*—Judge McMillan found each of the three remaining plans to be basically acceptable, but found the original Finger plan to be the only finished plan.

> "The original court ordered (Finger) plan is the only complete plan before the court" (Br. A2).

The Minority plan created clusters of two or more elementary schools zones using the old (1969-70) attendance areas and included all elementary schools. Each cluster contains approximately 2,000 students with a white-black ratio in the neighborhood of 70%-30%. There is no method specified as to how the students would be assigned within the clusters, although the principal author of the plan, Dr. Carlton Watkins, testified that he favored some kind of random assignment plan which would produce the desired racial ratio at each school. He also favored having each school serve grades 1 through 6 rather than having altered grade structures as in the Finger plans where each school would serve either grades one through four or five and six.

In terms of the number of children to be transported and transportation costs the plans are not greatly different.[45]

> "All plans which desegregate all the schools will require transporting approximately the same number of children. The overall cost, if a zone pupil assignment method is adopted, the minority Board Plan may be a little cheaper than the Finger plan" (Br. A23).

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[45] The HEW plan would require somewhat less busing at less cost because it leaves two schools all-black. If those schools were desegregated, however, the number of children to be bused would be about the same at a cost not significantly less than any of the other plans.

As to the preliminary Finger plan: "From the standpoint of economics it may be the cheapest plan available" (Br. A23).

Judge McMillan indicated the relative advantages and disadvantage, of these three plans. He judged each plan to be constitutional since each plan is feasible, reasonable and desegregates the schools. He, therefore, continued in effect the February 5 order, but allowed the Board to choose one of the other acceptable plans or some combination thereof on or before August 7, 1970. At a meeting on August 6, 1970, the board decided not to exercise any of these options (Br. A40). The court therefore ordered the February 5 plan to be implemented (Br. A39).

Summary of Argument

I

Both courts below held that the Charlotte-Mecklenburg school system was unconstitutionally racially segregated during the 1968-69 and 1969-70 school years. These holdings were clearly correct.

During the 1969-70 school year, the school board's desegregation plan which provided for the assignment of pupils by geographic attendance zones with pupils allowed a "free transfer" to other schools had resulted in: more than 16,000 of the 24,714 black pupils attending all-black or predominantly black schools; over 45,000 of the 59,000 white students attending schools which were obviously white; 16 schools were 98-100% black; 9 other schools were readily identifiable as black; 57 schools were identifiable as white; only 24 schools were not identifiable by race; and the faculties of 90% of the schools were still obviously white or black. In the elementary schools about three-fourths of the 13,010 black elementary pupils attended black or predominantly black schools. The courts below,

in applying the teachings of *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968) and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968), properly found the schools to be unlawfully segregated.

The district judge found that the segregation of black students in Charlotte had produced its inevitable results in retarded achievement. Although this case does not depend upon such findings of harm to black children, *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958), these facts profoundly impressed Judge McMillan and underscored the importance of his holding that the school board has "a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical apartheid" (293a).

The courts below found that the segregation of school children in Charlotte was caused by actions of governmental officials. The school board, for its part had over the years chosen school sites, determined capacities and drawn zone lines in a fashion to promote segregation. The residential segregation found in Charlotte was in large part created and maintained by the official actions of those involved in planning, zoning, public housing, urban renewal and other activities. Neighborhoods were kept white by the use of racial covenants, the functional equivalent of racial zoning ordinances. (*Bell* v. *Maryland*, 378 U.S. 226, 329 (1964), Mr. Justice Black dissenting.) Thus, no claim that the schools should remain segregated by reference to a "neighborhood school" policy is tenable. As this Court made plain in *Cooper* v. *Aaron*, 358 U.S. 1, 16-17 (1958), school boards are agents of the state and will not be excused from their duty to guarantee the constitutional rights of Negro children because the "vindication of those rights was rendered difficult or impossible by actions of other state officials."

II

The goal set by the district court to eliminate the racial identity of the present "black" schools in the Charlotte-Mecklenburg system is in conformity with the decisions of this Court. Upon finding that the continued existence of all-black schools in Charlotte was the result of racial discrimination by the school board and other governmental agencies, the court was required to seek ways to eliminate the consequences of these discriminatory actions. This Court has said in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) that "the system of segregation and its effects" (*id.* at 440) must be dismantled (*id.* 391 U.S. at 437), and eliminated "root and branch" (*id.* at 438). A desegregation plan must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442) and courts are to enter decrees "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*id.* at 438, note 4).

The trial judge, therefore, when he found it was necessary to appoint a consultant to assist him in preparing a plan because of the recalcitrance of the school board, appropriately instructed the consultant that black schools were illegally segregated in Charlotte and that "efforts should be made to reach a 71-29 [white-black] ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable." This specific, although flexible, goal for pupil assignments is exactly parallel to the kind of goal for faculty desegregation set by the district court and approved by this Court in *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1968).

In contrast to the complete relief sought by the district court, the court of appeals has announced a new rule looking toward less than complete relief. The new principle requires that in each case a court must decide whether the goal of complete desegregation to eliminate racially identifiable schools is a "reasonable" goal in that it can be accomplished by "reasonable" means. The new rule portends serious consequences for the general course of school desegregation. It is a new litigable issue which will produce less desegregation and at a slower pace. The rule is vague and ambiguous. The only thing clear about it is that it means less desegregation than the standard which we understood to apply before, that is, whether a plan is feasible. And there is no question as to the feasibility of the plan set aside by the court of appeals.

The court of appeals agrees with the district court that the segregation sought to be dismantled is illegal, but holds that, for some reason, the remedy is not worth the price. We think such a finding is unacceptable in the United States and conflicts with *Griffin* v. *School Board*, 377 U.S. 218 (1964). The techniques to right the wrong found to exist in Charlotte are at hand as the court ordered plan so clearly demonstrates. The holding of the court of appeals threatens to water down or temper the duty to convert to a unitary system. It should be rejected.

The defendants have argued that provisions of the Civil Rights Act of 1964 (Sections 401(b) and 407(a)(2), codified as 42 U.S.C. §§2000c(b) and 2000c-(a)(2)) forbid the busing ordered by the district court. We think the disposition of this issue by the court below was clearly correct in ruling that the Civil Rights Act placed "no limitations on the power of school boards or the courts to remedy unconstitutional segregation" (1274a). This is the construc-

tion placed on the statute by all four circuits which have addressed the issue. Moreover, the district court did not impose racial balance. Under its order the schools would vary from 3% to 41% black. What the court did do was to set a specific, yet flexible goal, the purpose of which was "the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools" (Br. A10).

III

The court-ordered desegregation plan meets the most important test of *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), in that the plan does promise to actually dismantle the dual system and provide a unitary system of schools. The principle characteristics of the dual system—the all-black schools—will be gone. The plan works.

The plan was produced because the district judge undertook the duty imposed upon him by law to seek means of desegregating the schools. It would seem beyond question that the court, having a detailed, feasible plan before it which desegregated all the schools was correct in judging that the board had failed to meet its "heavy burden . . . to explain its preference for an apparently less effective method." *Green, supra,* at 439.

We agree with the dissenters below that the proper test is whether a plan is "feasible" and whether it provides "effective relief," (*Green, supra,* at 439) not whether in the subjective judgment of a court the means are "reasonable." We do not understand the court below to question the feasibility of the plan. The plan calls for a transportation system which would be commensurate with the percentage of pupils transported in the state. The additional

busing would be for considerably shorter distances and take less time than the average distance and time for the bus trips for the 23,000 students presently transported in 1969-70. Nearly 11,000 elementary children are now being bused in the system. About 700 pre-school children are being transported great distances. The cost of the additional transportation will be a tiny fraction of the school budget. Enough buses are either on hand or available to be purchased or borrowed to implement the plan. The plan is educationally sound. The only impediment to the immediate conversion to a unitary school system under the court's plan is the board's unwillingness to do so.

The courts below approved of the techniques of pairing and clustering with transportation as appropriate and here necessary means, to desegregate the schools. Pairing was approved in *Green* (*supra* at 442, n. 6) and has been required in scores of school districts. Bus transportation is an ordinary tool of desegregation and has been required to desegregate schools. Since the constitutional imperative in this case is the desegregation of the schools, we can conceive of no reason why the courts below were wrong in holding that busing be employed.

We think that the courts below were also correct in rejecting the defendants' arguments that there is something wrong with assigning children to schools outside of their zones of residence. School boards have traditionally and necessarily reserved the right to alter attendance lines, grade structures and educational programs for their schools. As the district court's decision plainly shows, segregation can be eliminated by choosing to alter grade structures and provide transportation. The only reason for limiting assignments to adjacent zones in Charlotte would be to preserve segregation. In Charlotte only 541 of 17,000 of the children in black schools ride buses. At the white

schools, however, over 40% of the children already ride school buses. The question is not whether children will ride school buses, but where the buses will go.

The neighborhood school theory cannot be invoked now in support of segregation when it has been traditionally ignored to promote segregation. This is particularly true in a state which buses over 54% of the children in public schools.

The court of appeals has violated traditional standards of review in overturning the decision of the district court. In school desegregation cases district courts have been admonished to assess "the circumstances present and options available in each instance." *Green, supra,* at 439. And "in this field the way must always be left open for experimentation." *United States* v. *Montgomery County Board of Education, supra,* at 235. The equitable decree entered by the district court was faithful to those instructions and should not have been disturbed without a strong showing of abuse of discretion. *United States* v. *W. T. Grant Co.,* 345 U.S. 629 (1953). Instead of the traditional standards of review, the court of appeals fashioned its own subjective rule of reasonableness and vacated the district court's judgment. This new rule signals to district judges that their room for "experimentation" and their "options" are strictly limited. The signal is "go slow." We submit that the decision below has not only undercut *Green* and *Montgomery County,* but runs counter to the philosophy of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969) which requires immediate and effective relief. As Judge Sobeloff observed in dissent "reasonableness" is "all deliberate speed" in a new guise.

ARGUMENT

I.

The Public Schools of the Charlotte-Mecklenburg School System Are Racially Segregated in Violation of the Equal Protection Clause of the Fourteenth Amendment as the Result of Governmental Action Causing School Segregation and Residential Segregation.

A. *The Schools Are Organized in a Dual Segregated Pattern.*

Both courts below held that the Charlotte-Mecklenburg system was still unconstitutionally racially segregated. The record amply supports that finding and conclusion. Prior to this suit in 1965 there had been only a token break of the pattern of total racial segregation mandated by state law. The desegregation plan adopted in 1965 and continued in effect through the 1969-70 school term provided for the assignment of pupils by geographic attendance zones with pupils allowed a "free transfer" to attend the schools outside their areas of residence.[46] This is substantially the same kind of plan considered by this Court and found to be inadequate in *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968).[47] The court below concluded that: "The neighborhood school concept and freedom of choice as administered are not furthering desegregation" (313a; 300 F. Supp. at 1372). The court concluded that the Mecklenburg "rural schools are largely desegregated" but that in

[46] The plan was approved in 1965, and affirmed on appeal. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (W.D. N.C. 1965), affirmed, 369 F.2d 29 (4th Cir. 1966).

[47] A similar plan for geographic assignments and free transfers was also involved in *Northcross* v. *Board of Education of Memphis,* 397 U.S. 232 (1970).

the city of Charlotte "schools are still largely segregated" (302a; 300 F. Supp. at 1367-1368). Although the plan was modified in July 1969 to attempt to increase desegreation by closing certain black schools, there was little actual improvement.[48] Judge McMillan summarized the extent of desegregation during the 1969-70 term in these words:

> Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" schools or schools not readily identifiable by race. *More than 16,000, however, are obviously still in all-black or predominantly black schools.* The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decicision. The black school problem has not been solved.
>
> The schools are still in major part segregated or "dual" rather than desegregated or "unitary" (661a).

The court found that "nearly 13,000 out of 24,714 black students still attend schools that are 98% to 100% black"; that "nine-tenths of the faculties are still obviously 'black' or 'white' "; and that "over 45,000 out of 59,000 white students still attend schools which are obviously 'white' "

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[48] The July 29, 1969, plan, which was approved for one year only, did not produce the promised improvement and the court held that there had been a wide "gap" between the school board's promise and its performance (659a). The court found that "only 1,315 instead of the promised 4,245 black pupils" were transferred to white schools under the 1969 plan (659a). Even worse, the manner in which the free transfer feature operated threatened to transform some integrated schools into all-black schools threatening a "rapid shift from white to black, [so that] the net result of the 1969 pupil plan would be nearly zero" (659a). By March 1970, the court found even less progress: "In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board" (1226a).

(702a). During the school term just ended there were 11 schools which were 100% black, 5 schools 98-99% black, 3 schools 90-97% black, and 6 schools 55-89% black (660a). Thus, in a school system where black pupils were but 29% of the total, there were 25 schools out of 106 which the district judge held were "readily identifiable as black" (660a).[49]

Segregation was particularly intense at the elementary school level. About three-fourths of black elementary pupils attended predominantly black or all-black schools. There were 9,718 (or 74.6%) of the 13,010 black elementary pupils in schools which were from 65% to 100% black (832a-834a) and 60.7% of all black elementary pupils attended schools that were 98-100% black (id.).[50]

The court of appeals agreed with the district court that there was still a dual segregated system saying: "Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was impermissibly operating a dual system of schools in the light of subsequent decisions of the Supreme Court, *Green* v. *School Bd. of New Kent County*, 391 U.S. 430, 435 (1968), *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450 (1968), and *Alexander* v. *Holmes County Bd. of Ed.*, 396 U.S. 19 (1969)" (1263a-1264a).

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[49] The judge classified 57 schools as readily indentifiable as white schools and 24 as not readily identifiable by race (660a).

[50] The 1969-70 elementary school breakdown for heavily black schools is as follows (832a-834a):

	No. of Elementary Schools	*No. of Elementary Students*		
% Black		*White*	*Black*	*Totals*
100%	8	1	5,311	5,312
98–99%	4	32	2,536	2,568
92%	1	83	902	985
65–80%	3	378	969	1,347
	16	494	9,718	10,212

The several desegregation plans proposed by the school board were rejected by the courts below because they failed to accomplish sufficient desegregation.[51] The board sought to defend its fourth plan, filed in February 1970, in the court below. But the court of appeals held that "The district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated."[52]

The district judge examined the academic achievement test results of pupils in the segregated and desegregated schools in Charlotte and concluded that black children in

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[51] The board's May 1969 plan was the same basic plan which had been rejected in April 1969 with some modification of pupil transfer rules. The district court found that the free transfer plan did not accomplish desegregation. See 300 F. Supp. at 1384; 453a. The board's July 1969 plan was approved "reluctantly" for one year only. This plan closed 7 all-black schools and allowed pupils from the closed schools to be transported (if they so chose) to white schools. There was substantial opposition in the black community to the fact that this plan operated by one-way busing of blacks to white schools but closed black schools instead of desegregating them. The court found that the plan accomplished little increase in desegregation. The board's third proposal, the November 17, 1969, plan was rejected in the order of December 1, 1969. This plan called for rezoning. The court found that it would maintain 7 all-black schools and that most of the 25 black schools serving 16,197 of the 24,714 black children would be continued as black schools (701a).

[52] The board's senior high school plan, involving rezoning, was approved by the trial court with one exception. The court changed the zones to shift 300 black pupils in a designated area to Independence High School. This change created a satellite zone for Independence and the court of appeals rejected the board's appeal, and approved the change as one which "will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent 'tipping' or resegregation of other schools" (1273a). The board's proposals for junior high schools were found unacceptable because the plan would have left Piedmont Junior High 90% black and shifting toward 100% black.

Charlotte were suffering a substantial educational deprivation caused by segregation. Judge McMillan found that:

> Segregation produces inferior education, and it makes little difference whether the school is hot and decrepit or modern and air-conditioned.
>
> It is painfully apparent that "quality education" cannot live in a segregated school; *segregation itself is the greatest barrier to quality education* (588a).

The judge found that "segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children" (587a). Sixth grade students in black schools were on the average achieving at a fourth grade level on national achievement tests, whereas there was substantially higher levels in integrated and white schools (304a; 588a; 702a-704a).

More recent data was reviewed in the opinion entered on August 3, 1970. The gross disparities remained. Judge McMillan concluded:

> Of factors affecting educational progress of black children, segregation appears to be *the factor under control of the State,* which still constitutes the greatest deterrent to achievement (Br. A9).

As noted above, Judge McMillan was persuaded by the expert testimony[53] and by the facts of the case that "segregation itself is the greatest barrier to quality educa-

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[53] Plaintiffs' experts had testified at the hearing in March, 1969 in agreement with the conclusion of the Civil Rights Commission that: "The evidence indicates that Negro children attending desegregated schools that do not have compensatory education programs perform better than Negro children in racially isolated schools with such programs." *Racial Isolation in the Public Schools,* A Report of the United States Commission on Civil Rights, 205 (1967).

tion" (588a). And the school board apparently does not perceive compensatory education as a viable substitute for desegregation in creating equal educational opportunities for its black children:

> The defendants have come forward with no program nor intelligble description of 'compensatory education,' and they advance no theory by which segregated schools can be made equal to unsegregated schools (Br. A16).

Whatever doubts there may be about the standardized achievement tests as measuring instruments, the results profoundly impressed the trial judge that black children in Charlotte's all-black schools were not receiving an equal education. Of course, the case does not depend as a legal matter upon such local findings of educational harm. "The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). The segregation system was a massive intentional disadvantaging of the Negro minority by the white majority and its elimination is an urgent task. The district judge correctly held that the school board has "a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical apartheid" (293a).

B. *Governmental Agencies Created Black Schools in Black Neighborhoods by Promoting School Segregation and Residential Segregation.*

The findings of the district court make it plain that the existing pattern of school segregation in Charlotte-Mecklenburg is the deliberate result of state action designed to create a segregated school system. The court found that all

the school segregation in Charlotte was illegal and that there was no aspect of possibly innocent or adventitious segregation. Each and every black school in the system was held to be segregated in violation of the constitutional prohibitions against racial discrimination:

> On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated, *Green* v. *New Kent County; Henry* v. *Clarksdale; United States* v. *Hinds County* (711a).

The district court made no attempt to proclaim a general principle that all-black schools are illegally segregated *per se*. He held only that the particular all-black schools in Charlotte were illegally segregated.[54] That conclusion was supported by substantial evidence and findings.

Judge McMillan found that the school board had gerrymandered school attendance areas to promote segregation, selected the sites and sizes of schools to promote segregation, and used the school transportation system toward the same end. It was held that the racial makeup of the schools had been controlled:

> . . . the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of "building schools where the pupils are" without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James, obviously serve school

[54] Judge McMillan stressed this point in his recent opinion. See section headed, "*This is a local case in a local court—a lawsuit—to test the constitutional rights of local people*" (Br. A12).

> zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not deemed as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true "neighborhood school" philosophy (455a-456a).

The court heard extensive evidence about the extent of residential segregation in Charlotte and the governmental responsibility for the existing pattern of almost total residential separation. About 98% of the black inhabitants of Charlotte reside in the northwest quadrant of Charlotte. Judge McMillan summarized the findings about how this extensive segregation came about in these words:

> The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action all deriving their basic strength originally from public law or state or local governmental action. These elements include, among others, the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools

so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or "*de facto*," and the resulting schools are not "unitary" or desegregated (1228a-1229a).

The Fourth Circuit accepted these findings and conclusions stating that they were "supported by the evidence" (A. 1264a). The Fourth Circuit opinion mentions that "North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property until *Shelley* v. *Kramer*, 334 U.S. 1 (1948), prohibited this discriminatory practice" (*ibid.*). See, e.g., *Phillips* v. *Wearn*, 226 N.C. 290, 37 S.E.2d 895 (1946) (involving property in Mecklenburg County); *Eason* v. *Buffaloe*, 198 N.C. 520, 152 S.E. 496 (1930); *Vernon* v. *R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E.2d 710 (1946). Racial restrictive covenants operated to exclude Negroes from entire areas of cities. They had the same effect and purpose as residential segregation laws and ordinances of the kind outlawed by *Buchanan* v. *Warley*, 245 U.S. 60 (1917). Indeed, restrictive covenants were the functional and practical equivalent of such segregation ordinances when they were enforced by injunctions as in *Shelley*, *supra*, or damage suits (see *Barrows* v. *Jackson*, 346 U.S. 249 (1953)). Mr. Justice Black has pointed out that *Shelley* was argued to this Court on this basis by the Solicitor General, among others:

> This type of agreement constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective

to be accomplished by a system of private contracts. (*Bell* v. *Maryland*, 378 U.S. 226, 329 (1964), Mr. Justice Black, dissenting.)

Judge McMillan's findings about the causes of residential segregation in Charlotte are entirely corroborated by the national experience as reported by the United States Commission on Civil Rights. The Commission's formal findings were:

> 5. Within cities, as within metropolitan areas, there is a high degree of residential segregation—reflected in the schools—for which responsibility is shared by both the private housing industry and government.
>
> (a) The discriminatory practices by city landlords, lending institutions, and real estate brokers have contributed to the residential confinement of Negroes.[55]
>
> (b) State and local governments have contributed to the pattern of increasing residential segregation through such past discriminatory practices as racial zoning ordinances and racially restrictive covenants capable of judicial enforcement. Current practices in such matters as the location of low-rent public housing projects, and the displacement of large numbers of low-income nonwhite families through local improvement programs also are intensifying residential segregation.[56]
>
> (c) Federal housing programs and policies serve to intensify racial concentrations in cities. Federal policies governing low- and moderate-income housing pro-

[55] See the testimony of Daniel O. Hennigan covering this kind of discrimination in Charlotte (28a-57a).

[56] See the testimony of Yale Rabin concerning state and local actions in Charlotte (174a-241a).

grams such as low-rent public housing and FHA 221 (d)(3) do not promote the location of housing outside areas of intense racial concentration. Federal urban renewal policy is insufficiently concerned with the impact of relocation on racial concentrations within cities.

6. Individual choice contributes to the maintenance of residential segregation, although the impact of such choice is difficult to assess since the housing market has been restricted. (*Racial Isolation in the Public Schools, supra,* at 201-202.)

The Commission reported that the policy of the Federal Housing Administration in the 1930's and 1940's was a "principal impetus to housing discrimination" (*Id.* at 254).[57] The FHA not only recommended the insertion of racial covenants, but even after *Shelley* v. *Kraemer, supra,* the Commission reports, "the FHA continued to treat racial integration in housing as a reason for denying benefits to an applicant" (*id.* at 254; citing Abrams, *Forbidden Neighbors,* 233 (1955), and Weaver, *The Negro Ghetto,* 71-73 (1948)).

The court below thus accepted the finding of the trial court that the schools in Charlotte were illegally segregated. Judge Butzner wrote:

> The fact that similar forces operate in cities throughout the nation under the mask of *de facto* segregation

[57] A glaring example of the nearly inevitable effect of the policy of the federal government to promote residential segregation and the school board's policy of building schools in accommodation of that policy is the Double Oaks School. The federal housing officials and the local housing authority built a low-income housing development for blacks, leaving space for a school. The school board built a school to serve the children of that project. In 1969-70, as in previous years, only black children attended Double Oaks—over 800 (832a). This is one of the ten schools the board would leave all-black (*id.*) and is one of the two schools HEW would leave all-black.

> provides no justification for allowing us to ignore the part that government plays in creating segregated neighborhood schools (A. 1264a-1265a).

The court below thus rejected the board's argument that segregation in the Charlotte schools could be justified by reference to a "neighborhood school" policy. The Fourth Circuit cites a number of decisions where courts have reached similar conclusions about the relation between segregated housing policies and segregated schools, *e.g.*, *Henry* v. *Clarksdale Munic. Separate School Dist.*, 409 F.2d 682, 689 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); *United States* v. *School Dist. 151 of Cook County*, 404 F.2d 1125, 1130 (7th Cir. 1968), *aff'g* 286 F. Supp. 786, 798 (N.D. Ill. 1968); *Brewer* v. *School Bd. of City of Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968); *Keyes* v. *School Dist. No. One, Denver*, 303 F. Supp. 279 and 289 (D. Colo. 1969), *stay vacated*, 396 U.S. 1215 (1969); *Dowell* v. *School Bd. of Oklahoma City*, 244 F. Supp. 971, 975 (W.D. Okla. 1955), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).[58]

It does not matter, for purposes of judging the constitutionality of the resulting school segregation, that agencies of the state, other than the local school board, are in part

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[58] See also *Holland* v. *Board of Public Instruction of Palm Beach County*, 258 F.2d 730, 732 (5th Cir. 1958). In a number of recent decisions the Fifth Circuit has held that geographic zoning plans are acceptable only if they tend "to disestablish rather than reinforce the dual system of segregated schools." *United States* v. *Greenwood Municipal Sep. School Dist.*, 406 F.2d 1086, 1093 (5th Cir. 1969); *United States* v. *Indianola Municipal Sep. School Dist.*, 410 F.2d 626 (5th Cir. 1969), *cert. denied*, —— U.S. —— (1970); *Davis* v. *Board of School Comm'rs of Mobile County*, 393 F.2d 690, 694 (5th Cir. 1968); *United States* v. *Choctaw County Board of Ed.*, 417 F.2d 838 (5th Cir. 1969); *Braxton* v. *Board of Public Instruction of Duval County*, 402 F.2d 900 (5th Cir. 1968); *Valley* v. *Rapides Parish School Board*, 423 F.2d 1132 (5th Cir. 1970); *Youngblood* v. *Board of Public Instruction of Bay County, Fla.*, —— F.2d —— (5th Cir., No. 29369, July 24, 1970).

responsible for the residential segregation pattern. As this Court made plain in *Cooper* v. *Aaron*, 358 U.S. 1, 16-17 (1958), school boards are agents of the state and will not be excused from their duty to guarantee the constitutional rights of Negro children because the "vindication of those rights was rendered difficult or impossible by the actions of other state officials." Nor is the local board's responsibility relieved by the fact that private as well as governmental discrimination in housing has contributed to the segregated residential pattern. As Judge McMillan has found, the board has made choices in locating schools, fixing the sizes and grade structures of schools, determining the transportation patterns, and adopting the policy of assigning pupils by residences. The board has defined the relevant school "neighborhoods" by its own decisions. Housing segregation results in school segregation only in the context of these choices by the school board—an agency of the state. Thus, a situation which has the appearance of inevitability—school segregation in Charlotte's black ghetto—is revealed as the product of governmental decision-making. As the Fourth Circuit held in *Brewer* v. *School Board of the City of Norfolk*, 397 F.2d 37, 41-42 (4th Cir. 1968):

> If residential racial discrimination exists it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color (Footnotes omitted).

The reasoning in *Brewer* is all the more apt where, as here, government has contributed heavily to creating the segregated housing pattern.

II.

The District Court Was Correct in Ruling That the Dual Segregated System in Charlotte-Mecklenburg Must Be Disestablished by Reorganizing the System So That No Racially Identifiable Black Schools Remained. The Court of Appeals Erred in Substituting a Less Specific Desegregation Goal.

A. *This Court's Decisions Require Complete School Desegregation.*

The district court sought to afford complete relief in this case by requiring a desegregation plan which would eliminate the racially identifiable "black" schools and leave "just schools". The trial judge's decision that each predominantly black or all-black school in Charlotte must be reorganized on an integrated basis by reassigning pupils and faculties is in conformity with this Court's decisions defining the duty to eliminate state-imposed segregation in the public schools. *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*). *Brown II* speaks of the need "to achieve a system of determining admission to the public schools on a nonracial basis." (349 U.S. at 300-301) In *Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958), the Court wrote of the duty of "initiating desegregation and bringing about the elimination of racial discrimination in the public school system." In 1968, in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), the Court made it plain that *Brown* required more than simply a system of nondiscriminatory admission of Negroes to "white" schools. Rather, the whole system of segregation must be dismantled (*id.*, 391 U.S. at 437), and discrimination must be eliminated "root and branch" (*id.* at 438). The Con-

stitution requires "abolition of the system of segregation and its effects" (*id.* at 440).

This Court has called for the abolition of racially identifiable schools saying that desegregation plans must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442). The requirement of complete relief was emphasized by the holding in *Green, supra,* that courts should render decrees "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (391 U.S. at 438, note 4). Mr. Justice Brennan's opinion said that the courts should "retain jurisdiction until it is clear that state-imposed segregation has been completely removed" (*id.* at 439). Thus it ought to be entirely clear that this Court's decisions require fundamental reform of racially segregated dual systems to abolish every vestige of segregation and prevent its recurrence. The courts are not limited to requiring a mere minimum amount of desegregation which might give the bare appearance of non-discriminatory assignments. Rather, the lower courts have been admonished to strike out the roots and branches of the segregated system. The district court's decision was faithful to the duty set out in *Green, supra.*

Judge McMillan, having determined that the black schools in Charlotte were illegally segregated, directed his expert consultant to devise a plan which eliminated the black schools. Judge McMillan had to appoint his own consultant to devise a plan because of what Judge Sobeloff has aptly described as the school board's "total lack of cooperation" and the fact that the board "has resisted and delayed desegregation at every turn" (1293a; see note 9 at 1291a-1293a). Accordingly, the court set forth detailed guidelines for the court consultant to follow in preparing

the plan. Among the criteria set forth in the December 1, 1969, opinion are the following:

> 2. Drawing school zone lines, like "freedom of transfer," is not an end in itself; and a plan of geographic zoning which perpetuates discriminatory segregation is unlawful . . . [citations omitted].
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> 12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.
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> 14. Where pupils live must not control where they are assigned to school, if some other approach is necessary in order to eliminate racial segregation . . . [citations omitted].
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> 15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated . . . [citations omitted].
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> • • •
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> 17. Pairing of grades has been expressly approved by the appellate courts . . . [citations omitted]. Pairing, grouping, clustering, and perhaps other methods

may and will be considered and used if necessary to desegregate the schools.

18. Some 25,000 out of 84,000 children in this country ride school busses each day, and the number *eligible* for transportation under present rules may be more than 30,000. A transportation system already this massive may be adaptable to effective use in desegregating schools (708a-712a).

Petitioners urge that the desegregation goals for Charlotte which were set forth in the trial court's instructions to the expert consultant were entirely appropriate under this Court's decision in the *Green* case. This Court's decision in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1968), also provides a substantial precedent for the trial judge's approach in setting a concrete desegregation objective. Judge Winter's dissenting opinion below states this well (1301a-1302a):

> The district court wisely attempted to remedy the present dual system by requiring that pupil assignment be based "as nearly as practicable" on the racial composition of the school system, 71% white and 29% black. The plan ordered fell short of complete realization of this remedial goal. While individual schools will vary in racial composition from 3% to 41% black, most schools will be clustered around the entire system's overall racial ratio. It would seem to follow from *United States* v. *Montgomery Board of Education*, 395 U. S. 225, 232 (1968), that the district court's utilization of racial ratios to dismantle this dual system and remedy the effects of segregation was at least well within the range of its discretion. There the Supreme Court approved as a requirement of faculty integration that "in each school the ratio of white to Negro

faculty members is substantially the same as it is throughout the system." It did so recognizing that it had previously said in *New Kent County,* 391 U. S. at 439, "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." If in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason why the same should not be true to achieve pupil integration, especially where, as here, some wide deviations from the overall ratio have been permitted to accommodate circumstances with respect to particular schools.

B. *The Fourth Circuit's New Reasonableness Rule Makes the Goal of Desegregation Less Complete and Specific and Threatens to Undermine Brown v. Board of Education.*

The court below, by a narrow vote (actually, only three members of the court), has explicitly announced a new rule of law to govern all school desegregation cases. The new principle requires that in each case a court must decide whether the goal of complete desegregation to eliminate racially identifiable schools is a "reasonable" goal in that it can be accomplished by "reasonable" means. Thus we have not merely an issue about the reasonableness of particular desegregation plans or techniques, but rather, an issue about the reasonableness of the goal of desegregation.

As Judge Sobeloff has stated so clearly in his dissent, the new rule portends serious consequences for the general course of school desegregation:

. . . Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt.[59] The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome" (1290a-1291a).

We believe that the court of appeals erred by not adopting the trial court's more specific requirement that each black school in Charlotte be reorganized so that it would no longer be a racially identifiable black school. The district judge made no effort to announce a rule of law to govern any case but the Charlotte case (Br. A 12-A13). He found that the Charlotte schools were unlawfully segregated and that it was educationally feasible to desegregate each of them. The Finger Plan demonstrates that desegregation of all the schools is indeed feasible, and we

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[59] It was only two weeks later that Judge Sobeloff's prediction was realized. The trustees of School District No. 1 of Clarendon County, South Carolina urged upon the court of appeals the "reasonableness" of a freedom of choice plan which had not worked. *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County*, No. 14571, —— F.2d —— (4th Cir., June 5, 1970) (separate concurring opinion by Judge Sobeloff):

> "This case is the lineal descendant of *Briggs* v. *Elliot*, one of the four cases consolidated in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). [Footnote omitted] That it is still being litigated at this date, nineteen years since *Briggs* was initiated and sixteen years after the decision in *Brown* is a most sobering thought." *Ibid.*

do not understand the court of appeals majority to seriously question the general feasibility or educational soundness of the Finger Plan. However, the reasonableness doctrine was applied to set aside the Finger Plan for elementary schools on the ground that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system" (1276a). At the same time, the reasonableness rule was applied to approve the Finger Plan for secondary schools involving busing, non-contiguous and satellite zoning, and similar techniques to eliminate each predominantly black secondary school.

The Fourth Circuit has explicitly attempted to formulate a legal principle to be applied in desegregation cases on a national basis. The rule was announced as one necessitated by the problem of some cities "which have black ghettos so large that integration of every school is an improbable, if not an unattainable goal" (1267a-1268a). It is particularly inappropriate and unecessary to attempt to frame such a rule in a case such as this, for Charlotte has no vast intractable desegregation problem as the Finger Plan demonstrates.[60] Desegregating the Charlotte schools is not a difficult matter in the technical sense. The technology to desegregate school systems of this size is readily available. The problem is and has been a problem of political and legal resistance to desegregation.[61] The

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[60] Judge McMillan again found this to be so:

> There is no 'intractable remnant of segregation' in this school system. No part of the school system is cut off from the rest of it, and there is no reasonable way to decide what remnant shall be deemed intractable (Br. A18).

[61] Judge McMillan thoughtfully addressed this point in his recent decision. (See section headed *"The Issue Is One of Constitutional Law—Not Politics,* Br. A13-A14):

> Civil Rights are seldom threatened except by majorities. One whose actions reflect accepted local opinion seldom need

United States Commission on Civil Rights has recently made the point:

> It is a mistake to think of the problems of desegregation and the extent that busing is required to facilitate it solely in the context of the Nation's relatively few giant urban centers such as Chicago, New York, or Los Angeles. In most of our cities the techniques necessary to accomplish desegregation are relatively simple and create no hardships. The experience in communities which have successfully desegregated could easily be transferred to cities of greater size. (Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970.)

The real thrust of the "reasonableness rule" as applied to reject the elementary school plan is as Judge Sobeloff wrote:

> . . . no more than an abstract, unexplicated judgment —a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price. This is a conclusion neither we nor school boards are permitted to make.

If the reasonableness of school desegregation as a goal is to be litigated in every case by a subjective assessment of

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to call upon the Constitution. It is axiomatic that persons claiming constitutional protection are often, for the time being, out of phase with the accepted "right" thinking of their local community. If in such circumstances courts look to public opinion or to political intervention by any other branch of the government instead of to the more stable bulwarks of the Constitution itself, we lose our government of laws and are back to the government of man, unfettered by law, which our forefathers sought to avoid (Br. A14).

whether the end justifies the cost involved, then the *Brown* decision will in many places become a practical nullity.

As the National Education Association Brief *Amicus Curiae* in support of the Petition for Certiorari in this case has pointed out, the Fourth Circuit decision is paradoxical in that while it "creates a wide ambit for the exercise of discretion to limit desegregation, it severely, and NEA believes unwarrantedly, restricts the traditional discretion of the district court to frame a plan which will secure the constitutional objective." (NEA Brief *Amicus Curiae*, p. 21, note 19.)

The reasonableness rule is so vague, ill-defined, and, in Judge Sobeloff's phrase, "inherently ambiguous" (1289a) that it is "highly susceptible to delaying tactics in the courts" (1290a). The Charlotte-Mecklenburg board illustrates this by the Cross-Petition for Certiorari which defends the reasonableness rule but argues that the Fourth Circuit has misapplied its own rule in approving the junior and senior high school desegregation plans ordered by the district court. The point is that the opinion below contains no standards by which to judge the reasonableness question. The specific application in Charlotte, in which the plan for high schools and junior high schools was approved by the court of appeals, yet the elementary plan was disapproved, leaves the law in great uncertainty. The result implies that it may be legal to deny a desegregated education to some black children and that the only requirement is to offer constitutional protections to a reasonable number of them. Such a doctrine is alien to the requirement that the States shall not deny "to *any person* within their jurisdiction, the equal protection of the laws" (emphasis supplied). The reasonableness rule, if applied in this fashion, would conflict with the tradition of personal constitutional rights under the Fourteenth Amendment. (See Br. A 13.)

Judge Butzner's decision suggests that complete desegregation can be achieved only in "towns, small cities, and rural areas" (1267a). The ruling implies that some indefinite number of elementary pupils will remain in predominantly black and perhaps all-black schools, by its statement that "not every school in a unitary system need be integrated" and that while boards "must use all reasonable means to integrate the schools" sometimes "black residential areas are so large that not all schools can be integrated by using reasonable means."[42] This holding, by acknowledging that the black schools are the product of illegal segregation practices holds that the wrong is without a remedy.

We urge that this Court reject the notion that the constitutional rights of black citizens to equal protection of the laws may be left without a remedy in the courts of the United States. The concept that a state may violate the constitutional rights of citizens because it is too expensive to protect those rights is unworthy of our legal system and a betrayal of our constitutional heritage. Judge McMillan stated the correct rule: "The alleged high cost of desegregating schools (which the court does not find to be a fact) would not be a valid legal argument against desegregation, *Griffin* v. *School Board* [377 U.S. 218 (1964)]; *United States* v. *Cook County, Illinois* [404 F. 2d 1125 (7th Cir. 1968)]" (710a). See also, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); cf. *Baldwin* v. *New York*, 26 L.ed 2d 437 (1970).

The court below suggests three measures which might be taken instead of eliminating racially identifiable schools, e.g., providing an integrated school for each child in later

[42] There is perhaps some slight unclarity in the application of the rule to this case, for the court fails to state categorically that Charlotte's black residential area is of such size that schools must remain black.

years (as at the secondary school level), establishing special integrated programs in the black schools, and permitting black pupils the right of free transfer to leave the all-black schools. None of these suggestions represents a satisfactory substitute for the constitutional right to attend school in a system where racial identification of the schools has been removed and there are "just schools." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 442 (1968). The idea of providing integration in later years is merely a postponement of the right of desegregation and conflicts with this Court's determination that the dual system must be abolished "now and hereafter." *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). The provision of special integrated programs at black schools is by its terms limited to peripheral activities not central to the daily classroom experience of grade school children. The provision of free transfers for blacks has proven an unsuccessful method of desegregating the schools in Charlotte-Mecklenburg and it cannot be expected that any but a few blacks would benefit from the proposed rule allowing black students to transfer from majority black schools. *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968). These three measures, while unobjectionable in themselves, are simply no substitute for a desegregated school system.

The reasonableness rule threatens to undermine the *Brown* decision. As Judge Sobeloff has suggested in dissent, the holding threatens to water down or temper the duty to convert to a unitary system (1281a). Sixteen years after *Brown I* there is no room for retreat from the principle that racial segregation is unconstitutional and must be abolished. This Court has just recently rejected the doctrine of "all deliberate speed" because of the long experience of evasion and delay of the duty of desegregation. *Alexander* v. *Holmes County Board of Education*, 396 U.S.

19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970). The new and subjective reasonableness rule portends a new era of litigation under a subjective standard sanctioning a great deal of continuing racial segregation. It should not be followed.

C. *The Goal of Integrating Each School in Charlotte Is Consistent With Federal Statutory and Constitutional Requirements.*

The defendants have argued that provisions of the Civil Rights Act of 1964 (Sections 401(b) and 407(a)(2), codified as 42 U.S.C. §§2000c(b) and 2000c-6(a)(2)) forbid the busing ordered by the district court. The court of appeals rejected this reasoning stating that the argument "misreads the legislative history of the statute," and that the sections "are not limitations on the power of school boards or courts to remedy unconstitutional segregation" (1274a). The same argument has been rejected on numerous occasions by other courts and we think the treatment of this issue by the court below is sufficient to dispose of the question (1247a-1248a). Other courts have come to the same conclusion in a number of cases: *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 880-881 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. den. sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967); *United States* v. *Board of Trustees of Crosby Independent School District*, 424 F.2d 625 (5th Cir. 1970); *Tillman* v. *Board of Public Instruction of Volusia County*, No. 29180, —— F.2d —— (5th Cir., April 23, 1970); *Andrews* v. *City of Monroe*, No 29358 —— F.2d ——(6th Cir., April 23, 1970); *United States* v. *School District 151, Cook County, Ill.*, 404 F.2d 1125, 1130 (7th Cir. 1968), *affirming* 286 F. Supp. 786 (N.D. Ill.); *Keyes* v. *School*

District No. One, Denver, 303 F. Supp. 289, 298 (D. Colo. 1969), *stay granted,* —— F.2d —— (10th Cir. 1969), *stay vacated,* 396 U.S. 1215 (1969); *Moore* v. *Tangipahoa Parish School Board,* 304 F. Supp. 244, 250 (E.D. La. 1969).

The board's construction of the Act would render it an unconstitutional attempt by the Congress to authorize the States to violate the Fourteenth Amendment by continuing segregation. But, of course, "Congress may not authorize the states to violate the Equal Protection Clause." *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969); *Katzenbach* v. *Morgan,* 384 U.S. 641, 651, n. 10 (1966).

This case does not present the abstract question of whether any racial balance of the schools is required. By requiring the elimination of racially identifiable schools the trial judge did not impose any strict requirement that each school be a racial microcosm of the entire system. Certainly there was no question of balance unrelated to the requirement of eliminating unconstitutional racial segregation caused by the State. The district judge did not require any fixed racial ratios of pupils. He merely adopted the racial ratio "as a starting guide, expressed a willingness to accept a degree of modification, and departed from it where circumstances required" (1287a). As he recently wrote:

> The November 7, 1969 order expressly contemplated wide variations in permissible school population; and the February 5, 1970 order approved plans for the schools with pupil populations varying from 3% at Bain Elementary to 41% at Cornelius. This is not racial balance but racial diversity. The purpose is not some fictitious "mix," but the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools (Br. A10).

Petitioners do not contend that the Constitution requires that formerly segregated systems must invariably convert to an arrangement in which every school has an approximate ratio which reflects the system-wide ratio of the races. The trial judge did not proceed on the theory that any such balancing was required by the Constitution, although the board's arguments continue to characterize the holding in this manner. But petitioners do urge that it is within the discretion of district courts to adopt as a remedial goal some specific target to measure progress toward eliminating racial identifiability of schools. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). The objective of desegregation plans, to convert to a unitary system, might in some cases achieve a balanced system where every school is a racial microcosm of the entire system. Such racial balance plans may often be feasible as recent experience in Greenville, South Carolina demonstrates, for example. *Whittenberg* v. *School District of Greenville County,* C.A. No. 4396, D. S.C., Order of Feb. 4, 1970. The Greenville plan produced a ratio of about 20% black and 80% white in each school in a system with 58,000 children in 105 schools; it included transportation for pupils living more than 1½ miles from school. As we have said previously, this nation has more than adequate technology to integrate the schools and afford a quality education. It is generally possible to eliminate all-black schools by feasible desegregation plans. However, we take no absolutist position which ignores the possibility that there are exceptions to this rule. It is sufficient to decide this case to conclude that a feasible and workable plan to eliminate "black schools" and "white schools" is at hand.

III.

The District Court Acted Within the Proper Limits of Its Discretion by Ordering a Plan Consistent With the Affirmative Duty to Desegregate the Schools and the Objective of Preventing Resegregation.

A. *The Finger Plan Promises to Establish a Unitary System.*

The court-ordered desegregation plan meets the most important test of *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), in that the plan does promise to actually dismantle the dual system and provide a unitary system of schools. It is undisputed that the plan will eliminate the principal characteristics of the dual system—the all-black schools. This is the essential thing that a plan must accomplish in order to be an "adequate" plan under *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955), and *Green, supra*. *Green* calls for *results* in accomplishing desegregation. The trial judge understood this, stating:

> The courts are concerned primarily not with the techniques of assigning students or controlling school populations, but with *whether those techniques get rid of segregation of children in public schools.* The test is pragmatic, not theoretical. (582a)

Judge McMillan was also cognizant of this Court's advice that no "universal answer" or "one plan will do the job in every case." *Green, supra*, 391 U.S. 430, 439. He knew also that this Court had emphasized that "in this field the way must always be left open for experimentation." *United States* v. *Montgomery County Board of Education*, 395 U.S. 225, 235 (1969). Thus Judge McMillan undertook a detailed and conscientious study, aided by the

skilled and intelligent advice of an unusually capable expert consultant working with the local school administrative staff, to devise "alternatives which may be shown as feasible and more promising in their effectiveness." *Green, supra*, 391 U.S. at 439. The Finger Plan was the product of this study.[63]

Where there is an available plan which will completely desegregate the schools and the board opposes it, "that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method." *Green, supra* at 439. The board has never sustained the "heavy burden" of opposing the Finger Plan. Indeed, the board has never had any viable legal theory. The board's arguments rest largely on ideological positions against "racial balance" which are premised on a denial of the duty to integrate the schools and are in the teeth of the *Green* decision.

B. *The Court Ordered Plan Is Feasible.*

Petitioners agree with the dissenting judges below that the "feasibility" of a desegregation plan is the proper matter for inquiry. *Green, supra,* indicates that plans must be shown to be "*feasible*" and to "provide *effective* relief" (391 U.S. at 439).

The district court made detailed findings of fact supporting the conclusion that the Finger Plan is feasible and these findings are supported by substantial evidence. It was error for the court of appeals to substitute its own

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[63] We do not contend that the Finger Plan is the only plan which will satisfy constitutional requirements in Charlotte, nor did the court below. In February, the court ordered the board to implement the Finger Plan or any other plan it might devise which would work (824a-825a). In August, the court specifically approved two other plans which the board could employ if it chose to do so and if the details were completed (Br. A33-34).

opinion that the plan required the board to engage in too much increased bussing where there was no claim that any of the district court's findings on this issue were clearly erroneous. Cf. *Northcross* v. *Board of Education of Memphis*, 397 U.S. 232, 235 (1970). As Judge Sobeloff has shown, in dissent, "there is no genuine dispute" on the feasibility of the plan; it is "simple and quite efficient" (1284a). Here are the facts.[64]

The Finger Plan requires transportation of pupils to accomplish desegregation. The system now transports 23,600 pupils by school bus and another 5,000 by common carrier.[65] The school board's proposed plan would bus about 5,000 additional children,[66] but still would not desegregate the

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[64] The facts discussed in this section covering the feasibility of the Finger Plan are those that were in the record in the Court of Appeals.

Many of these matters were re-litigated at the hearing in July, 1970. And the significant findings of March, 1970 were reaffirmed (Br. A16-A26).

There were some new findings, all of which support our view that the Finger Plan is feasible. 1) Funds are now available from the State for the operational costs of transportation of *all* city children who live more than 1½ miles from the school to which they are assigned (Br. A11). 2) There are sufficient buses on hand or available on loan so that *no* capital expenditures are required to implement the Finger Plan immediately (Br. A18-A20, A23, A26). 3) Pre-school children are presently bused the greatest distances (Br. A16-A17, A24-A25). 4) There is an ample supply of bus drivers (Br. A21, and see A9). 5) The plan will not cause an unwarranted traffic problem (Br. A25). 6) The board already staggers the opening of schools so that adjusting of the opening and closing hours of particular schools to accommodate the transportation system would be consistent with established practice (Br. A25). 7) The total school budget for 1970-71 is approximately $66,000,000 (Br. A21, A23). Both the county and the state have more than sufficient surplus funds to pay for any conceivable expense which might be occasioned by the Finger Plan (Br. A23).

[65] See 1200a.

[66] See 1219a.

system, leaving 10 Negro schools.[67] The Finger plan by busing about 8,000 more children than the board's proposal (a total of about 13,000 more than at present)[68] will eliminate racial identifiability from every school in the system. The court of appeals affirmed the order as to the secondary students (1,500 senior high and 2,500 junior high pupils), but reversed the requirement as to elementary pupils (9,300 pupils, including 1,300 in schools to be simply rezoned, and 8,000 involved in cross busing between paired schools).[69]

The court carefully considered the busing from the standpoint of the children. The crucial finding is this:

> The court finds that from the standpoint of distance travelled, time en route and inconvenience, the children bussed pursuant to the court order will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported at state expense. (1205a)

At present the *average* one-way trip in the system is over 15 miles requiring one hour and fourteen minutes.[70] Eighty percent of the buses in the system require more than one hour for a one-way trip now.[71] The average one-way trip under the court plan "for elementary students is less than seven miles, and would appear to require not over 35 min-

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[67] The board plan would produce 9 elementary schools 83% to 100% black *serving over half of the entire black elementary population* (826a). In this plan Piedmont Junior High would be 90% black and shifting toward 100% black; segregation would actually increase by 1% more black pupils (830a).

[68] See 1219a.

[69] *Ibid.*

[70] See 1204a, 1215a.

[71] See 1204a.

utes at most, because no stops will be necessary between schools.[72]

The court of appeals ruled that busing is "a permissible tool for achieving integration" and stated that the factors to be considered in appraising busing were "the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources" (1272a). Only the cost factors seems to have been used to support the court's decision that the elementary school plan involved too much busing. The age of the pupils seems not to have been a decisive factor since busing elementary pupils is an established tradition in Charlotte-Mecklenburg with 10,441 elementary pupils already being bused in 1969-70 (619a). There was no suggestion that the times and distances were decisive since they compared most favorably with the present practice. The average elementary school busing distances under the Finger Plan were shorter than the average trips now made and only a little over half as long as the busing distances approved by the Court of Appeals for the black high school students assigned to Independence High School (1273a).

With respect to the costs of the Finger Plan, we believe that this ground for disapproving the elementary plan is, in Judge Winter's phrase "insubstantial and untenable."[73] The court below states the cost issue in terms of the in-

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[72] See 1215a. "The average straight line mileage between the elementary schools paired or grounded under the 'cross-bussing' plan is approximately 5½ miles" (1201a). The *trip* mileage was arrived at by the bus superintendent's method of taking straight line mileage and adding 25%."

[73] Indeed, Judge McMillan's recent findings that *no* capital outlay will be required to immediately implement the total court ordered plan (Br. A23) would seem to dispose of the matter entirely.

creased *percentage* of pupils who will be bused. The court recites that the additional elementary pupils who must be bused represent an increase of 39% over all pupils presently bused requiring a 32% increase in the bus fleet (1276a). The court also stated that the added secondary busing which was approved brought the total percentage increases to "pupils 56%, and buses 49%" (*ibid.*). These were the facts recited to support the conclusion that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system" (1276a).

The ruling below does not contain any discussion of the costs of the Finger Plan busing "in relation to the board's resources" but only a discussion of the cost in relation to present expenditures for busing. As we have stated elsewhere in this brief, we do on any account accept the premise that such a monetary consideration should be decisive of important individual rights. All the more does it seem clear that the prior level of expenditures in operating an unconstitutional, segregated system should not be decisive in defining what constitutes a nonsegregated unitary system. But in any event, there is no foundation in this record for a conclusion that the board lacks sufficient resources to implement the Finger Plan. The board's resources are much broader than local funds because in North Carolina transportation costs for school children are largely met by the state board of education, which bears most of the operating costs and also replaces worn out buses after local authorities make the initial purchase. The capital outlay required for the 90 buses needed in the elementary school phase of the Finger Plan will be about $5,400 per bus or $486,000, an investment which will buy not only vehicles with useful lives of up to 15 years, but also the right to have them perpetually replaced at no further cost to the

local board.[74] The State will bear the operational cost of the 90 buses which was found to be $186,000 annually. When these expenditures are considered in the context of the local education budget figures, which exceeded 57 million dollars in 1969-70,[75] and the 3.5 billion dollar state education budget, they are so small as to be insignificant.

Moreover, the discussion of these costs ignore a vital fact. *The State Board of Education, a defendant in this case, already has in its possession a sufficient number of buses to implement the Finger Plan.* The case thus involves merely a decision about whether existing state resources—buses already owned by the defendant State Board of Education—will be used to integrate the Charlotte schools. Judge McMillan found that the State Board of Education had "approximately 400 brand new school busses and 375 used busses in storage, awaiting orders from school boards" (1219a).[76] As Judge McMillan put it:

> The problem is not one of availability of busses but of unwillingness of Mecklenburg to buy them and of the state to furnish or make them available until final decision of this case (1220a).

Since the State Board of Education already owns sufficient used busses in storage to implement the Finger Plan

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[74] And, of course, none of these vehicles need be bought immediately.

> "No capital outlay will be needed to supply buses for the 1970-71 school year. The state is ready and willing to lend the few busses the board may need; replacements can be bought after actual need has been determined under operating conditions" (Br. A23).

[75] The local budget is approximately $66,000,000 for the 1970-71 school year (Br. A21, A23).

[76] The facts as to availability of busses in July, 1970 are found at Br. A18-A20.

there really is no legitimate issue in this case about the financial burden of the plan. Even if the local board had insufficient money to pay for these busses (which is not true), desegregation may not be defeated on the basis that one agency of the state does not have sufficient funds to reimburse another state agency which has an equal duty to aid in desegregation of the public schools. The appropriate principle was stated in *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958), where the Court unanimously declared that:

> State support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

It would plainly be within the power of the district court, if it proved necessary, to require the State Board of Education to loan—or even grant—the necessary buses now in storage to the Charlotte-Mecklenburg board. Cf. *Griffin* v. *County School Board*, 377 U.S. 218 (1964), where the Court required that money be levied and spent to redress constitutional rights.

C. *The Finger Plan Utilises Appropriate Techniques to Achieve Pupil Desegregation.*

We believe that the court below was correct in rejecting the board's objections to a variety of desegregation techniques used in the court ordered plan, such as busing to promote integration, creating satellite school zones in noncontiguous areas, and creating paired or clustered schools with altered grade structures. The court below pointed to the direction in *Brown II* about using "practical flexibility" in shaping remedies, as support for use of the satellite zone technique (1247a). *Brown* v. *Board of Education*, 349 U.S.

294, 300 (1955). The court also noted that the pairing and clustering of schools was approved in *Green* v. *County School Bd. of New Kent County,* 391 U.S. 430, 442, n. 6 (1968), and *Hall* v. *St. Helena Parish School Bd.,* 417 F.2d 801, 809 (5th Cir. 1969), *cert. denied,* 396 U.S. 904 (1969). There are a great many other decisions in which courts have required use of pairing and clustering techniques, sometimes necessitating transportation, in order to accomplish desegregation.[77] Adoption of the board's argument would require repudiation of techniques widely employed to accomplish the dismantling of segregated systems.

School bussing is an ordinary tool of educational administration which may properly be employed to desegre-

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[77] Cases where courts have employed the pairing or clustering technique include: *Nesbit* v. *Statesville City Board of Education,* 418 F.2d 1040, 1042 (4th Cir. 1969) (*en banc*); *Brunson* v. *Board of Trustees of School District No. 1,* No. 14571, —— F.2d —— (4th Cir., June 5, 1970); *Green* v. *School Board of Roanoke,* No. 14335, —— F.2d —— (4th Cir., June 17, 1970); *Brewer* v. *School Board of Norfolk,* No. 14544, —— F.2d —— (4th Cir., June 22, 1970), *cert. den.* 38 U.S.L. Week 3522; *Hall* v. *St. Helena Parish School Board,* 424 F.2d 320 (5th Cir. 1970); *United States* v. *Board of Trustees of Crosby Independent School District,* 424 F.2d 625 (5th Cir. 1970); *Mannings* v. *Board of Public Instruction of Hillsbrough County,* No. 28643, —— F.2d —— (5th Cir., May 11, 1970); *Davis* v. *Board of School Commissioners of Mobile County,* No. 29332, —— F.2d —— (5th Cir., June 5, 1970), cert. pending on other issues, No. 436, O.T. 1970; *Harvest* v. *Board of Public Instruction of Manatee County,* No. 29425, —— F.2d —— (5th Cir., June 26, 1970); *Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28639, —— F.2d —— (5th Cir., July 1, 1970); *Tillman* v. *Board of Public Instruction of Volusia County,* No. 29180, —— F.2d —— (5th Cir., July 21, 1970); *United States* v. *School District 151,* Cook County, Ill., 404 F.2d 1125 (7th Cir, 1968), affirming 286 F.Supp. 786 (N.D. Ill.); *Kemp* v. *Beasley,* 423 F.2d 851, 856 (8th Cir. 1970); and *Jackson* v. *Marvell School District No. 22,* 425 F.2d 211 (8th Cir. 1970).

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te the schools.[78] Generalized objections to school busing
to
promote desegregation do not sustain the board's bur-
der
n. Obviously some transportation is necessary in the
sys
stem. It is plainly not a valid objection to busing that it
is
used to promote integration, for this is the constitutional
im
perative. The board has no satisfactory theory to dif-
fer
entiate that busing which is admittedly necessary from
the
at which it finds objectionable, i.e., to legally differenti-
ate
between "good" and "bad" busing.

The board attacks arrangements which involve transport-
ing
children from their zone of residence to a non-adjacent
zone
ne. But pupils have no inherent right to attend any par-
ticular school because of their place of residence. A child's
"o
wn neighborhood school zone" does not exist in the order
of
natural phenomena. It is the product of school board
de
cision, i.e., state action. Attendance areas and the grades
se
rved by particular buildings are always subject to change
and often are changed. There is no good reason not to use
av
ailable transportation facilities to desegregate the
scho
ols, or to limit that transportation to an artificial
"a
djacent" zone. Segregated schools need not inevitably
fo
llow segregated housing patterns. There is nothing in-
ex
orable about such segregation; there is merely the ap-
pearance of inevitabilty. The general case for busing to
promote integration is well stated in "On The Matter of

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be
[78] Busing to promote desegregation has been approved in a num-
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er of cases including: *Kemp* v. *Beasley*, 423 F.2d 851 (8th Cir.
ur
970) ("bussing is only one possible tool in the implementation of
of
nitary schools"; per Blackmun, J.); *Clark* v. *Board of Education*
ce
of Little Rock, No. 19795, —— F.2d —— (8th Cir., May 13, 1970),
of
ert. pending No. 409 O.T. 1970; *United States* v. *Board of Trustees*
of Crosby Independent School District, supra; Harvest v. *Board*
of
of Public Instruction of Manatee County, supra; Tillman v. *Board*
of Public Instruction of Volusia County, supra; and *United States*
v. *School District No. 151*, Cook County, Ill., *supra*.

Bussing: A Staff Memorandum from the Center For Urban Education" (February 1970):

> Good education, as well as the moral imperatives of a pluralistic society, demands desegregation of the schools. How can school desegregation be accomplished in cities and suburbs with long-established racial housing patterns? What method can circumvent the hard fact that segregated neighborhoods foster segregated neighborhood schools? One tried and tested means is the transportation of children out of their immediate neighborhoods by school bus.
>
> Riding the yellow school bus is as much a symbol of American education in 1970 as the little red schoolhouse was in 1900. And, until recently, it had conveyed no emotional overtones other than nostalgia for lost youth. In a country as large as ours, neighborhood schools within walking distance are a relatively recent luxury of the cities.
>
> Most children take a bus or car to school. Children in rural areas ride to central schools. Children in suburbia queue up on the corner for the bus that their parents at open school board meetings insist is theirs by right. Private and parochial school pupils board school busses and ride often for half an hour to their destination. In large cities children travel public subways and busses, sometimes more than an hour each way, to special schools of music and art, performing arts, or science. And parents of handicapped children have maintained steady pressures on state legislatures to provide state-supported bussing to schools filling special educational needs. More recently, southern parents have rented their own busses to transport white children to private, segregated schools. In none of these cases have parents complained of harm to their children by the bus ride, or of the expense of the busses.

Transferring children from one school to another is literally a means to an end—the end of the bus ride should be better schooling. In cases where the transfer becomes an end in itself, the results are predictably disappointing. Other things being equal, a child from a racially isolated neighborhood will find an integrated school a better environment for learning than a school in which his classmates are equally isolated. But there is no magic in a bus ride which offsets poor planning, a teacher's dislike or lack of respect for a child, or a disregard of emergency procedures.

The poverty of the board's ideas in its arguments against busing to integrate schools is emphasized by the facts with respect to the current use of busing in Mecklenburg. Many new white schools are located so that few pupils can walk to schools. The walk-in school is basically a phenomenon of the black neighborhoods. Of 17,000 children in black schools, only about 541 are now transported to school (1204a). The white schools have the opposite pattern. For example, in six white high schools and two junior high schools with a total of 12,184 pupils, only 96 students live within the mile and a half walking distance (1203a). Some 12,088 of these pupils are eligible for transportation and 5,349 of them ride the school buses (*id.*). Many pupils use private transportation.

The more one studies the detailed facts with respect to school bus transportation in Charlotte, and the data in the record with respect to such transportation in North Carolina generally, the more it seems clear that the only reason not to use buses to integrate the schools is to keep them segregated.

Judge Sobeloff found the majority's conclusion with respect to the elementary plan so inconsistent with the deci-

sion approving the use of busing, satellite zoning, and similar techniques for secondary students that he said the "decision totally baffles me" (1289a). The major distinction between the busing which is approved and that which is rejected is that the secondary plans primarily increased busing of black students to formerly white schools while the elementary plan requires busing of white children as well as Negroes. We are unlikely to ever end the dual school systems until it becomes accepted that the inconveniences incident to reorganizations of the school systems will not be borne by black pupils alone but will be shared by the white community. Equal protection does require that desegregation plans be generally equitable and not place the entire burden on blacks. Judge McMillan announced at the time he approved the interim plan for 1969-70 that he would not again approve a plan for one-way busing (590a-591a). He wrote that:

> If, as the school superintendent testified, none of the modern, faculty-integrated, expensive, "equal" black schools in the system are suitable for desegregation now, steps can and should be taken to change that condition before the fall of 1970. Unsuitability or inadequacy of a 1970 "black" school to educate 1970 white pupils will not be considered by the court in passing upon plans for 1970 desegregation. (591a)

D. *The Neighborhood School Theory Cannot Be Justified on the Basis of History and Tradition Because It Was Widely Disregarded in Order to Promote Racial Segregation.*

Much of the argument about preserving the neighborhood school and against busing is simply a fake—a spurious attempt to suggest that there is a great traditional right that pupils have always had to go on foot to a nearby

school located conveniently to their homes. That concept has little reality in a state like North Carolina where 54.9 percent of the pupils ride a school bus every day an average trip of 12 miles one way (1199a). The real tradition of North Carolina schools, and other states in the Fourth Circuit, is a tradition not of neighborhood schools, but of separate "white" and "Negro" schools, whether or not the neighborhoods were separate.

It has not been so very many years since the Fourth Circuit solemnly assembled to hear school men attempt to justify busing Negro children not only out of their neighborhoods but out of their counties to segregated all-black schools. These cases give one an interesting perspective about the arguments current now. The following are some busing arrangements revealed in cases in the Fourth Circuit:

1. *Griffin* v. *Board of Education of Yancey County*, 186 F. Supp. 511 (W.D. N.C. 1960). The court found that Negro pupils were being bused every day an 80 mile round trip from Burnsville to Asheville. While the case was pending without any relief, the board finally built a school for the 25 Negroes in Yancey County with a *changed grade structure*: to wit, all 12 grades were taught in two rooms for 25 pupils. Judge Warlick's opinion notes that bus transportation was used extensively throughout the State.

2. *School Board of Warren County, Va.* v. *Kilby*, 259 F.2d 497 (4th Cir. 1958). The school board appealed an order requiring desegregation where some Negro pupils were bused out of the county 25 miles each way and others were bused 50 miles each way to a boarding school where they were required to remain all week and return home on weekends. We repeat: the school board appealed seeking to preserve this arrangement.

3. *Goins* v. *County School Board of Grayson County, Va.*, 186 F. Supp. 753 (W.D. Va. 1960), stay denied, 282 F.2d 343 (4th Cir. 1960). Negro pupils bused 30-40 miles out of their county.

4. *Corbin* v. *County School Board of Pulaski County, Va.*, 177 F.2d 924 (4th Cir. 1949) (bus travels out of county 60 miles per day). Eleven years later, see *Crisp* v. *County School Board of Pulaski County, Va.* (W.D. Va. 1960), 5 Race Rel. L. Rep. 721.

Similar arrangements involving out of county assignments were condemned in *Buckner* v. *County School Board of Greene County, Va.*, 332 F.2d 452 (4th Cir. 1964), and *Walker* v. *County School Board of Floyd County, Va.* (W.D. Va. 1960), 5 Race Rel. L. Rep. 714.

The conception that pupils were entitled to go to their nearest school got short-shrift in the context of the segregated system. Dual overlapping attendance areas within which blacks were often denied access to nearby white facilities were common, *Jones* v. *School Board of Alexandria, Va.*, 278 F.2d 72, 76 (4th Cir. 1960). Also common were "satellite zones" and non-contiguous attendance zones. See, e.g., *Haney* v. *County Board of Education of Sevier County, Ark.*, 410 F.2d 920 (8th Cir. 1969). See, generally, the excellent monograph commissioned by the U.S. Office of Education, Weinberg, "Race and Place, A Legal History of the Neighborhood School" (U.S. Govt. Printing Office, 1967). Weinberg recalls the non-contiguous *satellite zone* in the Arlington County, Virginia case called the "North-Hoffman Boston Zone" which was an all-black satellite zone located a 20 minute bus ride from the school:

> In much-litigated Arlington County, Va., 30 Negro children applied under the State pupil placement law for transfer to a white school. The school board re-

jected 26 of the 30 applications, claiming it based its decision on five criteria: "attendance area, overcrowding at [white] Washington and Lee High School, academic accomplishment, psychological problems, and adaptability."[26] Seven of the students had applied for transfers on the ground that three white schools were nearer to their home. As the court explained: "However, the school authorities had other factors to consider, such as the adoption of presently established school bus routes, walking distances and the crossing of highways, as well as that [all-Negro] Hoffman-Boston was but a 20 minute bus ride for these pupils."[27]

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[26] *Thompson* v. *County School Board of Arlington County*, 166 F. Supp. 529, 532 (1958).

[27] *Ibid.* at 533.

Of course, current practices in Charlotte-Mecklenburg sanction deviations from the neighborhood school ideal to promote segregation. The district judge disapproved a board request for a modification of the 1969-70 plan saying, "As this court pointed out before, bus transportation has too long been used as a tool to promote segregation. The year 1969 is too late in the day to start using this tool for that purpose in new situations" (595a). The free transfer plan now in effect allowed 1,200 white students to transfer out of their neighborhood schools in black neighborhoods in 1968-69 (453a).

Judge McMillan was right when he ruled: "The neighborhood school theory has no standing to override the Constitution" (300 F. Supp. at 1369; 306a).

E. *The Finger Plan Is Necessary to Accomplish the Constitutional Objective.*

If there was some proposal in the record which would be *equally effective or more effective* in eliminating segrega-

tion, there would be room for discussion about which plan is most desirable. Judge McMillan demonstrated that he was prepared to accept school board alternatives which produced equal results in accomplishing desegregation. He preferred such "home-grown products" even where he believed the expert consultant's proposals were more efficient. But an essential finding which supports the Finger Plan for elementary schools is Judge McMillan's conclusion that it was *necessary* to adopt a plan of this type to accomplish the result of desegregation. The court found:

> Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion. (1208a)

Judge Sobeloff's dissenting opinion noted that "The point has been perceived by the counsel for the board, who have candidly informed us that if the job must be done then the Finger plan is the way to do it" (1282a).

F. *The Court of Appeals Applied an Improper Standard for Appellate Review of the District Court's Discretionary Determination in Formulating Equitable Relief.*

Where the constitutional objective of integration is accomplished a district court's judgments on issues relating to the feasibility of particular local arrangements should not be upset except for plain abuse of discretion. There is, of course, no "discretion" to keep schools segregated. But there must be a substantial area of discretion for trial

judges to make practical judgments about the feasibility of local school desegregation arrangements.

The Finger elementary plan ought to be upheld if the case is governed by the traditional rule for appellate review of a chancellor's decree in equity. The prevailing rule is that equitable discretion in framing remedies is necessarily broad and that a strong showing of abuse of discretion must be made to reverse such a decree. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago R. I. & P. R. Co.*, 294 U.S. 648, 677 (1935); *United States* v. *Corrick*, 298 U.S. 435 (1936); *Rogers* v. *Hill*, 289 U.S. 582 (1933). In order to set aside the equity decree the appellant "must demonstrate that there was no reasonable basis for the district judge's decision," and thus that the remedy is so lacking in rationality as to amount to an abuse of discretion. *United States* v. *W. T. Grant Co.*, *supra*, 345 U.S. at 634.

This Court's decisions in school cases have relied on traditional equitable principles on remedial issues. In the second *Brown* decision the Court invoked the tradition of equity which was said to be "characterized by a practical flexibility in shaping its remedies and by a facility for reconciling public and private needs" (349 U.S. at 300). The *Brown II* Court cited with approval a passage in *Alexander* v. *Hillman*, 296 U.S. 222, 239 (1935), stating.

> Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and properly to enforce substantial rights of all the parties before them.

In *Griffin* v. *School Board*, 377 U.S. 218, 232-233 (1964), the Court said that "relief needs to be quick and effective,"

and that a federal court could require a county to levy taxes if necessary to maintain a non-discriminatory public school system. *Green* v. *County School Board,* 391 U.S. 430, 439 (1968), emphasized that in formulating a remedy district courts were to assess "the circumstances present and the options available in each instance." In *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, 235 (1969), the Court emphasized that "in this field the way must always be left open for experimentation." In the *Montgomery County* case the Court reversed a court of appeals decision which labeled the district judge's order too rigid and inflexible in favor of the trial court's "more specific and expeditious order."

There is nothing in this development of school desegregation law since *Brown* which warrants the departure announced by the plurality opinion of Judge Butzner for the court below from the traditional rule of appellate review. This new test of "reasonableness" enables the reviewing court to set aside the trial court's discretion on the ground that the appeals court majority would prefer another mode of relief albeit less effective. This runs exactly counter to the spirit of *Green* which declares that the result—actual desegregation—is the imperative thing and that the methodology of desegregation plans is secondary. It also runs counter to the philosophy of *Alexander, Carter* and *Dowell, supra,* which place a premium on the immediate implementation of constitutional rights pending the completion of litigation. The reasonableness test allows so much scope for unpredictable reversals of those decrees which accomplish actual desegregation as to substantially nullify *Alexander.* The reasonableness test signals the need for trial courts to adopt a "go-slow" cautious approach. Although busing is approved in principle in the opinion below, the result makes it clear that busing must be

limited. The standard of "reasonableness" is broad and vague, but it does not allow broad discretion for trial courts to order busing. Any plan found objectionable by a school board can colorably be said to be "unreasonable" justifying at least a stay pending appeal. The "reasonableness" test is "deliberate speed" in a new guise.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of the district court reinstated with directions that the desegregation of the schools proceed forthwith.

Respectfully submitted,

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APPENDIX

Memorandum of Decision and Order, dated August 3, 1970

I.

Summary

Pursuant to the mandates of the Supreme Court of the United States and the Fourth Circuit Court of Appeals, further hearings (eight days of them) have been conducted July 15-24, 1970, regarding methods for desegregation of the public schools of Charlotte and Mecklenburg County, North Carolina, and the known plans for desegregation of the elementary schools have been reconsidered.

The Court again finds as a fact that compliance with all parts of the desegregation order for senior high, junior high and elementary schools now in effect will require, at the most, transportation of 13,300 children on 138 busses.

The elementary portion of the order will require, at the most, transporting 9,300 children on 90 buses. The defendants already own or control at least 80 safely operable busses not in use on regular routes, *and* they expect early delivery of 28 more new ones. Such buses as may be needed beyond these 108 can be borrowed for a year without cost from the State.

No capital outlay will be required this year to comply with the court's order. The School Board and the county government have ample surplus and other funds on hand to replace with new busses as many of the used buses as 1970-71 experience may show they actually need. If they have to buy 120 new ones, at $5,500 each, the cost will approach $660,000, which is less than the cost of two days' operation of the schools.

Memorandum of Decision and Order, dated August 3, 1970

Regardless of any order of this court, all children assigned to any school more than 1½ miles from home are, under state law and regulation, now entitled to bus transport.

The 5/4 School Board majority have not obeyed the orders of the Circuit Court to prepare a new plan for elementary schools in place of their rejected plan. The court ordered plan for all schools has been in effect since June 29, 1970 under the mandate of the Supreme Court.

The School Board has not used all reasonable means to desegregate the elementary schools.

At least three reasonable plans are available to the Board: (1) the court ordered (Finger) plan; (2) the 4/5 minority Board ("Watkins") plan; and (3) an earlier draft of the Finger plan.

The Circuit Court directed this court to have a plan in effect for the opening of schools in the fall, and the Supreme Court on June 29, 1970 put this court's February 5 order back into effect pending these proceedings. The court ordered (Finger) plan is the only complete plan before the court, and it is a reasonable plan. The Board is herein directed to put the court ordered plan (with authorized modifications, if desired) into effect with the opening of school in the fall, unless they exercise the options set out herein to adopt the 4/5 minority Board plan (the "Watkins" plan) or an earlier draft of the Finger plan, or any combination of these three plus excerpts from the HEW plan, which complies with the directives in the February 5 order. The Board is directed to notify the court in writing by noon on August 7, 1970, as to the course of action which it has voted to follow.

Board plans for desegregation of the faculties of all schools and of the student bodies of the senior high schools and the junior high schools are approved.

Memorandum of Decision and Order, dated August 3, 1970

II.

Brief History of Proceedings.

On April 23, 1969, after lengthy hearings and research, an order was entered that the defendants submit a plan for the desegregation of the schools of Charlotte and Mecklenburg County, North Carolina, to be predominantly effective in the fall of 1969, and to be completed by the fall of 1970. Among other things the court found that under North Carolina law there is no "freedom of choice" to attend any school; that the Board of Education has the total control over the assignment of students to schools; and that residence has never created a right to attend a particular school. It was further found that all the black and predominantly black schools of this school system are illegally segregated. The November 7, 1969 opinion contained detailed guidelines for desegregating this particular group of schools, and included the following findings:

> "The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their *locations*, their *controlled size* and their *population* have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land;

> zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *"de facto,"* and the resulting schools are not "unitary" or "desegregated."

Segregation of black children into black schools is *not* because of residential patterns, but because of assignment and other policies of the School Board, including the call upon segregated housing and school site selection to lend respectability to those policies.

(There is attached hereto an 18-page exhibit listing approximately 65 sections of the General Statutes of North Carolina and 2 sections of its Constitution under which the segregation of the black race in North Carolina has been the policy of our Constitution and the letter of our statutes for many years. Many of these provisions were repealed by the 1969 General Assembly, but most of them were still on the books when the April 23, 1969 opinion was written.) [The exhibit referred to is not printed herein.]

A consultant, Dr. John A. Finger, Jr., was appointed by the court in December, 1969, to draw a desegregation plan after it became apparent that the defendants had no such plan and had not resolved to prepare one which would desegregate the schools. The development of the plan is described in the order of February 5, 1970, the supplemental historical memorandum of March 21, 1970, and the supple-

mental findings of fact dated March 21, 1970. Briefly stated, the court-appointed consultant prepared plans for the desegregation of all the black schools. Faced with the imminent existence of valid desegregation plans, the Board then went to work and prepared some plans of its own.

This court approved the Board's plan for senior high schools (with one minor change); it gave the School Board a choice of several plans or procedures as to junior high schools; and it disapproved the Board's plan for elementary schools, because it left half the black children in black schools, and ordered into effect one of the plans designed by the consultant, Dr. Finger, for desegregation of the elementary schools.

The Circuit Court of Appeals granted a stay as to the elementary schools and the Supreme Court left the stay in effect. The district court then, in the order of March 25, 1970, postponed until September 1, 1970, the implementation of the plans for junior and senior high schools because the stays issued by the Circuit Court and the Supreme Court had taken off the pressure for mid-year 1969-70 desegregation.

Before the appeal to the Fourth Circuit was concluded, the defendants, including the Governor and the State Board of Education, voiced strenuous opposition to compliance with the court order, basing their objections in part upon parts of the 1964 Civil Rights Law and upon North Carolina's "anti-bussing law" which had been passed by the General Assembly a few weeks after this court's original April 23, 1969 order. A three-judge court was convened and has met and has decided that the "anti-bussing law" in pertinent part is unconstitutional, and eventually issued appropriate injunctions.

The Circuit Court of Appeals then issued its opinion on May 26, 1970. It affirmed the principal findings of fact and legal conclusions of the district court, including the finding that the segregated residential housing upon which the defendants relied for defense was caused by forces deriving their basic strength from governmental action. It (1) approved the desegregation of faculties, (2) approved the plans for desegregation of junior high schools, and (3) approved the plans for desegregation of senior high schools all as ordered by the district court. It expressly *dis*approved the Board's plan for elementary schools because it left half the black elementary children in "black" schools, and it remanded the matter for the school board to prepare a new plan using all reasonable means of desegregation, and for the district court to reconsider the assignment of elementary pupils under a theory of "reasonableness". The district court was directed to put a plan into effect for the fall term 1970.

The Supreme Court on June 29, 1970, entered an order reading in pertinent part as follows:

> ". . . The petition for a writ of certiorari is granted, provided that the judgment of the Court of Appeals is left undisturbed insofar as it remands the case to the district court for further proceedings, which further proceedings are authorized, and the district court's judgment is reinstated and shall remain in effect pending those proceedings."

At the July 15-July 24 hearings the defendants announced that:

> (a) Faculties have been assigned for all schools according to the February 5, 1970 order, so that when

schools open in September all faculties will have about 75% white teachers and about 25% black teachers;

(b) The senior high schools will be desegregated this fall in accordance with the plan previously approved by the district court and by the Circuit Court;

(c) The junior high schools will be desegregated this fall in accordance with the plan previously approved by the district court and by the Circuit Court; and

(d) As to elementary schools the majority of the defendants have no official plan and no plan of action for desegregation except the plan, previously rejected by both district court and the Circuit Court, which would leave half the black elementary children in segregated schools.

Since the school board has refused to obey the Circuit Court's instructions to file a new elementary plan by June 30, 1970, it might, were this an ordinary case, have no standing to be heard further. However, the case affects numerous people who, though not Board members, are entitled to have the matter further considered as fully and fairly as possible.

This court has tried to follow faithfully the orders of the Supreme Court and the Circuit Court. This presents some unique problems; the Circuit Court's "reasonableness" order is vague; the Supreme Court's order allowing certiorari is cryptic, and raises and leaves unanswered several major questions; neither order is a clear guide for this court. However, this court believes that, regardless of the Board's continued default, this court's duty is to reconsider the elementary desegregation problem in view of

the questions whether the methods previously required by the court are reasonable and whether the Board has exhausted all reasonable methods available to it.

III.

The Extent of Continued Segregation—And Its Results.

The schools are still segregated as described in this court's memorandum opinion of November 7, 1969. Over 9,000 black children attend schools that are 100% black. Two-thirds (16,000) of the black children still attend racially identifiable "black" schools. Fifty-seven schools are "white" and twenty-five are predominantly "black."

The tangible results of segregation continue to be apparent from the 1969-70 Stanford Achievement Tests in Paragraph Meaning and Arithmetic, given during the sixth month of school, for grades 3, 6, 8 and 10. In "black" schools third graders perform at first grade or early second grade levels, while their contemporaries at "white" schools perform at levels generally from one to two grades higher. Sixth graders in the black schools (Double Oaks and Bruns Avenue, for example) perform at third grade levels while their contemporaries at Olde Providence, Pinewood, Lansdowne and Myers Park perform at seventh or eighth grade levels. In the eighth grade we see Piedmont Junior High students reading at early fifth grade levels while their contemporaries at McClintock and Alexander Graham read at early ninth grade levels. In the tenth grade, on a scale where the *average* is 50, the black high school, West Charlotte, had English scores of 38.30 and mathematics scores of 35.89; Harding, nearly half black, had scores of 42.89 and 40.76; while the obviously "white" schools had scores ranging from 43.2 to 52.2. At First Ward Elementary

School only two black *third* graders out of 119 tested scored as high as third grade, while 100 were still at first grade level of proficiency as to paragraph meaning.

Of factors affecting educational progress of black children, segregation appears to be *the factor under control of the state* which still constitutes the greatest deterrent to achievement.

IV.

The Legal Basis For Desegregation.

A. *Segregated public schools are unconstitutional.*—Desegregation is based on the Constitution as interpreted in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), where the Supreme Court said:

> "'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. *Segregation with the sanction of law, therefore, has a tendency to* [*retard*] *the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial*[*ly*] *integrated school system.*'
>
> • • •
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.* . . . ." (Emphasis added.)

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Green v. *New Kent County*, 391 U.S. 430 (1968) placed upon school boards the burden

> ". . . to come forward with a plan that promises realistically to work, and promises realistically to work *now*," [and]
>
> ". . .to convert promptly to a system without a 'white' school and a 'Negro' school, *but just schools*." (Emphasis added.)

The principal difference between New Kent County, Virginia, and Mecklenburg County, North Carolina, is that in New Kent County the number of children being denied access to equal education was only 740, whereas in Mecklenburg that number exceeds 16,000. If *Brown* and *New Kent County* and *Griffin* v. *Prince Edward County* and *Alexander* v. *Holmes County* are confined to small counties and to "easy" situations, the constitutional right is indeed an illusory one. A black child in urban Charlotte whose education is being crippled by unlawful segregation is just as much entitled to relief as his contemporary on a Virginia farm.

B. *"Racial balance" is not required by this court.*—The November 7, 1969 order expressly contemplated wide variations in permissible school population; and the February 5, 1970 order approved plans for the schools with pupil populations varying from 3% at Bain Elementary to 41% at Cornelius. This is not racial balance but racial diversity. The purpose is not some fictitious "mix", but the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools.

C. *"Bussing" is still an irrelevant issue.*—Until the end of the 1969-70 school year, state law and regulations au-

thorized bus transportation for almost all public school children who lived more than 1½ miles from the school to which they were assigned. The excluded few were those inner-city children who both lived and attended school within the old (pre-1957) city limits.

If an inner-city child was assigned to a suburban or a rural school, or if a rural or suburban child was assigned to an inner-city school, he *was* entitled to bus transport.

Under those regulations, virtually all the children covered by the court order of February 5, 1970, were entitled to bus transport under *then existing* state regulations *even if the order of this court had not mentioned transportation.*

In *Sparrow* v. *Gill*, 304 F.Supp. 86 (1969), a three-judge federal court ordered an end to the discrimination against the inner-city children (and thereby in effect ordered bus transport for those children) by requiring the school authorities to discontinue transport for suburban children unless they also offered it to inner-city children.

The state authorities have announced intention and promulgated rules to comply with this decision by providing transport on the usual basis for *all* city children who live over 1½ miles from school.

The local School Board, in its last plan for partial elementary desegregation, stated that

> "Transportation will be provided to and from school for all students who are entitled thereto under state law and applicable rules and regulations promulgated by the State."

(Without such transportation even the Board's own plan would have left children, in numbers they estimate at nearly 5,000, assigned to schools too far away to reach.)

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In view of the above facts, every child assigned to any school over 1½ miles from his home is entitled to bus transportation in North Carolina.

The issue is not, "Shall we bus children?" but "Shall we *withhold* transportation already available?"

In *Griffin* v. *Prince Edward County*, 377 U.S. 218 (1964), the Supreme Court held that a county could be required to recreate an entire public school system rather than keep it closed to avoid desegregation. The same principle would seem to apply here.

D. *This is a local case in a local court—a lawsuit—to test the constitutional rights of local people.*—The *principles* which outlaw racial discrimination in public schools certainly are of nationwide application, but the *facts* and results may vary from case to case. This is a local suit involving actions of the State of North Carolina and its local governments and agencies. The facts about the development of black Charlotte may not be the facts of the development of black Chicago or black Denver or New York or Baltimore. Some other court will have to pass on that problem. The decision of the case involves local history, local statutes, local geography, local demography, local state history including half a century of bus transportation, local zoning, local school boards—in other words, local and individual merits.

This court has not ruled, and does not rule that "racial balance" is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*

The orders of this court have been confined to the only area they can properly embrace, and that is *the rights of*

the particular parties represented in this case, on the particular facts and history of this case.

E. *The issue is not the validity of a "system", but the rights of* INDIVIDUAL PEOPLE.—If the rights of citizens are infringed by the system, the infringement is not excused because in the abstract the system may appear valid. "Separate but equal" for a long time was thought to be a valid system but when it was finally admitted that individual rights were denied by the valid system, the system gave way to the rights of individuals.

F. *The Issue Is One Of Constitutional Law—Not Politics.*—At the hearings the defendants offered public opinion polls and testimony that parents don't like "bussing," and that this attitude produces an adverse educational effect upon the minds of the children. The court has excluded such evidence, and must continue to proceed unaffected, if possible, by this and other types of political pressure and public opinion.

This is not out of disregard for the opinions of neighbors. A judge would ordinarily like to decide cases to suit his neighbors. Furthermore, as first suggested on August 15, 1969, it may well be that if the people of the community understood the facts, as the court has been required to learn and understand them, they would reach about the same conclusions the court has reached.

To yield to public clamor, however, is to corrupt the judicial process and to turn the effective operation of courts over to political activism and to the temporary local opinion makers. This a court must not do.

In the long run, it is true, a majority of the people will have their way. The majority must be a majority of the pertinent voting group. As our slave-owning grandfathers

of the South learned in 1865, the pertinent voting group on constitutional matters includes the people and their elected representatives from the nation at large, not just the South, and not just Mecklenburg County. Methods exist to amend the Constitution. If the Constitution is amended or the higher courts rule so as to allow continued segregation in the local public schools, this court will have to be governed by such amendment or decisions. In the meanwhile, the duty of this and other courts is to seek to follow the Constitution in the light of the existing rulings of the Supreme Court, and under the belief that the constitutional rights of people should not be swept away by temporary local or national public opinion or political manipulation.

Civil rights are seldom threatened except by majorities. One whose actions reflect accepted local opinion seldom needs to call upon the Constitution. It is axiomatic that persons claiming constitutional protection are often, for the time being, out of phase with the accepted "right" thinking of their local community. If in such circumstances courts look to public opinion or to political intervention by any other branch of the government instead of to the more stable bulwarks of the Constitution itself, we lose our government of laws and are back to the government of man, unfettered by law, which our forefathers sought to avoid.

Lord Edward Coke, Chief Justice of the Court of Common Pleas of England, may have summed it up when in 1616 he wrote, responding to a peremptory demand from the King's attorney general, that he must deny the King's request because under his oath his obligation was that he

> "... shall not delay any person of common right for the letters of the King or of any person nor for any other cause ...."

G. *The duty to desegregate schools does not depend upon the Coleman report, nor an any particular racial proportion of students.*—The essence of the *Brown* decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and breadth of experience, and that the segregated education itself is inherently unequal. The tests which show the poor performance of segregated children are evidence showing one result of segregation. Segregation would not become lawful, however, if all children scored equally on the tests.

Nor does the validity of *Brown* depend upon whether the system contains ideal proportions of black and white students. The Charlotte-Mecklenburg system does contain a theoretical "ideal" 70-30 proportion of white and black students. This has some bearing upon the reasonableness of any particular local plan or part of such plan. However, it does not give rise to any legitimate contention that *Brown* may be ignored where you cannot have at least 60% or 70% white children in a school. The HEW plan providing for 57% black students in a group of schools may well be constitutional in some other system, though unconstitutional in Mecklenburg where a school 57% black is immediately racially identifiable as a "black" school.

V.

The Reasonableness of the Specific Methods and the Overall Plans Available to Desegregate the Black Charlotte Schools.

A. *The facts under which any question of "reasonableness" must be judged.*—From the lengthy and largely repetitious testimony at the July 15-24 hearings, and from previous evidence, the following facts bearing on "reasonableness" are found:

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1. In North Carolina the school bus has been used for half a century to transport children to *segregated consolidated* schools. Last year 610,000 children, comprising nearly 55% of the state's public school population, were transported daily on school busses. With the 1970 extension of transportation to inner-city children, the average daily school bus population of North Carolina this September will reach perhaps three-fifths of all public school children. Those eligible for transport are far more numerous. The "anti-bussing law" has been held unconstitutional.

2. Some 70.9% of these bussed children are in the first eight grades. There may be more first graders than children of any other age riding school busses.

3. The academic achievement tests quoted in this and previous orders show that the later desegregation is postponed in this school district the greater the academic penalties are for the black children. By the sixth grade the performance gap is several grades wide. By the eighth grade it may be four grades wide.

4. School bus transportation is safer than any other form of transportation for school children.

5. The defendants have come forward with no program nor intelligible description of "compensatory education," and they advance no theory by which segregated schools can be made equal to unsegregated schools.

6. In Charlotte-Mecklenburg approximately 23,300 children in grades one through twelve (plus more than 700 kindergarten children, ages four and five) ride some 280 schools busses to school every day. The school bus routes for the four and five years olds vary from seven miles to thirty-nine miles, one way. The average one way bus route

in the system today is about an hour and fifteen minutes. Average daily bus travel exceeds forty miles.

7. Approximately 5,000 children of all ages rode public transportation (City Coach Company) every day of the 1969-70 school year at reduced fares, or 20¢ a day (10¢ each trip).

8. The State Department of Public Instruction has announced that it will pay for transportation of children on city bus systems or by other contract carriers at whatever rate may be approved by the North Carolina Utilities Commission. City Coach Company has requested a fare increase. City Coach has indicated a capacity to transport between 6,000 and 7,000 pupils daily if they get fares and routes satisfactorily established.

9. There are only two adult male drivers out of some two hundred and eighty regular bus drivers who drove school busses during the 1969-70 school year, and only about seventeen adult women who drove kindergarten school busses during that year. The other 260-plus drivers are boys and girls, 16, 17 and 18 years old.

10. There is no black residential area in this school system which is so large that the students can not be afforded a desegregated education by reasonable means. The additional length of travel required to implement the best available plans for desegregating the system is less than the average distance of bus transportation now being provided elementary children under existing bus practices, and the travel times are less than times required by existing bus routes.

11. The offer of transportation to encourage "freedom of choice" is ineffectual. It was expressly ordered by this court on April 23, 1969, and put into effect by the defendants in the fall of 1969; and it has had no substantial effect upon the exercise by black children of freedom of choice to go to white schools.

12. There is no "intractable remnant of segregation" in this school system. No part of the system is cut off from the rest of it, and there is no reasonable way to decide what remnant shall be deemed intractable.

13. The regular bus routes are about 280 in number, including 17 bus routes transporting four and five-year-old children to child development centers (kindergartens).

14. Up until the July 15, 1970 hearings, the defendants had allowed the court to believe they only had 280 buses plus a few spares. On the last day of the hearing, however (July 24, 1970), some amazing testimony was developed on cross-examination of the witness J. W. Harrison, the Transportation Superintendent. He testified and the court finds as facts that *in addition to* the 280 "regular" busses, the Board's bus assets include at least the following:

(i)	Spare buses	20
(ii)	Activity buses (each driven less than 1,000 miles a year)	29
(iii)	Used buses replaced by new ones in 1969-70	30
(iv)	New buses currently scheduled for replacement purposes and expected to be delivered in near future	28
	Total:	107

15. It only requires, at the most, 138 busses to implement the court ordered plans for desegregation of all the high schools, junior high schools, and elementary schools in the county!

16. In addition to this, the State school Bus Transportation Department informed the local defendants in early 1970 that there were 75 new busses available to the local school system if they wanted them, out of the 400 new buses then held by the State.

17. As of July 18, 1970, it was stipulated that the State Board of Education had 105 new busses on hand and 655 new ones on order, of which some 289 had been manufactured.

18. It was stipulated that by September 1st the State Department of Education would have approximately 400 secondhand busses on hand and available on loan, without cost, for local school boards to use in 1970-71.

19. According to Defendants' Exhibit 35, a letter of July 10, 1970 from the State Superintendent of Public Instruction to the Superintendent of the Charlotte-Mecklenburg school system:

> "At the present time approximately 400 discarded busses are available at various school garages in the state *that could safely be used, if necessary,* on a temporary basis for the transportation of additional children." (Page 4) (Emphasis added.)
>
> "In the event discarded busses must be used on a temporary basis the state will expect a local school unit to replace the discarded bus pressed back into service

as early as possible and at least by the beginning of the following fiscal year." (Page 6)

• • •

"We would request school units that hold title to these [old] *busses to transfer the title without cost to the school unit needing to use these vehicles on a temporary basis."* (Page 6) (Emphasis added.)

• • •

"It would be the responsibility of the school unit requesting temporary use of old busses to put the old busses in good mechanical repair after they receive delivery of the bus." (Page 7)

20. The testimony of Mr. Harrison was that for a 54-passenger bus a set of new tires, if needed, would cost $324; a complete overhaul of the brakes with replacement of all rubber parts and working parts would cost about $25. (Mechanics are paid on a salary, not a commission, basis.)

21. The brakes, tires, lights and steering on any second-hand bus which might be put into service can be put into first-class safety condition for a figure per bus not exceeding $500. In the case of the busses already on hand in the Charlotte-Mecklenburg system, this cost should be less because the local system has an excellent preventive maintenance and parts replacement program and according to the transportation superintendent anticipates and makes repairs before trouble develops, rather than wait for breakdowns, so that the old rolling stock as well as the new is kept in good condition.

22. The transportation superintendent, Mr. Harrison, testified that he maintains, and now has, a manpower reserve of about 100 students who are qualified and available as school bus drivers, over and above the 280-odd regular drivers. More are now being trained.

23. The estimated school budget for the year 1970-71 is approximately $66,000,000, which is $8,000,000 more than the 1969-70 budget.

24. Of this $66,000,000 the amount of approximately $21,900,000 was allocated to the School Board by the county without restriction as to its use, and the School Board is free to use whatever part of it they find necessary to comply with court orders. (Blaisdell testimony.)

25. The Board's opinion evidence, including numerous exhibits, on numbers of pupils to be transported and numbers of extra busses required (526 for the entire system, 293 for elementary schools) can not be taken seriously. The pupil count was made by counting all pupils in each zone who live more than a mile and a *quarter* (not a mile and a *half*) from each school, and (with some minor but unspecified adjustments) treating all of these children as requiring transportation. This method fails to account for several factors such as (1) the 7% who are absent every day; (2) the pupils now riding City Coach busses; (3) the pupils now already receiving school bus transport; (4) those who go to school in private vehicles.

Moreover, by cutting the "walking distance" from the statutory figure of 1½ miles to 1¼ miles, the Board method reduces by 40% (from over seven square miles to just over five square miles) the area of the walking zone and thereby sharply increases those eligible for bus transport.

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In computing needed busses, the Board figures unwarrantedly assume: (1) that each bus can make only one round trip a day instead of the average of 1.8 round trips a day now made; (2) that each bus can only transport 46 pupils a day instead of the present average of 84.4; (3) that busses used in the desegregation program must be less efficient than the others.

All these assumptions are contrary to the evidence which, for example, shows that one "desegregation" bus (Bus #23, Exhibit 54) transported 99 children daily among schools as remote as Northwest Charlotte (9th and Bethune) on the one hand and Sharon Elementary and Beverly Woods Elementary, and Quail Hollow Junior High on the other, with the driver then going on in the bus to South High School.

The court's previous findings on these items are reaffirmed. Maximum numbers of pupils to be transported and additional busses needed, even if *Sparrow* v. *Gill* were not in the picture, remain:

	No. Pupils	*No. Busses*
Senior High	1,500	20
Junior High	2,500	28
Elementary	9,300	90
	13,300	138

(Board witnesses after refining lines and making actual pupil assignments now say that the number of senior high pupils requiring transportation is 1,815 and the number of junior high pupils requiring transportation is 2,286.)

26. All plans which desegregate all the schools will require transporting approximately the same number of children. In overall cost, if a zone pupil assignment method is adopted, the minority Board plan may be a little cheaper than the Finger plan.

27. Mecklenburg County had a July 31, 1970 surplus or "carry-forward" of approximately four million dollars, of which one million dollars are completely free of any allocation or budgeting commitment.

28. North Carolina, whose biennial 1969-71 budget is $3,590,902,142.00, regularly has a biennial surplus of many millions of dollars.

29. The annual cost of pupil transportation is approximately $20 a year per pupil; the state pays it all, except for certain minor local administrative costs, and the original purchase of the first bus for a route; thereafter, the state replaces the bus periodically. Earlier findings that the cost was $40 per pupil year were in error.

30. No capital outlay will be needed to supply busses for the 1970-71 school year. The state is ready and willing to lend the few busses the Board may need; replacements can be bought after actual need has been determined under operating conditions.

31. The $66,000,000 school budget amounts to about $366,667 a day for a 180-day school year. If the county eventually has to buy as many as 120 new busses, their cost, at $5,500 each, would be $660,000, which is less than the cost ($733,000) of two days of school operation.

32. *Age of children* has apparently never prevented their school bus transportation. There are, of course, more children between kindergarten and the sixth grade than there are in the higher grades when the dropout rate increases, and more elementary children, including first graders, receive transportation than do high schoolers.

The longest bus routes in the entire county are the routes by which four and five-year-old kindergarten children are transported to child development centers (see Principals' Monthly Bus Report, Defendants' Exhibit 63). The Pineville Child Development Center has one bus, No. 297, which travels over 79 miles a day on one round trip with four and five-year-old children. Another such trip is over 70 miles a day. The Davidson Child Development Center has five busses which travel from 48 to 60 miles a day on one round trip with five-year-old children. The Bain Elementary School has a bus route, No. 115, which travels over 61 miles on one round trip each day, requiring two hours in the morning and two hours in the afternoon with elementary children. Routes to numerous elementary schools are very long in miles and time. The more than 10,000 children in grades one through six who have been riding school busses all these years and who now ride at an average travel time of an hour and a quarter each way are not shown to have had their education damaged by the experience.

Educationally it appears unreasonable to postpone desegregation of small children until later grades. The only concrete evidence of an educational nature in the whole hearing which rose above the level of opinion is the Stanford Achievement Tests which show that the performance gap, which is ordinarily noticeable in the first grade, has become several grades wide by the time the segregated

black child reaches the sixth grade. The lasting effects of segregation are minimized if it is eliminated at an early age.

33. *Traffic problems.*—The county has over 160,000 passenger vehicles and nearly 30,000 trucks registered in it. It is estimated that the total number of automobile trips in the county daily other than truck trips is over 869,000. Traffic is heavy in most parts of the county. Since the so-called "cross-bussing" of the Finger plan or the minority plan will not contemplate pick up and discharge of pupils in the central business area, the busses added by the Finger plan or the minority Board plan will provide very little interference with normal flow of traffic. School busses are no wider than other busses (the law requires that this be so); they already use all the major streets and traffic arteries in the county and city every school morning of the year. There is no evidence to show that adding 138 school busses to the volume of existing traffic will provide any such impediment as should be measured against the constitutional rights of children. It would also appear that a school bus transporting 40 to 75 children should reduce traffic problems by cutting down on the number of automobiles that parents might otherwise be driving over the same roads.

34. The schools already operate on staggered schedules. Today, the opening and closing of schools and the class hours of school bus drivers are adjusted to serve the practical requirements of transportation. Plaintiffs' Exhibit 12 shows that the elementary schools already operate on a staggered opening and closing schedule. Some open at 8:00; some at 8:05; some at 8:10; some at 8:15; some at 8:25 and

some at 8:30 and 8:45 in the morning, and the schools close for grades one and two at hours including 1:30; 1:35; 2:00; 2:15; 2:30; 2:45; 3:00; 3:05 and 3:10. The court finds that staggered opening and closing hours for elementary schools, and arrangement of class schedules of bus drivers for late arrival and early departure are facts of life which will not be eliminated by desegregation of the schools.

35. The defendants have plenty of money, plenty of know-how, plenty of busses on hand or available upon request, and plenty of capacity to implement the court ordered plan or the minority plan or any combination of the various plans. Their contentions to the contrary, and their five million dollar "estimates," when heard against the actual facts, border on fantasy![*]

B. *Reasonableness of methods.*—"Reasonable" is variously defined in more than 1,000 words in Webster's *Unabridged Dictionary*. In the context, the most appropriate definition seems to come from Black's *Law Dictionary*: "Reasonable. Just; proper. Ordinary or usual. *Fit and appropriate to the end in view.*" (Emphasis added.)

The end in view is the desegregation of the schools. The methods available include the following: (1) consolidation of schools (which began fifty years or more ago) and for which the school bus has been the "ordinary or usual," as well as the necessary tool; (2) assignment of pupils;

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[*] "There was a table set out under a tree in front of the house, and the March Hare and the Hatter were having tea at it.... The table was a large one, but the three were all crowded together at one corner of it. 'No room! No room!' they cried out when they saw Alice coming. 'There's *plenty* of room!' said Alice indignantly, and she sat down in a large arm-chair at one end of the table." (Lewis Carroll, *Alice's Adventures in Wonderland*.)

(3) school bussing; (4) non-contiguous zoning (before *Brown*, no black child was allowed to attend the nearest school if it happened to be white); (5) restructuring of grades in schools; (6) rezoning; (7) pairing, clustering and grouping of schools; (8) use of satellite zones; (9) freedom of choice, with appropriate restrictions; and (10) closing of schools.

All of these methods have been approved as legal by the Fourth Circuit Court of Appeals and by other courts. They work; singly and in combination they can work to accomplish the reassignment of children to eliminate segregation. If they are legal, and if they accomplish the end in view, and if they have been in use for half a century, they certainly qualify as "reasonable" methods. They are "appropriate to the end in view"; they desegregate the schools in a practical way.

C. *The various plans.*—

1. *The 5/4 Majority Board Plan.*—The original Board plan was rejected by this court and by the Circuit Court. The School Board has not obeyed the order of the Circuit Court of Appeals to file a new plan, and has not drafted nor attempted to draft another plan. The Board majority have not explored other methods of desegregation as directed by the Circuit Curt (pairing, clustering, grouping, non-contiguous zoning, re-arranging grade structures), except to discuss these matters among themselves and to offer lengthy testimony rationalizing the non-use of alternative methods. Although parts of the disapproved Board plan could be used in a current plan, the Board plan as originally proposed is still inadequate because it leaves half the black elementary students still attending black schools. The court does not find it to be reasonable.

2. *The HEW plan.*—This plan proposes to adopt the basic zoning program of parts of the Board majority plan, and then to re-zone some of the black schools with some white schools, mostly in low and middle income areas, and by clustering, pairing, grouping and transportation, to produce a substantial desegregation of most of the black schools. The faults of the plan are obvious. It leaves two schools (Double Oaks and Oaklawn) completely black; it leaves more than a score of other schools completely white; it would withdraw from numerous white schools the black students who were transported to those schools during the 1969-70 school year. The clusters proposed by HEW would for the most part continue to be thought of as "black" in this county because the school populations of most of the clusters would vary from 50% to 57% black and the lowest black percentage in any cluster is 36%. Recommended HEW faculty assignments to these clusters of schools contemplated faculties which in the main would be less than half white, and this would be another retrogression from the arrangements already made by the School Board for the fall term! Contrary to orders of the district court and the Circuit Court, the HEW people limited their zoning to contiguous areas.

All witnesses except the HEW representatives themselves joined in hearty criticism of the HEW plan because of its ignorance of local problems, because of its threat of resegregation, and because it tends to concentrate upon the black and low-or middle-income community a race problem that is county wide.

In other days and other places the HEW plan would have looked good; and in those districts where black students are in the majority, much of such a plan could well be reasonable today. However, "reasonableness" has to be

measured in the context; and in this context the HEW plan does not pass muster. It also on the facts of this case would fail to comply with the Constitution.

3. *The court order of February 5, 1970, including the Finger Plan.*—This order directs the desegregation of the schools. It offers the Finger plan as one way to do it, and encourages the Board to use its own resources to develop something better. As to the Finger elementary plan itself, the court, after eight days of further evidence and extensive further study, still finds it to be a reasonable method or collection of methods for solving the problem. The plan was designed by a qualified educator. It was drafted with technical assistance of the school staff. It does the complete job. It has a clear pupil assignment plan. It preserves a sound grade structure; it is adaptable to ungraded experimentation; it can be implemented piecemeal, in sections or by clusters of schools if necessary; it embraces local knowledge; it can be implemented immediately. It uses all reasonable methods of desegregation. It takes proper advantage of traffic movement and school capacity. It passes all tests of reasonableness.

4. *The 4/5 Minority Board Plan.*—This plan was presented intelligently and clearly by Dr. Carlton Watkins, its chief drafter, one of a 4/5 minority of the Board. It was spared any aggressive attack by Board witnesses or counsel. It is home grown. It was conceived and drafted by four members of the local Board. It uses all the techniques of the Finger plan. It desegregates all the schools. Like the Finger plan, it involves all communities of the county. It appears to the court that it can be implemented with somewhat shorter travel distances for school busses,

though perhaps a few more children might have to ride school busses than under the Finger plan. Its assignments are made with an eye toward the dynamics of community growth and shrinkage. It is spontaneous in origin and shows a willingness on the part of some of the Board to experiment. Its cost of implementation is roughly on a par with that of the Finger plan. Like the Finger plan, it can be implemented one part at a time and it does not create probabilities of resegregation of black schools. The principal fault of the minority plan is its present lack of a system of pupil assignment. Board witnesses were not willing to admit it outright, but the court has the very definite impression that they could draft a pupil assignment plan and put the minority plan into effect this fall if so directed by the Board.

5. *An earlier draft of the Finger plan.*—This draft, illustrated by Plaintiffs' Exhibit 10, is the first comprehensive recommendation of Dr. Finger to the court and to the school staff. It would require less transportation than any other plan before the court, and for shorter distances. It would have to be implemented all at once, and it does not involve all of the county in its scope. From the standpoint of economics it may be the cheapest plan available. From the standpoint of avoidance of tendencies toward resegregation and from the standpoint of total community involvement in the total community plan it is not on a par with the minority plan nor the final Finger plan. It is however, like the minority plan and the final Finger plan ordered by the court, a "reasonable" plan.

Memorandum of Decision and Order, dated August 3, 1970

VI.

A Reservation Concerning Reasonableness Versus Constitutional Rights

Reasonable remedies should always be sought. Practical rather than burdensome methods are properly required. On facts reported above, the methods required by this order are reasonable. However, if a constitutional right has been denied, this court believes that it is the constitutional right that should prevail against the cry of "unreasonableness." If a home has been illegally searched and evidence seized, the evidence is suppressed. If a defendant in a drunk driving case "takes the Fifth" and puts the state to its proof, the state has to prove its case without any testimony from him. The unreasonableness of putting the state to some expense can not be weighed against nor prevail over the privilege against self-incrimination or the right of people to be secure in their homes. If, as this court and the Circuit Court have held, the rights of children are being denied, the cost and inconvenience of restoring those rights is no reason under the Constitution for continuing to deny them. *Griffin* v. *Prince Edward County, supra.*

ORDER

1. Pursuant to the June 29, 1970 mandate of the Supreme Court of the United States, this court's order of February 5, 1970 will remain in effect pending these proceedings and except as modified herein or by later order of this court or a higher court.

2. The action of the Board in making faculty assignments in accordance with the order of February 5, 1970 is approved.

3. The action of the Board in making pupil assignments and other arrangements to operate the senior high schools in accordance with this court's order of February 5, 1970 is approved.

4. The action of the Board in making pupil assignments and other arrangements to operate the junior high schools in accordance with this court's order of February 5, 1970 is approved.

5. Numbered paragraphs 10 [823a] and 11 [824a] of the February 5, 1970 order of this court are amended by inserting the words "cumulative" and "substantially" at the appropriate points in each paragraph so that the two paragraphs will read as follows:

> "10. That 'freedom of choice' or 'freedom of transfer' may not be allowed by the Board if the cumulative effect of any given transfer or group of transfers is to increase substantially the degree of segregation in the school from which the transfer is requested or in the school to which the transfer is desired.
>
> "11. That the Board retain its statutory power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Administrative transfers shall not be made if the cumulative result of such transfers is to restore or substantially increase the degree of segregation in either the transferor or the transferee school."

6. As to the elementary schools:

(a) The order entered by this court on February 5, 1970 having been subjected to three weeks of review under the

reasonablness test is expressly found to be reasonable, and the School Board are directed to put the court ordered plan of desegregation into effect at the opening of school in the fall of 1970, *unless* they avail themselves of some of the options indicated herein.

(b) The plan for elementary school desegregation proposed by a 4/5 minority of the School Board (the Watkins plan) has been examined and is found to be reasonable, as far as it goes. It is, however, incomplete because it contains no plan for pupil assignment. The School Board are authorized to prepare an appropriate pupil assignment plan and use the minority plan for elementary school desegregation instead of the comparable portions of the plan previously ordered by the court, if they so elect.

(c) The School Board, if they so elect, may use portions of the minority plan and portions of the court ordered plan, bearing in mind that the most important single element in the order of this court on February 5, 1970 is paragraph 16, reading as follows:

> "16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*"

(d) The Board are free to incorporate into any plan they may make whatever portions of the work of the Department of Health, Education and Welfare staff, or such parts of the original partial Finger plan (Plaintiffs' Exhibit 10), which are consistent with their duty to carry out the order to desegregate the schools.

(e) If the Board elect to carry out the Finger plan, they are authorized, if they find it advisable, to close Double Oaks school and reassign its pupils in accordance with the general purposes of the February 5, 1970 order.

(f) The Board are directed to file a written report with this court on or before noon on Friday, August 7, 1970, indicating what plan or combination of plans they have voted to use.

(g) The Board are again reminded, as they were reminded during the July 15, 1970 hearings, that since the 29th day of June, 1970, they have been and still are subject to the order of the Supreme Court, which reinstated this court's February 5, 1970 order pending these proceedings, and that this court will be under some duty to measure the Board's performance against what they could have done starting on June 29, 1970.

7. The following portion of this order is taken in modified form from the recommendations in the proposed plan of the Department of Health, Education and Welfare. It has been included in part in orders of district courts to various school systems, such as the school system in Dorchester County, South Carolina. It is included in this order not with any idea of impairing or affecting any party's right of appeal, but with the thought that this community

has a difficult job of implementing a major desegregation program and that just as in the case of Greenville, South Carolina, whose schools were desegregated before any final word came from the Supreme Court, it will take leadership to do the job. Some of these suggestions of the Department of Health, Education and Welfare are therefore incorporated in this order as follows, for such aid as they may be in working through the difficult administrative and community problems which must be overcome:

SUGGESTIONS FOR PLAN IMPLEMENTATION

Successful implementation of desegregation plans largely depends upon local leadership and good faith in complying with mandates of the Courts and the laws upon which the Courts act. The following suggestions are offered to assist local officials in planning for implementation of desegregational orders.

Community

1. The Superintendent and Board of Education should frankly and fully inform all citizens of the community about the legal requirements for school desegregation and their plans for complying with these legal requirements.

2. The Board of Education should issue a public statement clearly setting forth its intention to abide by the law and comply with orders of the Court in an effective and educationally responsible manner.

3. School officials should seek and encourage support and understanding of the press and community organizations representing both races.

4. The Board of Education, or some other appropriate governmental unit, should establish a bi-racial advisory committee to advise the Board of Education and its staff throughout the implementation of the desegregation plan. Such committee should seek to open up community understanding and communication, to assist the Board in interpreting legal and educational requirements to the public.

5. The Superintendent should actively seek greater involvement of parents of both races through school meetings, newsletters, an active and bi-racial P.T.A., class meetings, parent conferences, and through home visits by school personnel.

6. The Superintendent and Board of Education should regularly report to the community on progress in implementing the desegregation plan.

School Personnel

1. The Superintendent should provide all personnel copies of the desegregation plan and arrange for meetings where the personnel will have an opportunity to hear it explained.

2. The Board of Education should issue a policy statement setting forth in clear terms the procedures it will follow in reassignment of the personnel.

3. Assignments of staff for the school year should be made as quickly as possible with appropriate followings by school principals to assure both welcome and support for personnel new to each school. Invitations to visit school before the new school year begins should be offered.

4. The Superintendent should see that a special orientation program is planned and carried out for both the professional and non-professional staffs (including bus drivers, cafeteria workers, secretaries and custodians) preparatory to the new school year. He should make every effort to familiarize new and reassigned staff with facilities, services, and building policies, and prepare them to carry out their important role in a constructive manner. The Superintendent should direct each principal to see that each teacher new to a school is assigned for help and guidance to a teacher previously assigned to that school. Such teachers should have an opportunity to meet before the school year actually begins.

5. The Superintendent should arrange an in-service training program during the school year to assist personnel in resolving difficulties and improving instruction throughout the implementation period. Help in doing this is available from the St. Augustine College in Raleigh, North Carolina.

8. The Clerk is directed to serve copies of this order on the members of the School Board individually, and upon all other parties by sending copies by certified mail to their counsel of record.

9. Subject to further orders from higher courts, jurisdiction is retained, and the attention of the parties is called to pages 27 and 28 [1278a-1279a] of the order of the Fourth Circuit Court of Appeals respecting the duties of the court and the parties with regard to any desired modification of the plan or of this order.

Memorandum of Decision and Order, dated August 3, 1970

This the 3rd day of August, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

[The "18-page exhibit listing approximately 65 sections of the General Statutes of North Carolina and 2 sections of its Constitution under which segregation of the black race in North Carolina has been the policy of our Constitution and the letter of our statutes for many years (Br. A4)" is omitted.]

Memorandum Decision, dated August 7, 1970

The defendant school board and this court are under order of the Fourth Circuit Court of Appeals to produce a plan for desegregation of the elementary schools to "take effect with the opening of school next fall."

Pending the proceedings, by order of the Supreme Court of the United States, this court's February 5, 1970, judgment, including the Finger plan, is in effect.

On August 3, 1970, after lengthy hearings, this court by order directed the defendants to elect which among several options they had voted to use to desegregate the elementary schools.

On August 7, 1970, the board reported to the court that they have authorized an appeal from this court's order of August 3, 1970; that they reject the various options from among which the court authorized them to choose; and that the board

> "has no choice but to acquiesce in the District Court's order relative to its own elementary plan of February 5, 1970 . . . In acquiescing the Board is of the firm continuing opinion that the Court ordered plan of February 5, 1970, is unreasonable."

The court accepts the board's action as its undertaking to use the plan directed on February 5, 1970, (as modified on August 3, 1970) in its desegregation of the elementary schools.

This 7th day of August, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Defendants' Report of Action Taken as Directed by the Court in Its Order of August 3, 1970

The Board of Education met in public session and adopted the following resolution for submission to the Court, said resolution being as follows:

"This written report is submitted to the United States District Court for the Western District of North Carolina pursuant to its mandate dated August 3, 1970, and entered into that certain civil proceedings entitled James E. Swann, et. al., plaintiff, vs. Charlotte-Mecklenburg Board of Education, et. al., defendants.

> " 'The Board are directed to file a written report with this Court on or before Noon Friday, August 7, 1970, indicating what plan or combination of plans they have voted to use.'

That Court, in its August 3, 1970, Order, provided that as to elementary schools, Paragraph 6-A.

> " 'The Order entered by this Court on February 5, 1970, having been subjected to three weeks of review under the reasonabless test, is expressly found to be reasonable and the School Board are directed to put the Court ordered plan of desegregation into effect at the opening of school in the fall of 1970 *unless* they avail themselves of some of the options indicated herein.'

"The School Board concluded that the options referred to, the Watkins, the early Finger and the HEW plans, do not offer reasonable alternatives which comply with the standards prescribed by the Court of Appeals of the Fourth Circuit and therefore has no choice but to acquiesce in the District Court's Order relative to its own elementary plan of February 5th which, upon rehearing, the District

Court itself found to be reasonable. In acquiescing the Board is of the firm continuing opinion that the Court ordered plan of February 5, 1970, is unreasonable."

Furthermore, the Board of Education authorized the Board Attorneys to appeal the Order of August 3, 1970, as it is deemed to be unreasonable and contrary to law.

/s/ William J. Waggoner
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FILE COPY

AUG 14 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL.,
Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,
Respondents.

AMICUS CURIAE BRIEF OF WILLIAM C. CRAMER

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AMICUS CURIAE BRIEF OF WILLIAM C. CRAMER

AUTHORITY TO FILE

All parties having consented, this Amicus Curiae brief is filed on behalf of William C. Cramer, Member of Congress from the 8th Congressional District of Florida, author of the amendment to section 401 (b) of the Civil Rights Act of 1964 prohibiting the assignment of students to public schools to overcome racial imbalance.

QUESTIONS ADDRESSED

1. Does section 5 of the Fourteenth Amendment empower the Congress to formulate legislative guidelines for enforcing the equal protection clause of that Amendment?

2. Is Title IV of the Civil Rights Act of 1964, relating to Desegregation of Public Education, a Constitutional expression of the authority conferred by section 5?

3. Was Title IV intended to be applied nationally or sectionally?

4. Does *de facto* segregation occur in the South?

5. Does the establishment of *de jure* quotas by the Courts constitute the assignment of students to public schools in order to overcome racial imbalance in violation of section 401 (b) of Title IV of the Civil Rights Act of 1964?

6. Are officials or courts of the United States 'empowered' to issue orders to bus pupils or students from one school to another or from one school district to another to racially balance student bodies although section 407 (a) of Title IV of the Civil Rights Act of 1964 specifically prohibits such orders?

I.

THE CONSTITUTIONAL SETTING

At the time the Constitution was being discussed by the Founding Fathers, the institution of slavery was prevalent throughout the former colonies—both North and South. How slaves were to be counted in the apportionment of power divided the Constitutional Convention. At one time, it broke up over the question. At no time, however, was the issue of Negro rights in any of its present ramifications within the contemplation of the drafters of the Charter.

When continued reservations of certain key leaders forced the adoption of the first Ten Amendments, they were added as a limitation on the power of the new Federal Government rather than as an inhibition on any of the powers then reserved to the States.

In the years following ratification, the issue of slavery became critical as the Nation expanded to the West. During this period, in the landmark Dred Scott decision, the rights of Negroes were further circumscribed.

Not until the post-Civil War period were the Dred Scott disabilities legislatively removed (in 1866). And not until the approval and ratification of the 13th, 14th,

and 15th Amendments were Constitutional protections relative to the treatment of Negroes finally adopted. At the time of their approval, however, many States—North, South, and Border—continued to maintain effective dual systems of laws for blacks and whites. Consequently, while Negroes were emancipated, their rights remained proscribed in law, customs, mores and tradition. In *Plessy* v. *Ferguson*,[1] the practice of providing 'separate but equal' accommodations was given formal judicial sanction. It remained the law of the land for the next half century.

In the Thirties and Forties, cases challenging the 'separate but equal' doctrine were pressed upon the courts. Not until the first *Brown* decision in 1954, however, was the doctrine, as it applied to education, finally overturned. Since then, the courts have played an increasingly activist role in effecting an end to segregation in public education.

But, the reach of the courts in such matters is Constitutionally circumscribed. All that was prohibited by the 14th Amendment was State action denying the equal protection of the laws because of race, color, or previous condition of servitude. Once such *de jure* denials were removed, the oversight authority of Federal courts logically ceased.

As to how such disabilities were to be removed, the amendment itself leaves no doubt. Section 5 categorically states that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." This language makes it abundantly clear that the framers of the Fourteenth Amendment envisioned that the Congress of the United States, that is the elected representatives of the sovereign people, would have the final say in formulating guidelines for enforcing its provisions.

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[1] 163 U.S. 537 (1896).

[1a] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Granted this authority, it follows that once the "power to enforce" has been exercised in accordance with the language and tenor of the amendment, the courts are duty bound to give full expression to the legislative will for, to do otherwise, would contravene the law and violate Constitutional responsibilities. By the same token, if the Congress, in exercising its "power to enforce", exceeded duly conferred Constitutional authority, then the courts would be bound to strike down such measures.

Insofar as the question of school desegregation is concerned, the Congress has seen fit to act. On July 2, 1964, after lengthy deliberations, it approved and the President signed into law the Civil Rights Act of 1964, Public Law 88-352, 88th Cong., 2d Session, 78 Stat. 241. In the years since its passage, the Act has been the subject of both Executive action and Judicial interpretation. Unfortunately, in the process, the language and purpose of the National Legislature in approving it has frequently been misconstrued. Hence, the Congressional plan has been repeatedly contravened.

The aim of this brief is to present a selective legislative history of the Civil Rights Act of 1964. By doing so, it is hoped that those misconceptions which presently cloud, and at times compromise, the full and effective implementation of the Act's Constitutionally-conferred Congressional purposes can, once and for all, be laid to rest.

II.

LEGISLATIVE HISTORY OF TITLE IV

On June 19, 1963, President Kennedy submitted to the Congress a proposed Civil Rights Act of 1963. In a message accompanying the omnibus package, the President complained of "the slowness of progress toward primary and secondary school desegregation", noting that it was more than 9 years since the Supreme Court's decision in the *Brown* case. To speed the process of school desegregation, the President called on Congress to "assert its

specific Constitutional authority to implement the 14th Amendment." [2] Specifically, he recommended the enactment of a two-pronged approach for achieving desegregation in the public schools. The first was designed to accelerate the litigation process while, at the same time, relieving private individuals of the responsibility for initiating and prosecuting school desegregation cases. As expressed by the President: "Authority would be given the Attorney General to initiate in the Federal district courts appropriate legal proceedings against local public school boards or public institutions of higher learning—or to intervene in existing cases . . ." under the conditions set forth in the measure.[3]

The second prong of the President's plan proposed a program of Federal technical and financial assistance to aid school districts in the process of desegregation. As stated in the President's Message: [4]

> "As previously recommended, technical and financial assistance would be given to those school districts *in all parts of the country* which, voluntarily or after result of litigation, are engaged in the process of meeting the educational problems flowing from *desegregation or racial imbalance* but which are in need of guidance, experienced help, or financial assistance in order to train their personnel for this changeover, cope with any difficulty and complete the job satisfactorily (including in such assistance, loans to a district where State or local funds have been withdrawn or withheld because of desegregation)." [Emphasis added]

The Administration bill was introduced in the House of Representatives by Congressman Celler, Chairman of the Committee on the Judiciary. It was designated H.R.

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[2] House Doc. 124, 88th Cong., 1st Sess. at 6 (1963).

[3] Id. at 6 and 7.

[4] Ibid.

7152, and referred to the Judiciary Committee and, in turn, to an appropriate subcommittee for consideration.

As introduced, Title III of the bill relating to "Desegregation of Public Education" consisted of ten sections. The first, (301), contained definitions. The next 5 sections (302 through 306) dealt with technical assistance to facilitate desegregation in the public schools. Sections 303 through 306, as originally introduced, in addition to desegregation, were also concerned with "other plans designed to deal with problems of racial balance in school systems." Indeed, throughout these sections, the term "racial balance" and "measures to adjust racial imbalance" were used repeatedly, as the following language will confirm:

> Sec. 302. The Commissioner shall conduct investigations and make a report to the President and the Congress, within two years of the enactment of this title, upon the extent to which equal educational opportunities are denied to individuals by reason of race, color, religion or national origin in public educational institutions at all levels *in the United States, its territories and possessions,* and the District of Columbia.
>
> Sec. 303. (a) The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit, to render technical assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools *or other plans designed to deal with problems arising from racial imbalance in public school systems.* Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation or racial imbalance, and making available to such agencies personnel of the Office of Education or other persons *specially equipped to advise and assist them in coping with such problems.*

(b) The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel *to deal effectively with special educational problems occasioned by desegregation or measures to adjust racial imbalance in public school systems.* Individuals who attend such an institute may be paid stipends for the period of their attendance at such institute in amounts specified by the Commissioner in regulations, including allowances for dependents and including allowances for travel to attend such institute.

Sec. 304 (a). A school board which has failed to achieve desegregation in all public schools within its jurisdiction, *or a school board which is confronted with problems arising from racial imbalance* in the public schools within its jurisdiction, may apply to the Commissioner, either directly or through another governmental unit, for a grant or loan, as hereinafter provided, for the purpose of aiding such school board *in carrying out desegregation or in dealing with problems of racial imbalance.*

(b) The Commissioner may make a grant under this section, upon application therefor, for—

(1) the cost of giving to teachers and other school personnel inservice training *in dealing with problems incident to desegregation or racial imbalance in public schools;* and

(2) the cost of employing specialists in problems incident *to desegregation or racial imbalance and of providing other assistance to develop understanding of these problems by* parents, school children, and the general public.

(c) Each application made for a grant under this section shall provide such detailed information and be in such form as the Commissioner may require.

> Each grant under this section shall be made in such amounts and on such terms and conditions as the Commissioner shall prescribe, which may include a condition that the applicant expend certain of its own funds in specified amounts for the purpose for which the grant is made. *In determining whether to make a grant,* and in fixing the amount thereof and the terms and conditions on which it will be made, *the Commissioner shall take into consideration* the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; *the nature, extent, and gravity of its problems incident to desegregation or racial imbalance, and other such factors as he finds relevant.*
>
> * * * *
>
> Sec. 305. Payments pursuant to a grant or contract under this title may be made (after necessary adjustments on account of previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, and on such conditions, as the Commissioner may determine.
>
> Sec. 306. The Commissioner shall prescribe rules and regulations to carry out the provisions of sections 301 through 305 of this title. [Emphasis added]

Although there were more complex titles in the bill, the proposed extension of technical assistance to problems related to 'racial imbalance' quite naturally focused congressional attention on Title III. Consequently, during the course of hearings on this provision, questions were repeatedly directed to witnesses in an effort to ascertain what the term 'racial imbalance' as used in the bill actually meant. Congressman Cramer, in particular, persistently sought a definition of this elusive phrase, but without success.[5]

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[5] Hearings on H.R. 7152 before Subcom. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess. at 1782, 1888-1889, 2084-2086, 2138, 2163, 2234-2236 (1963).

Upon conclusion of the hearings, the Subcommittee met n Executive Session for 17 days to consider the omnibus ill. Ultimately, it struck out of H.R. 7152 all after the nacting clause and inserted an amendment in the nature f a substitute. The amended version was thereafter rec-mmended to the full Judiciary Committee. It contained a reworked version of old Title III, renumbered Title IV, embodying a number of major and minor changes. The most significant of these was the elimination from the Title of all authority to extend financial assistance to overcome problems of 'racial imbalance.' Various rea-sons were assigned for these deletions. As stated in the Report:[6]

> ". . . The Committee failed to extend this assistance to problems frequently referred to as 'racial imbal-ance' as no adequate definition of the concept was put forward. The Committee also felt that *this could lead to the forcible disruption of neighborhood pat-terns*, might entail inordinate financial and human cost and create more friction than it could possibly resolve." [Emphasis added]

The full Judiciary Committee, in its consideration of the bill, also adopted an amendment in the nature of a substitute. The Committee substitute was practically the same as the Subcommittee proposal relating to methods to effect desegregation in public education. As finally ap-proved, however, the renumbered Title was limited to au-thorizing suits by the Attorney General to further "the orderly achievement of desegregation in public educa-tion." As the analysis of the reported bill contained in the Committee's report confirms, all mention of or refer-ence to the controversial notion of 'racial balance' was stricken from the Title:[7]

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[6] House Report 914, 88th Cong., 1st Sess. at 21-23 (1963).

[7] Id. at 23-24.

Section 401 contains definitions including the definition of "desegregation" as the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin.

Section 402 would direct the Commissioner of Education to conduct a survey and report to the President and Congress, within 2 years from enactment, concerning the lack of availability of equal educational opportunities by reason of race, color, religion, or national origin in public educational institutions at all levels.

Section 403 would authorize the Commissioner, upon the application of any State or local educational agency, to furnish technical assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools.

Section 404 would authorize the Commissioner to arrange with colleges and universities for the operation of institutes for special training designed to improve the ability of teachers and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by school desegregation. Stipends could be paid to those attending such institutes in amounts specified by the Commissioner.

Section 405 (a) would authorize the Commissioner, upon application by a school board, to make a grant to defray the cost of (1) providing inservice training to teachers and other school personnel in dealing with problems incident to desegregation, and (2) employing specialists to advise in respect of such problems.

Section 405 (b) would direct that in passing on an application for a grant, the Commissioner take into consideration the total amount available for the grant program, other pending applications, the financial condition and resources of the applicant, and the seriousness of its problems incident to desegregation.

Section 406 would authorize payments pursuant to a grant or contract under title IV to be made by the Commissioner in advance or by way of reimbursement.

Section 407 (a) would confer authority upon the Attorney General to institute civil suits in the Federal district courts in order to achieve desegregation in public schools and colleges. He could bring suit when he received a written complaint from parents that the school board in their district had failed to achieve desegregation, or from an individual that he had been denied admission to or continued attendance at a public college by reason of race, color, religion, or national origin. As a prerequisite to suit, the Attorney General would be required to certify that the signers of the complaint were "unable to initiate and maintain appropriate legal proceedings" for relief, and that the institution of an action would materially further the public policy favoring the orderly achievement of desegregation in public education. It is not intended that determinations on which the certification was based should be reviewable.

Section 407 (b) provides that the Attorney General may deem a person "unable to initiate and maintain appropriate legal proceedings" within the meaning of subsection (a) if such person is unable to bear the expense of the litigation or obtain effective legal representation, or when the Attorney General is satisfied that the institution of the litigation by such person may result in injury or economic damage to him or his family.

Section 407 (c) provides that the term "parent" includes any person standing in loco parentis.

Section 408 provides that in any action or proceeding under title IV, the United States is to be liable for costs the same as a private person.

Section 409 provides that nothing in title IV shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

Despite these changes, Congressman Cramer's fears were still not allayed. They prompted him to pen these prophetic words in the Report:[8]

> "[A]s a matter of legal craftsmanship, this bill is inexpertly drafted, imprecisely worded and imperfectly oriented to the very problems it professes to solve. The ambiguity of its language creates a cloud of obscurity which conceals its potential consequences. While we are unprepared to say that the ambiguity is deliberate and calculated, it is difficult to believe that it is altogether accidental. Statutory ambiguities require judicial interpretation. In light of the trend court decisions have taken in recent years, it is not unrealistic to predict that the interpretations the courts would make would be of the broadest possible scope. *What the courts interpret tomorrow may be altogether different from what a majority of the Members of Congress intended . . .*" [Emphasis added]

Title IV was considered on the Floor of the House of Representatives on February 6, 1964. In all, eight amendments were proposed and two were adopted. Of particular moment was one offered by Congressman Cramer providing that the definition of "desegregation" in section 401 (b) "shall not mean the assignment of students to public schools in order to overcome racial imbalance." In explaining the need for and meaning of his amendment, the Florida lawmaker declared:[9]

> "Mr. Chairman, this amendment is very simple. *It does precisely and unequivocally what the proponents of the bill indicate they wanted to do. That is, to strike 'racial imbalance' from the bill* and from this title which I otherwise, in its present form, believe is still in the bill as I have said before many times.

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[8] House Report 914, 88th Cong., 1st Sess. at 112 (1963).

[9] 110 Cong. Rec. 2280 (1964).

"In the hearings before the committee I raised questions on 'racial imbalance' and in the subcommittee we had lengthy discussions in reference to having these words stricken in the title, as it then consisted, and to strike out the words 'racial imbalance' proposed by the administration.

"*The purpose is to prevent any semblance of congressional acceptance or approval . . . to include in the definition of 'desegregation' any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.*" [Emphasis added]

At the conclusion of his remarks, Congressman Celler, Chairman of the Judiciary Committee and a Floor Manager of the bill, sought recognition: [10]

"Mr. CELLER. Mr. Chairman, will the gentleman yield?

"Mr. CRAMER. I yield to the gentlemen from New York.

"Mr. CELLER. Mr. Chairman, the amendment offered by the gentleman from Florida is acceptable.

"The CHAIRMAN. The question is on the amendment offered by the gentleman from Florida (MR. CRAMER)."

The Cramer amendment was thereafter unanimously adopted by the House.

On February 10, 1964, the House passed and sent to the Senate the proposed Civil Rights Act of 1964, including amended Title IV. In that Body, supporters of the omnibus legislation moved for immediate consideration of the House bill in order to avoid referring it to the Judiciary Committee, traditionally hostile to such measures. Their efforts were successful. In the early stages of the Floor debate that followed, proponents expressed the hope that the House bill would be accepted without modification, thus obviating the necessity of extended consid-

[10] Ibid.

eration of the bill and a House-Senate Conference. This effort did not succeed, however. In consequence, the Senate deliberated on H.R. 7152 for 83 precedent-smashing days.

As in the House, one of the principal concerns of Senate Members was the meaning and application of 'racial balance' insofar as the amended version of the bill was concerned. Because of grave reservations on this score, additional clarifying amendments were demanded as the price for approval of the bill. Their literal effect was to deny any "official" or "*court*" of the United States the power "to issue any order seeking to achieve a racial balance in any school requiring the transportation of pupils or students from one school to another or one district to another in order to achieve such racial balance, or otherwise enlarge the *existing power* of the court to insure compliance with constitutional standards." [11] Since "existing power" as asserted by the courts at the time, comprehended only ending segregation in the schools, not promoting integration, Congress sought to make it crystal clear that no enlargement of that authority was contemplated by the Act. In other words, it, rather than the courts, would set the guidelines for desegregating public schools. No better elucidation of this can be found than in the amplifying remarks of then-Majority Whip Hubert Humphrey speaking for the Managers of the bill: [12]

> "Next, changes are made to resolve doubts that have been expressed about the impact of the bill on the problem of correcting alleged *racial imbalance* in public schools. *The version enacted by the House was not intended to permit the Attorney General to bring suits to correct such a situation,* and indeed, said as much in section 401 (b). However, *to make this doubly clear, two amendments* dealing with this matter are *proposed.*

[11] 110 Cong. Rec. 12714 (1964).

[12] Id. at 12717.

"The first provides that nothing in title IV 'shall empower any 'court' or 'official' of the United States to issue 'any order' seeking to achieve 'a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.' *This addition seeks simply to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools, and should serve to soothe fears that title IV might be read to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools.*

"*Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.'*

"*Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws.*" [Emphasis added]

Senator Javits of New York, a staunch proponent of civil rights, likewise sought to reinforce these understandings: [13]

"Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or regulation relating to racial imbalance, it is negated expressly in the bill. . . . Therefore *there is no case in which the thrust of the statute* under which the money would be given *would be directed toward . . . bringing about a racial balance in the schools.*

[13] Id. at 12714.

> If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have *an open and shut case* under Section 603. *That is why we have provided for judicial review.* The Senator knows as a lawyer that we never can stop anyone from suing, *nor stop any Government official from making a fool of himself,* or from trying to do something that he has no right to do . . ." [Emphasis added]

From the foregoing, it is evident that the Senate was fully cognizant of the ambitions of some 'courts' and 'officials' to enlarge the legislative plan from one aimed at ending segregation to one seeking to end so-called racial isolation by compelling racial balance in the Nation's public schools. Both through amendments and colloquy it attempted to nip these ambitions in the bud, as witness the following exchange between Senator Robert Byrd of West Virginia and Administration-spokesman Senator Humphrey: [14]

> "Mr. Byrd of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title IV school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?
>
> "Mr. Humphrey. *I do.*
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> • • • •
>
> [Mr. Humphrey.] "[*T*]*he Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race.* The bill *does not attempt to integrate* the schools, but it does attempt to eliminate segregation in the school systems. *The natural factors such*

[14] Id. at 12715, 12717.

as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional." [Emphasis added]

As already mentioned, debate in the Senate went on for 83 record-breaking days. Along the way, it became obvious to all concerned that the necessary ⅔'s vote for cloture, i.e. to shut off debate, could not be obtained unless sufficient clarifications and assurances were provided by the managers of the bill and appropriate amendments had been offered and accepted. Consequently, the Senate leadership, in consultation with the Attorney General, drafted a substitute containing them. The compromise measure won over a sufficient number of Senators to secure the necessary strength to effect cloture and the filibuster was ended. Nine days later, the Senate passed and sent to Conference a reworked version of H.R. 7152 containing the anti-busing guarantees of sections 401 (b) (the Cramer Amendment) and 407 (a).

On July 2, 1964, the House concurred with Senate amendments and the Civil Rights Act of 1964 was signed into law by then-President Lyndon Johnson.

III.

JEFFERSON AND BEYOND— THE SECOND RECONSTRUCTION

A. The Promise of Uniformity

Shortly after the Civil Rights Act of 1964 became the law of the land, a three-judge panel of the Fifth Circuit Court of Appeals undertook to review a consolidated group of school desegregation cases.[18] Their "distinctive features" declared the tribunal, are that they "require us

[18] *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (C.A. 5, 1966), commonly referred to as *Jefferson I*.

to re-examine school desegregation in the light of the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW)." [16]

The panel evidenced its sensitivity and awareness of its role in the constitutional scheme of things when it declared in its opinion:

> "More clearly and effectively than either of the other two coordinated branches of government Congress speaks as the voice of the nation." [17]

And again, when it said:

> "When Congress declares national policy, the duty the other two coordinated branches owe to the nation requires that, within the law, the judicial and executive respect and carry out that policy." [18]

And again:

> "We shall not permit the Courts to be used to destroy or dilute the effectiveness of the Congressional policy . . ." [19]

This apparent desire and determination to conform to its constitutional role as interpreter of the Nation's laws in order to effectuate national goals was commendable. Unfortunately, performance failed to measure up to promise. As the following analysis will show, the Court, in rendering its decision, repeatedly misconstrued and misinterpreted the Congressional will. Standing alone, each of its errors of construction represented a serious departure from what Congress intended. In synergistic combination, their effect has been to provide the judicial underpinnings for a radical revamping, recasting and re-

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[16] Id. at 845.

[17] Id. at 850.

[18] Id. at 856.

[19] Id. at 859.

ordering of Congressional priorities, policies, and purposes.

In the process, the Congressional will has been blurred and blunted and the promise and potential of the Civil Rights Act of 1964 has gone unrealized and unfulfilled.

B. The De Facto-De Jure Distinction

The goal of proponents of those provisions of the Civil Rights Act of 1964 dealing with education (Titles IV and VI) was to provide a uniform Federal approach for ending discrimination in the Nation's public schools. This aim was underscored by President Kennedy in his Message to Congress proposing enactment of the measure:

> "This is not a sectional problem—it is nationwide. . . . A national domestic crisis also calls for bipartisan unity and solutions." [20]

It was echoed in the Report of the House Judiciary Committee:

> ". . . H.R. 7152, as amended, resting upon [constitutional] authority is designed as a step toward (sic) eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope." [21]

And re-echoed on the Floor in both Houses of Congress:

> "'E Pluribus Unum'. We want unity. Equity begats unity. We want one and the same treatment for all." [22]

The Court in *Jefferson I* exhibited its perception of the pitfalls of a piecemeal approach in this memorable passage from its opinion:

> "In sum, the lack of uniform standards has retarded the development of local responsibility for the ad-

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[20] House Doc. 124, 88th Cong., 1st Sess. 13 (1963).

[21] House Report 914, 88th Cong., 1st Sess. at 18.

[22] Senator Pastore, a principal spokesman for the bill, 110 Cong. Rec. 7059 (1964).

ministration of schools without regard to race or color. What Cicero said of an earlier Athens and an earlier Rome is equally applicable today." [23]

But the type of uniformity it had in mind was of a peculiar variety. By judicial fiat, it was to apply to Rome and Athens, Georgia (and other communities in the South), not to the Nation as a whole. Adopting the "ingenious though illogical distinction" [24] between so-called *de facto* and *de jure* segregation, it concluded that Congress had intended that the 'equal protection clause' was to be applied unequally and that, in effect, every manifestation of racial isolation in the South constituted *de jure* segregation. Whether Congress could have passed sectionally directed legislation had it wanted to is open to serious doubt. That it never contemplated such a double standard, is not, however. For the Court to have imputed such an intention was to thwart congressional will and, in the process, raise the spectre of a Second Reconstruction in America—one effected by judicial ukase.

The Court's rationale for this divisive rendering of the Union of States was this: Since the South was the area of the Nation which had maintained dual systems of education imposed by law prior to *Brown I*, the South required special rules for rehabilitation and reform—by implication, in perpetuity.

From a purely judicial standpoint, there would, at first blush, appear to be some justification for this view. The reason: It is generally presumed that the *Brown* decisions focused on the special problems of dual school systems in the old Confederacy. As a matter of fact, however, half of the consolidated group of cases decided in *Brown* actually originated elsewhere, i.e. in Kansas and Delaware. Thus, the notion that these decisions were con-

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[23] *Jefferson I* at 861.

[24] *United States* v. *Jefferson County School Board*, 380 F.2d 385 (C.A. 5, 1967), commonly referred to as *Jefferson II* at 398, Judge Gewin dissenting.

fined to the South is without foundation. So too is the unsupported proposition that the Congress intended the Civil Rights Act of 1964 to either establish or perpetuate arbitrary sectional differences. Indeed, everything the National Legislature said and did confirmed a contrary intention. In the words of Senator Pastore: "There must be only one rule to apply to every State." [25]

Yet the Court made short work of such evidences. The "similarity of pseudo *de facto* segregation in the South to actual *de facto* segregation in the North", it declared, "is more apparent than real." [26] Only "segregation resulting from racially motivated gerrymandering is properly characterized as '*de jure*' segregation", [27] it asserted. And, such gerrymandering, in the Court's lights, occurred only in the South.

The Court therefore concluded that:

> "Adequate redress . . . calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the State's system of *de jure* school segregation and the organized undoing of the effects of past segregation." [28]

Perhaps the most curious of the curious reasoning resorted to by the Court to justify the legislative lobotomy it was performing related to the role attributed to the author of section 401 (b). In commenting on his reasons for offering this provision, it blandly asserted that:

> ". . . Congressman William Cramer, who offered the amendment, was concerned that the bill as originally proposed might authorize the government to require busing to overcome *de facto* segregation." [29]

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[25] Senator Pastore, 110 Cong. Rec. 7059 (1964).

[26] *Jefferson I* at 876.

[27] Id. at 876.

[28] Id. at 866.

[29] Id. at 879.

Having reached this conclusion, it interpreted his proposal in this way:

> "The affirmative portion of this definition, down to the 'but' clause, describes the assignment provision necessary in a plan for conversion of a *de jure* dual system to a unitary, integrated system. The negative portion, starting with 'but', excludes assignment to overcome racial imbalance, that is acts to overcome *de facto* segregation." [30]

It then determined that:

> "As used in the Act, therefore, 'desegregation' refers only to the disestablishment of segregation in *de jure* segregated schools." [31]

In effect, therefore, the Court decided that the Cramer Amendment did not mean what it said. Although the language declared that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance", it found that the author intended only a limited prohibition. What Congressman Cramer and his colleagues wanted, according to the Court, was to prevent racial balance in *de facto* areas (all presumably in the North), not in his own constituency in the South where all separation of the races was presumed to be *de jure* in nature.

That the Court attributed such an intention to the Florida lawmaker seems hardly credible. In point of fact, what he actually sought to accomplish through his amendment was something quite different. From the debates, it is evident that the common understanding of Members of Congress at the time of its consideration was that *de facto* segregation was separation of the races by personal choice or preference and that such separation occurred in all sections of the Country—South as well as North. *De jure* segregation, on the other hand, was separation imposed by law or color of law. While primarily confined

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[30] Id. at 878 referring to Section 401 (b) of the Act.

[31] Ibid.

o the South, it was recognized that insidious manifestations existed in all parts of the Nation. The Civil Rights Act of 1964 embodied these understandings. Its aim was o root out all forms of *de jure* segregation nationwide. *De facto* segregation, however, that is the right of free association as reflected in neighborhood living patterns, was to be left alone wherever it occurred—North or South.

The contrary holding of the three-judge panel in *Jefferson I* that the Civil Rights Act of 1964 contemplated a double standard of administration, flies in the face of these understandings. Unfortunately, it was approved by the Court of Appeals, sitting in banc, in *Jefferson II* and thereafter, in one form or other, in a steady line of cases emanating from the Fifth and other Circuits ever since. Some have even gone so far as to assert, in effect, that Black neighborhoods in the South are *de jure* segregated per se. Through such arbitrary determinations, the literal and logical distinction between *de facto* (by choice) and *de jure* (by law) segregation which Congress believed it had written into the Civil Rights Act of 1964, has been all but obliterated.

C. Desegregation and Racial Balance

The Fourteenth Amendment provides that no State shall deny to any of its citizens the equal protection of the laws. The negative character of that enjoinder has been uniformly adhered to through the years.

In 1883, for example, the Supreme Court of the United States in the *Civil Rights Cases* [22] unequivocally held that the Fourteenth Amendment is a prohibition against State action and only State action. Mr. Justice Bradley delivered the opinion of the Court in which the principle was stated:

> "It is State action of a particular character that is prohibited. . . . [The amendment] nullifies and makes

[22] 109 U.S. 3, 11 (1883).

> void all State legislation, and State action of every kind, which denies to any the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. . . ."

More recently, the Supreme Court reaffirmed those principles in *Burton* v. *Wilmington Parking Authority*[33] when it announced that the *Civil Rights Cases*, "embedded in our constitutional law" the principle "that the action inhibited by the . . . Fourteenth Amendment is only such action as may fairly be said to be that of the States."

In *Briggs* v. *Elliott*, this view was upheld when the Court, seeking to "point out exactly what the Supreme Court had decided and what it has not decided" in *Brown* declared:

> "It has not decided that the federal courts are to take over and regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, does not require integregation. It merely forbids discrimination."[34]

The same view was espoused in *Queen Cohen* v. *Public Housing Administration*, when Judge Rives, speaking for the Court, stated:

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[33] 365 U.S. 715, 721 (1961).

[34] *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (E.D.S.C., 1955).

[e]ither the Fifth nor the Fourteenth Amendments
[o]erate positively to command integration of the
"[r]ces, but only negatively to forbid governmentally
op[p]forced segregation." [35]

[P]enident Kennedy, in submitting his Civil Rights Mes-
Pres[s] 1963, however, urged that the Congress scrap this
[a]ge in[s]ch in favor of a radical new one. What he pro-
[a]pproain effect, was that the time-honored, judicially ap-
[p]osed, distinction between desegregation and integration
[h]rovedinguished by legislative fiat and a new standard
[t]e exting racial balance substituted. In the President's
[r]equiri
[w]ords:

"[A]s previously recommended, technical and financial
[a]sistance would be given to those school districts
[a]s *all parts of the country* which, voluntarily or as
[t]he result of litigation, are engaged in the process
[o]f meeting the educational problems flowing from
desegregation or racial imbalance . . ." [36] [Emphasis
[a]dded]

[T]The language of the bill accompanying the Presidential
Messa[g]e embodied this approach. As proposed, it con-
tained a series of provisions whose enactment would have
had t[h]e effect of legislatively approving the requirement
of 'ra[c]ial balance' as an equivalent of or supplement to
desegr[e]gation. Members of Congress were, of course,
aware of the implications of President Kennedy's proposal
and t[h]ey did what they thought was necessary to elimi-
nate [s]uch provisions from the bill.

At first blush, some of the statements of the Court in *Jefferson I*, convey the impression that the National Legislature succeeded. On page 849, for example, the opinion states:

"Congress decided that the time had come for a sweeping Civil Rights advance, including *national*

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[35] 257 F.2d 78, 78 (C.A. 5, 1958).

[36] Message to Congress, H.Doc. 124, 88th Cong., 1st Sess. at 7 (1963).

> legislation to speed up *desegregation* of public schools and to put teeth into enforcement of *desegregation*. Titles IV and VI together constitute *the congressional alternative to court-supervised desegregation*." [Emphasis added]

And again, on page 851 of the opinion:

> "In April 1965, Congress for the first time in its history adopted a law providing general federal aid—a billion dollars a year—for elementary and secondary schools. It is a fair assumption that Congress would not have taken this step had Title VI not established the principle that schools receiving Federal assistance must meet *uniform national standards* for *desegregation*." [Emphasis added]

But such statements were mere windowdressing. Far from adhering to the desegregation objectives Congress set forth, the Court, in easy stages, proceeded first to undermine and then recast them. "There is not one Supreme Court decision", it declared, "which can be fairly construed to show that the Court distinguished 'desegregation' from 'integration' in terms or by even the most gossamer implication . . ." [37] Manifestly, therefore, "the duty to desegregate schools extends beyond mere 'admission' of Negro students on a non-racial basis." [38] Having established this it was but a short step to a declaration that:

> "The Constitution is both color blind and color conscious." [39]
>
> "Here race is relevant, because the governmental purpose is to offer Negroes equal educational opportunities. The means to that end, such as disestablishing segregation among students, distributing the bet-

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[37] *Jefferson I*, 846 n.5. It did not, of course, because at the time the decision was rendered it obviously felt that universally accepted semantic differences did not require it to.

[38] Ibid.

[39] Id. at 876.

ter teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation, must necessarily be based on race." [40]

And from this to citing with approval the proposition that:

"The courts and HEW cannot measure good faith or progress without taking race into account. '*When racial imbalance infects a public school system*, there is simply no way to alleviate it without consideration of race.'" [41] [Emphasis added]

In this fashion, "the unquestioned intent of Congress as illustrated by the legislative history" was obliterated, as was the former generally understood distinction between desegregation and integration.[42]

But the Court was still not content. "Some of the difficulty in understanding the Act and its legislative history", it stated, "arises from the statutory use of the undefined term 'racial imbalance'. It is clear, however, from the hearings and debates that Congress equated the term, as do the commentators, with '*de facto* segregation', that is, non-racially motivated segregation in a school system based on a single neighborhood school or all children in a definable area." [43]

Having reached this conclusion, it then went on to sanction racial balancing in non *de facto* areas i.e. all of the South, in this way:

"The provision referring to percentages (in HEW Guidelines) is a general rule of thumb or objective administrative guide for measuring progress in de-

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[40] Id. at 877.

[41] Ibid. Citing Wright, Public School Desegregation: Legal Remedies for *De Facto* Segregation, 16 West. Res. L.Rev. 478, 489 (1965).

[42] *Jefferson II* at 407, Cox dissenting.

[43] *Jefferson I* at 878.

> segregation rather than a firm requirement that must be met." [44]

It further observed that:

> "Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system." [45]

Thus was the transition made from *de facto* to *de jure*, from desegregation to integration and, finally, from ending racial classifications to *de jure* quotas and balancing.

In the years since its rendering, the misinterpretations of legislative meaning and intent reflected in *Jefferson* have been enlarged and expanded upon. In the process, what amounts to a wholesale diversion of the will of the National Legislature as expressed in the Civil Rights Act of 1964 has taken place. Thus:

Where Congress desired that the provisions of the Act be uniformly applied in all fifty States, not on a sectional basis, the Courts have limited effective coverage to the old Confederacy.

Where Congress struck the notion of racial balance as an equivalent of or supplement to desegregation from the original bill, the Courts have treated the matter as if it had never been considered.

Where Congress, seeking to accord its negative action positive standing, specifically amended the Act to provide that desegregation shall not mean the assignment of students to overcome racial imbalance, the Courts have circumvented its intention by ruling that the prohibition applied only in *de facto* areas of the North, not at all in the South where all segregation was held to be *de jure* per se.

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[44] Id. at 886-887.

[45] Id. at 888.

Where Congress defined desegregation to mean the assignment of pupils "without regard to their race", the courts have decided that the opposite was intended; that classification by race was necessary to remove the effects of past racial classification.

Where Congress sought to forestall attempts by courts or officials to bus students to achieve racial balance, the courts have approved what amounts to *de jure* quotas to measure compliance with their orders.

Where Congress sought to preserve neighborhood schools, the courts have set the stage for dismantling them.

IV.

CONCLUSION

The fundamental purpose of the Supreme Court in *Brown I* was to end legalized discrimination in public schools in order to improve the quality of education for Negro children. For a decade, decisions of the Court echoed and re-echoed this objective.

In enacting the Civil Rights Act of 1964, the Congress sought to further this end. Its aim was to provide the legislative wherewithal to marshal the full resources of the Federal Government to enhance the educational opportunities and, in the process, the quality of life, for Black Americans.

Unfortunately, almost before the ink was dry on this landmark measure, the Courts and the Executive began to circumvent Congress' handiwork. From a measure specifically designed to end segregation in the interest of education, it was reframed and reformulated until today it is cited as a statutory prop for balancing for balance's sake, for destroying neighborhood integration in order to accomplish racial integration, and, in an Orwellian exercise in 'doublethink', for perpetuating classification by

race in order to remove the inequities created by racial classification. Small wonder, under the circumstances, that increasing numbers of Americans of both races are disillusioned, that Congress is concerned, that the Executive is confused, and that the Judiciary, as evidenced by the diversity of its opinions, is bewildered.

Ironically, the present disillusionment and disenchantment would probably never have developed had the Courts and the Executive kept their respective eyes on the educational ball and on the carefully-considered measures that the people's representatives in the National Legislature framed to assist them. When, pursuant to its constitutionally-delegated authority that it "shall have power to enforce by appropriate legislation the provisions of" the Fourteenth Amendment, Congress passed the Civil Rights Act of 1964, its stated and restated objective was to provide the means for ending *segregation* in public education. This was the aim, the ideal, the raison d'etre.

To insure that this oft-stated goal would be strictly followed, the Congress provided what it considered to be satisfactory safeguards and assurances. These included the following:

(1) the Act would be uniformly applied in all 50 States;

(2) desegregation would not comprehend the notion of racial balance as either an equivalent or supplement;

(3) no assignment of students would be made to overcome racial imbalance;

(4) neighborhood schools would be maintained.

This desegregation theme runs through Congress' deliberations in Committee, its reports, and its debate on the Floors of both Houses. Its fundamental, its sole, its exclusive aim was to make the statute conform to Judge Parker's decision in *Briggs* that the Constitution is color

lind, not color conscious."[46] Managers of the bill emhasized and re-emphasized their understandings in this egard for, had they not, the necessary votes for passage f this extremely controversial measure would never have een forthcoming.

Unfortunately for the cause of civil rights and of education, the Courts and the Executive have misconstrued the Congressional will. As a result, a widening gulf between the promise of the Act and the performance of the Executive and the Courts in implementing and interpreting it has developed.

Justice Brandeis, one of the greatest civil libertarians ever to grace the bench, once said: "Experience teaches us to be most on our guard to protect liberty when the Government's purposes are beneficent."

It would be the ultimate irony if 'beneficent' attitudes on the part of well-meaning Executive and Judicial civil rights proponents had the ultimate effect of indelibly branding into the public consciousness the false notions that Blacks had to be treated unequally in order to be equal; that they are unable to either teach or learn from one another; that they, like some American Indians, in their own interest, must be made permanent wards of an all beneficent State.

Yet, is not this precisely what is happening?

What is to be done? Obviously, the Courts are at a judicial crossroads. If their efforts to improve educational opportunities for Black Americans are not to bear rancid fruit, they simply cannot continue to ignore the political, social, constitutional, and legislative mandate of the Civil Rights Act of 1964.

Some may argue that it is already too late; that past mistakes of interpretation cannot now be undone. But

[46] *Briggs* v. *Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955).

such assertions are falacious. After all, the Supreme Court waited half a century to undo *Plessy*. A mere half decade has passed since the 'balancing' trend began.

A vast reservoir of racial good will still exists. The opportunity to move ahead thus remains. If reason rules, progress will be great. But, if it does not, then a harsh night of disharmony, disruption, and discord will descend upon our land as a new era of Reconstruction—this time judicially imposed—rends the Nation assunder once again.

If this comes to pass, who can seriously argue that the cause of education for Black Americans, or for that matter, for any American, will be advanced?

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 281

JAMES E. SWANN, *et al.*,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION

e National Education Association (hereinafter NEA) is dependent, voluntary organization of professional edu-s. It has over one million members, including teachers, visors, and administrators. As stated in the Associa- Charter, its purpose is "to elevate the character and ce the interests of the profession of teachers and to ote the cause of education in the United States." Both EA and its members have a deep interest in the qual- education received by children of all races. NEA con- it imperative that pursuant to *Brown v. Board of Ed-*

ucation, 347 U.S. 483 (1954), desegregation of the nation's schools be complete and effective. NEA has recently conducted investigations of the problems of race and education in the school systems of Wilcox County, Alabama; Baltimore, Maryland; some 22 counties in Louisiana; Detroit, Michigan; some 30 counties in Mississippi; Hyde County, North Carolina; and the region of East Texas. NEA has also participated as a party or as *amicus curiae* in several school desegregation cases, including the proceedings in the instant case before the Fourth Circuit and before this Court on the petition for certiorari, and in numerous others has actively supported efforts to secure judicial relief.

STATEMENT

This case is before the Court on certiorari to review the judgment of the court of appeals insofar as it vacated the order of the district court requiring implementation of that court's desegregation plan for the Charlotte-Mecklenburg School District. The court of appeals affirmed the district court's order to the extent that it required implementation of the desegregation plan for senior and junior high schools. That part of the court of appeals judgment is not challenged in this case. It is attacked in a cross-petition for certiorari (No. 349) that was filed by respondents herein on July 2, 1970. To date, the cross-petition has not been granted.

Accordingly, we deal in this brief with the part of the court of appeals judgment challenged by petitioners, *i.e.*, that part vacating the district court's order insofar as it provided for the assignment of elementary school pupils and remanding that aspect of the case to the district court for further proceedings. The district court has now held hearings upon the remand and on August 3, 1970, issued a new order directing the School Board to put the court's elementary school desegregation order here involved into effect at the opening of the 1970 fall term unless the Board chooses to prepare a pupil assignment plan for use with the deseg-

regation plan recently proposed by a minority of the Board or to implement portions of both the court's plan and the minority plan so as to achieve the requisite desegregation of the schools. (Memorandum of Decision and Order, August 3, 1970, pp. 32-33).[3]

[3]In pertinent part, the court's August 3 order provided:

As to the elementary schools:

(a) The order entered by this court on February 5, 1970 having been subjected to three weeks of review under the reasonableness test is expressly found to be reasonable, and the School Board are directed to put the court ordered plan of desegregation into effect at the opening of school in the fall of 1970, *unless* they avail themselves of some of the options indicated herein.

(b) The plan for elementary school desegregation proposed by a 4/5 minority of the School Board (the Watkins plan) has been examined and is found to be reasonable, as far as it goes. It is, however, incomplete because it contains no plan for pupil assignment. The School Board are authorized to prepare an appropriate pupil assignment plan and use the minority plan for elementary school desegregation instead of the comparable portions of the plan previously ordered by the court, if they so elect.

(c) The School Board, if they so elect, may use portions of the minority plan and portions of the court ordered plan, bearing in mind that the most important single element in the order of this court on February 5, 1970 is paragraph 16, reading as follows:

> 16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*

(d) The Board are free to incorporate into any plan they may make whatever portions of the work of the Department of Health, Education and Welfare staff, or such parts of the original partial Finger plan (Plaintiffs' Exhibit 10), which are consistent with their duty to carry out the order to desegregate the schools.

We understand that the entire Memorandum of Decision and Order will be printed as an Appendix to the Brief for Petitioners.

The court of appeals opinion lays down several general principles (189a):[4] First, contrary to the view of the district court, a unitary school system does not require that each and every school within the system be integrated. Second, even so, the school board "must use all reasonable means to integrate" the schools within its jurisdiction. Third, if black residential areas are so large that not all schools can be integrated by using "reasonable means," the school board "must take further steps to assure that pupils are not excluded from integrated schools on the basis of race." Specifically, the school board should make available to children in identifiably black schools (that cannot be integrated by "reasonable means") integrated special classes, functions and programs, the right to transfer, with free transportation, from a school with a majority of black students to a school with a black minority, and assignment to integrated schools as these children come up the educational ladder.

The court of appeals explained its "reasonable means" test as requiring a school board to make "every reasonable effort" to integrate each school (189a-190a). Efforts that are not "reasonable" would apparently not be required so long as the school board takes the "further steps" noted above.

"Every reasonable effort" to desegregate is all that is required under the court of appeals opinion even though the black residential areas in Charlotte that are "so large" as to defy desegregation through the use of "reasonable means" are attributable to federal, state and local governmental action (189a). The court of appeals accepted as supported by the evidence the district court's findings that the existing residential separation of the races in Charlotte had been produced in part by governmental action and that the superimposition of neighborhood school lines upon governmen-

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[4]Citations are to pages in the "Appendix to Petition for Certiorari, Opinions Below."

tally fostered segregated neighborhoods resulted in the creation by the School Board of segregated neighborhood schools (186a-187a).

The court of appeals reviewed the different estimates of the district court and of the Charlotte-Mecklenburg School Board concerning the costs of the additional bussing required by the district court's order and affirmed the district court's findings on the issue, as well as on all other issues, as not clearly erroneous (191a-194a). This is the only discussion of bussing costs set out in the opinion. The court of appeals did observe that bussing is a permissible tool for achieving integration, that it is not new or unusual, that 54.9% of all North Carolina pupils are bussed an average daily round trip of 24 miles at an annual cost of over $14 million, and that the Charlotte-Mecklenburg School District currently busses approximately 23,600 pupils and another 5,000 ride common carriers (194a).

The court of appeals asserted that a school board should view the desirability of bussing to achieve integration in the same light as bussing is viewed in connection with other "legitimate improvements" in the school system, such as consolidating schools and locating new school facilities (194a). Specifically, the court listed five considerations that a school board should take into account in utilizing bussing as a tool for achieving integration: (1) the age of the pupils involved, (2) the distance they must be bussed, (3) the time required to bus them, (4) the effect on traffic and (5) the cost in relation to the school board's resources (194a).

Finally, the court of appeals held that the district court's order insofar as it dealt with elementary school pupils would require the respondent School Board to undertake additional bussing so extensive as to constitute an unreasonable means of desegregating the schools. In support of this holding the court of appeals reasoned that the district court's elementary school plan would require 9300 pupils to be bussed in 90 additional busses, that most of the bussed children

would be blacks in grades 1 through 4 and whites in grades 5 and 6, that the average round trip would be 15 miles through central city and suburban traffic, that the district court's plan would involve a 39% increase in the number of bussed children and a 32% increase in the size of the School Board's fleet of busses, and that the number of children bussed would be increased by 56% and the bus fleet by 49% if the additional bussing for junior and senior high school students approved by the court of appeals were included in the calculations (198a).

SUMMARY OF ARGUMENT

1. Even if the "reasonable means" test formulated by the court of appeals were an appropriate standard for review of district court desegregation orders, the court of appeals should have concluded in this case that the additional bussing required by the district court was a reasonable means to desegregate the Charlotte-Mecklenburg elementary schools. The cost of the additional bussing would be very small as compared to the resources available to the School Board, and the educational benefits that would be realized by black school children would far outweigh the relatively minor financial costs. The bussing of elementary school students is not rendered unreasonable because of their age. In North Carolina 70.9% of all bussed pupils attend elementary schools. Furthermore, the younger a black child is when he begins attending desegregated schools, the greater the substantial educational benefits arising from a desegregated education will be. The average distance that the students would be bussed under the district court's order is less than half the average distance that students are now bussed to school by the School Board. The time that would be spent on the bus is well within generally recommended limits. The effects of the additional bussing on traffic would be negligible. Finally, the percentage increase in students bussed and busses needed is directly attributable to the failure of the School Board to proceed sixteen years ago to desegregate the schools with all deliberate speed. Had the appro-

priate steps been initiated then to achieve desegregation within the school system, the increment in busing at this time would be modest indeed.

2. The "reasonable means" test is an inappropriate standard for review of a district court desegregation order. The test, at least as conceived by the court of appeals, suggests that bussing should be considered as a tool for achieving school desegregation in the same light that it is considered "for other legitimate improvements, such as school consolidation. . . ." This approach fails to recognize that the constitutional rights of Negro school children are at stake, and that school boards are charged with the duty to take "whatever steps might be necessary" to desegregate dual school systems. *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38 (1968). *Green* calls for a somewhat different standard of review, one that emphasizes the "heavy burden" upon the proponent of the less effective desegregation plan before the court. This burden should be at least as heavy as the "compelling governmental interest" test applied in other equal protection cases involving fundamental constitutional rights. *E.g., Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The rights involved in this case are no less fundamental and should not be denied by rejection or modification of the most effective desegregation plan before the court unless a compelling governmental interest necessitates such rejection or modification. No compelling governmental interest was shown here.

3. Under *Green v. School Board of New Kent County, supra*, the "heavy burden" or, as we suggest, "compelling governmental interest" standard applies in all cases, without exception, where a district court has before it a more effective plan to desegregate a dual system than that proposed by the local school board. *A fortiori*, the test should apply in cases such as the one at bar. Here, as both of the lower courts found, the neighborhood schools that would remain black absent the additional bussing required by the district court are black as a result, in part, of governmentally caused residential segregation. When the School Board, under these

circumstances, insists on a "neighborhood school" system, it effectively classifies pupils on the basis of race, and racial classifications can stand, if at all, only where they are justified by a "compelling governmental interest."

ARGUMENT

I

The Additional Bussing Required by the District Court's Order Constituted a "Reasonable Means" of Desegregating the Charlotte-Mecklenburg Elementary Schools.

The "reasonable means" test applied by the court of appeals was not in our view an appropriate standard for review of the district court's order, but we shall assume that it was for the purposes of this Part I of our Argument. We deal in Parts II and III, *infra*, with what we believe the School Board's minimum burden should have been to justify reversal of the district court's ruling.

It is not at all clear from the court of appeals opinion why the court found the additional bussing required by the district court's order to impose an unreasonable burden upon the School Board. Presumably, the court applied the five factors that it said a school board should take into consideration in determining who should be bussed where. The only alternative analysis that may be made of the court of appeals opinion is that the court found the additional bussing unreasonable simply because it constituted too great a relative increase in the number of children bussed and in the number of busses needed to transport them. In either event, in the judgment of NEA based upon the analysis below, the additional bussing called for by the district court is a "reasonable means" of desegregating the schools.

A. *Costs.* Perhaps the most significant among the factors enumerated by the court of appeals is the cost of bussing in relation to a school board's resources. In this connection, the court appears to have concentrated more upon

the dollars involved than upon the sufficiency of the Board's resources to absorb their expenditure.

The district court found that the additional cost to the School Board would amount to $672,000 during the first year ($186,000 of operating expense and $486,000 in capital outlay to purchase new busses) and $186,000 for each year thereafter (156a-157a), that the School Board now spends approximately $500,000 on bussing annually, out of a total operating budget of $51 million, and that local sources (as opposed to federal and State sources) now provide about $25 million a year to the school system. (138a-139a). Thus, the cost of the existing and additional bussing would be about 1.3% of the School Board's total operating budget and about 2.7% of the local funds provided annually to the Board. Nationally, schools devote approximately 4.3% of net current expenditures to transportation. O. Furno, *et al.*, "Cost of Education Index 1969-70," *School Management* 42-43 (January, 1970).

On remand, the district court found that the School Board already had 107 of the 138 busses that would be needed to provide the additional transportation required by the court's desegregation plan for all grades, that the State of North Carolina had 400 second-hand busses that it had offered to lend without cost to school boards for use in 1970-71, that the School Board would face no immediate need to invest in new busses, that the School Board's total budget for 1970-71 was $8 million higher than for 1969-70 and provided that $21.9 million was available for unrestricted use, and that the State, which has regular budgetary surpluses, pays almost all of the costs of operating the Charlotte-Mecklenburg school busses (Memorandum of Decision and Order, August 3, 1970, pp. 18-23). In short, the additional costs involved were found well within the capability of State and local governments to bear them. See, also, the discussion at pp. 23-24, *infra.*

The reasonableness of the costs here involved must also be measured against the value of what is being purchased.

These expenditures are not made just for transportation. They also buy increased educational opportunities, particularly for the black child.

Among educators there is virtually no question that the quality of schooling for ghetto younsters should be upgraded and efforts should be made to overcome the effects of racial isolation. The value of desegregation in this connection was demonstrated in an extensive study prepared for the Office of Education (HEW). That study showed that the achievement of Negro children is strongly influenced by the "educational backgrounds and aspirations of the other students in the school." The study further found that the principal difference in the school environments of white and black students is "the composition of their student bodies." J. Coleman, *Equality of Education Opportunity* 22 (1966).

The data collected by the Office of Education were reanalyzed for the United States Commission on Civil Rights. This re-examination confirmed the "importance of the student environment of the school" and showed that "segregated Negro students are most likely attending class with other students of a very low social class." Furthermore, the study showed that even when the social class of the student and his school are held constant, there still is "an upward trend in average achievement level as the proportion of white classmates increases." Thus, improved "social class level of the school . . . may not be the only source of benefit for Negro students in desegregated situations. There is also evidence that the racial composition, as distinguished from the social class composition of the school, has an important influence." U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* Appendices 40 (1967). This, in general, may be attributable to the better educational atmosphere produced when "the majority of the children . . . do not have problems of self confidence due to race and the schools are not stigmitized as inferior." Id. at 105.

The most comprehensive compilation to date of the educational effects of desegregation concluded:

> 1. Academic achievement rises as the minority child learns more while the advantaged majority child continues to learn at his accustomed rate. Thus, the achievement gap narrows.
>
> * * * *
>
> 2. Negro aspirations, already high, are positively affected; self-esteem rises; and self-acceptance as a Negro grows.
>
> * * * *
>
> 7. Virtually none of the negative predictions by anti-desegregationists finds support in studies of actual desegregation.
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> M. Weinberg, *Desegregation Research: An Appraisal* 378-379 (2d ed. 1970).

These conclusions rest on a study of about 300 surveys of school desegregation. See, also, the findings of the district court in this case indicating that in Charlotte blacks in desegregated schools perform better than blacks in all-Negro schools (97a-98a).

The cost of additional bussing to achieve desegregation should also be measured against the cost of compensatory education programs that may be utilized in an effort to make up for the disadvantages of a segregated school. A review of several such programs by the U.S. Commission on Civil Rights indicates that they are quite expensive. A New York City experimental project cost $80 per junior high school student and up to $250 for a student in senior high school. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 123 (1967). When the program was broadened to include more children, the cost ranged from $50 to $60 per child. *Id.* at 124. A Syracuse, N. Y., program experienced expenses of $100 per child for elementary and junior high students. *Id.* at 128. The lowest cost mentioned among the programs reviewed by the Commission was $35 per student in Philadelphia. *Id.* at 132. These

costs are substantially higher than the $20 per pupil cost for the additional bussing required by the district court in this case. Moreover, the results of the programs reviewed, insofar as achievement is concerned, were far less encouraging than those that can be expected from desegregated classes. *Id.* 128-140.

In short, NEA's position is that bussing costs, when incurred as part of a plan for desegregating schools, cannot be written off as mere transportation expenses. They provide real educational benefits to the disadvantaged youngsters in the ghetto, and those children, generally speaking, sorely need special attention in order to mitigate the adverse effects of racial isolation. The financial costs anticipated here are reasonable enough when viewed in connection with the financial resources available to bear them. They are more reasonable still when one considers what they will buy in the way of educational benefits for those children who have yet to realize the promise of desegregated schools, and the greater cost of less satisfactory compensatory education alternatives.

Finally, that it may cost money to vindicate the constitutional rights of black children in Charlotte's elementary schools is no reason to leave those rights in limbo. In *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), this Court held that the "saving of welfare costs" could not justify what would otherwise amount to a deprivation of an individual's right to equal protection of the laws. The costs there involved were far greater than those here in issue. And in *Griffin v. County School Board*, 377 U.S. 218, 233 (1964), the Court declared that in fashioning relief from continuing racial discrimination in connection with public education in Prince Edward County, Virginia, the district court might require the local authorities "to levy taxes to raise funds" to operate desegregated schools.

B. *Age.* Another factor considered by the court of appeals is the age of the students to be bussed. Among the findings of the district court, which were accepted by

the court of appeals, were that 9,300 additional children in grades 1 through 6 would be transported (155a) and that travel by school bus is safer than walking to school or riding there in private vehicles (140a). The district court had earlier noted that first graders "may be the largest group" among the 23,600 students that are currently being bussed by the School Board (22a). Judge Winter, concurring in part and dissenting in part in the court of appeals, observed (221a-222a) that the Charlotte-Mecklenburg School Board busses a far lower percentage (21%) of students than does North Carolina as a whole (54.9%). Statewide, 38.7% of all enrolled students (70.9% of all bussed students) are bussed to elementary schools (137a). Under the district court's order, a total of 43.6% of all Charlotte-Mecklenburg students will be bussed, and this figure includes substantial numbers of students bussed to junior and senior high schools. (186a, 138a, 157a) Thus, the percentage of elementary school students that will be bussed under the district court's order compares favorably with the percentage of elementary school students bussed statewide.

The district court's subsequent decision on August 3 included findings that currently more elementary school children than high schoolers are bussed in Charlotte-Mecklenburg and that four- and five-year olds are transported on the longest bus routes in the system (Memorandum of Decision and Order, August 3, 1970, pp. 23-24).

School children of all ages can be and are bussed to schools throughout the nation every day. During the 1969-70 school year some 18 million children were bussed to public schools in America. NEA, National Commission on Safety Education, *1968-1969 Statistics on Pupil Transportation* (1970). This amounted to approximately 39% of the estimated 45.5 million total public school population. NEA Research Division, *Estimates of School Statistics, 1969-70* (1969).

On the other hand, the age of the child probably has a crucial influence on the effectiveness of school desegrega-

tion. There is widespread, if not universal, recognition among educators that the critical years in the educational process are the early school years. In this formative period, the school system has the greatest opportunity to help the child develop mental discipline, appropriate social attitudes and fundamental skills, such as reading. See, for example, B. Bloom, *Stability and Change in Human Characteristics* 215-16 (1964).

For children from whom educational opportunity has historically been withheld, the early years are probably even more important. These children, as they progress through school, show a cumulative deficit. They often begin school with inadequate language skills, insufficient perceptual skills, shorter attention spans, and poorer motivation. With age, the child's linguistic patterns harden. The gap between his reading skills and those of his middle class peers enlarges. By the time the child reaches the eighth grade he is about three years behind the grade norms for reading, arithmetic and a variety of other subjects. B. Bloom, *et al., Compensatory Education for Cultural Deprivation* 73-74 (1965).[5]

As one would expect, then, the beneficial effects of desegregation are likely to be greatest in the lower grades. In Charlotte, as the district court found on remand, achievement test scores demonstrate that the higher the grade at which schools are first desegregated, the greater are the academic penalties that black children will incur (Memorandum

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[5] Compare the results of a survey made by the U.S. Office of Education reported in U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 14 (1967): "Negro and white students in metropolitan areas begin school with a noticeable difference in verbal ability. At sixth grade, the average Negro student is about one and one-half grade levels behind the average white student in verbal achievement. By the time 12th grade is reached, the average white student performs at or slightly below the 12th-grade level, but the average Negro student performs below the 9th-grade level. Thus, years of school completed has an entirely different meaning for Negroes and whites."

of Decision and Order, August 3, 1970, pp. 7-8, 16). More generally, "those [black] students who first entered desegregated schools in the early grades do generally show slightly higher average scores [on achievement tests] than the students who first came to desegregated schools in later grades." J. Coleman, *op. cit. supra,* at p. 331. To the same effect, see M. Weinberg, *op. cit. supra,* at p. 58; Report to the Board of Regents of the University of the State of New York, *Racial and Social Class Isolation in the Schools* 18, 238 (1969). Thus, if the optimum educational advantages of desegregation are to be obtained, desegregation should begin with the youngest pupils in the system.

In short, to the extent that the age of the children to be bussed to achieve desegregation is weighed in evaluating the "reasonableness" of the bussing, the younger the black child, the more he will benefit from the bussing. The added educational benefits of desegregation in the early grades more than outweigh the disadvantages, if any, that bussing might entail.

C. *Distance.* A third factor cited by the court of appeals is the distance that the children would be bussed. The district court found that the average length of a one-way bus trip in the school system was over 15 miles, while the average one-way trip for elementary school students under the court's plan would be less than 7 miles, which distance was obtained by the method used by the county school bus superintendent, *i.e.*, taking the straight line mileage and adding 25% (153a, 183a). On remand, the district court found that four- and five-year-olds today travel from 7 to 39 miles, one way, on the School Board's busses (Memorandum of Decision and Order, August 3, 1970, at p. 17).

The matter of distance, of course, involves for at least some children the question whether they are to be schooled in the "neighborhood" or at some more removed location. From the educator's viewpoint, the neighborhood school

has both advantages and disadvantages. See R. Havighurst, "The Neighborhood School: Status and Prospects," in Frazier ed., *A Curriculum for Children* 73-76 (1969) and R. Binswanger, *Address before the American Association of School Administrators*, February 13, 1967. Certainly, as the district court observed (22a), it is far from an unquestioned virtue. One of the foremost authorities in the field is of the view that "there cannot be a really good all-Negro neighborhood school in the United States today." Havighurst, *op. cit. supra*, at 82. See, also, M. Weinberg, *Race and Place* 89 n.5 (1967), and the discussion at pp. 14-15, *supra*.

It must be emphasized in this respect that the remedy fashioned by the district court is not much different than the remedy employed earlier by school authorities in the nation-wide effort to eliminate the educational deprivations of rural America. As a result of that effort the number of single-teacher schools was reduced from 156,066 in 1927-28 to 6,500 in 1965-66. NEA Research Division, *One Teacher Schools Today* 9 (1960); U.S. Office of Education, *Statistics of State School Systems, 1965-1966* 4. Similarly, the number of school systems was reduced from 127,422 in 1931-32, to 18,904 in 1969-70. NEA Research Division, *Estimates of School Statistics, 1969-70* 5-6 (1969). That consolidation eliminated nearby schools for many families and required extensive bussing of children to the villages. It involved costs and inconvenience and aroused resistance over the loss of locally-based schools. But in terms of the improved educational opportunity provided the students, it was worthwhile and constructive. In fact, the most important effect of school consolidations was the educational gains produced by bringing together laboring class children of the farms and middle-class children of the village. Swanson, "Contemporary Challenges: Monitoring Human Inputs into the Schools," *Fiscal Planning for Schools in Transition* in Proceedings of the Twelfth National Conference on School Finance 80-84 (1970).

D. *Time.* A fourth factor mentioned by the court of appeals is the time required to bus the students to and from school. The district court found that the average one-way bus trip under the district court's elementary school plan would take "not over 35 minutes at the most" whereas the average one-way bus trip in the Charlotte-Mecklenburg school system today takes "nearly an hour and a quarter" (153a).

The generally recognized limits on the amount of time that a student should be bussed were formulated in 1948 by the National Commission on School District Reorganization. That Commission laid down the minimum staff and enrollment levels which are consistent with the educational interests of the children. The Commission, however, counseled school planners that:

> In more sparsely populated areas, the need to transport children to and from school makes it desirable to modify these standards. It may be detrimental to the physical and emotional well-being of children to keep them on the road for long periods; thus, over-zealous efforts to set up desirable situations for the provisions of a good educational program may seriously undermine one of its most important elements. The best information available indicates that:
>
> 1. The time spent by elementary children in going to and from school should not exceed 45 minutes each way.
> 2. The time spent by high school pupils in going to and from school should not exceed an hour each way.
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> NEA, Department of Rural Education, *Report of the National Commission on School Reorganization* 81-82 (1948).

No development since these standards were formulated suggests that they are outmoded. The bussing prescribed by the district court is well within them.

E. *Traffic.* Lastly, the court of appeals mentioned the effect of the bussing on traffic. The court noted that the bussing required by the district court would run through central city and suburban traffic and that (193a) "large numbers of school buses themselves generate traffic problems that only experience can measure." Judge Sobeloff, in his separate opinion dissenting in part and concurring in part, found in the record "no evidence of insurmountable traffic problems due to the increased bussing." He also doubted whether the additional busses would have very much of an impact in an area in which estimated automobile trips per day approximate 870,000. The district court found that the School Board already operates 279 busses within the school district and that the court's desegregation plan would involve "no serious extra load on downtown traffic because there will be no pickup and discharge of passengers in downtown traffic areas" (142a, 143a).[6]

F. *Percentage increase.* The additional bussing of elementary school pupils required by the district court's order

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[6]On remand, the district court made findings which clearly establish that the traffic problem is an unreal one (Memorandum of the Decision and Order, August 3, 1970, at pp. 24-25):

> The county has over 160,000 passenger vehicles and nearly 30,000 trucks registered in it. It is estimated that the total number of automobile trips in the county daily other than truck trips is over 869,000. Traffic is heavy in most part of the county. Since the so-called "cross-bussing" of the Finger plan or the minority plan will not contemplate pick up and discharge of pupils in the central business area, the busses added by the Finger plan or the minority Board plan will provide very little interference with normal flow of traffic. School busses are no wider than other busses (the law requires that this be so); they already use all the major streets and traffic arteries in the county and city every school morning of the year. There is no evidence to show that adding 138 school busses to the volume of existing traffic will provide any such impediment as should be measured against the constitutional rights of children. It would also appear that a school bus transporting 40 to 75 children should reduce traffic problems by cutting down on the number of automobiles that parents might otherwise be driving over the same roads.

does represent a substantial percentage increase in the total number of pupils bussed by the school board (39%) and in the total number of busses needed to transport them (32%). This increase is substantial, however, simply because the district court's order in one sweep invoked measures that in large part should have been taken over the last sixteen years. Had the school board begun in the 1954-55 school year to desegregate its elementary schools by providing each year 1/17th of the additional bussing called for by the district court, so that 100% of such bussing would be provided for the first time in the 1970-71 school year, the percentage increase from 1969-70 to 1970-71 in the number of students bussed and the number of busses needed for them would be only 1.69% and 1.45% respectively. The capital outlay for new busses during the period would have been only $28,000 per year, including 1970-71. The lump-sum capital outlay that would be required *now* by the district court's order if new busses had to be purchased approaches a half million dollars simply because outlays of capital to achieve desegregation as required by law were not forthcoming during the previous sixteen years.

The sizeable percentage increase in pupils bussed and busses needed resulting from the district court's order is thus directly attributable to the failure of the School Board to desegregate the schools during the years that have elapsed since 1954. Furthermore, "the actions of the present school board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods" (87a) have affirmatively added to the problem. To hold with the suggestion of the court of appeals that additional bussing may not be a "reasonable means" of achieving desegregation where it involves too "extensive" an increase is to reward school districts for delaying desegregation—and augmenting separate facilities in the interim—to the point where such extensive increases are necessary. The size of the percentage

increases in bussing simply does not warrant consideration in the "reasonableness" equation.

In sum, NEA believes the desegregation plan for elementary schools ordered by the district court was a reasonable and effective means of desegregating this portion of the school system. Since there was no more effective desegregation plan before the district court, its order should have been affirmed by the court of appeals. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968). Accordingly, this Court should reverse the ruling of the court of appeals and reinstate the district court's order. However, in so doing the Court should not embrace the "reasonable means" test as a standard for review of desegregation orders. We turn now to a consideration of that issue.

II.

The Court of Appeals Should Have Reviewed the District Court's Order Not by the Standard of Whether It Provided for "Reasonable Means" for Effectuating Desegregation, but by Determining Whether Its Modification Was, at the Least, Necessary To Serve a Compelling Governmental Interest.

The court of appeals' opinion appears to draw a line beyond which a district court may not go in providing effective relief to remedy the established unconstitutional deficiencies of dual school system: A district court may require whatever desegregation may be achieved by "reasonable means," but where the remnants, no matter how large, of a dual school system cannot be disestablished by "reasonable means", they need not be disestablished at all. We have demonstrated above that the additional bussing of elementary school pupils required by the district court constituted a "reasonable means" of achieving desegregation and so met the new test formulated by the court of appeals. We argue here that that test itself is an improper one.

The obligation to desegregate a dual school system may well be an absolute duty that may not be avoided in any part on any ground. We do not, however, reach that question, nor need this Court in order to reverse the decision of the court of appeals. At the least, one who seeks to overturn or modify an effective desegregation plan ordered by a district court must demonstrate that such a reversal or modification is necessary to serve a compelling governmental interest. No such interest was shown here.

What are "reasonable means" to achieve desegregation and what are not may all too easily be determined without sufficient recognition that the fundamental and immediate rights of thousands of black school children to an education in desegregated public schools is at stake. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969). The court of appeals in this very case made just such an error. It indicated that bussing, as a means of achieving desegregation, should be viewed "in the light" that it is viewed "for other legitimate improvements, such as school consolidation and the location of new schools" (194a). Although a school board may decide against a proposed school consolidation or particular location for a new school on the ground that the proposal would require additional bussing that the school board, rightly or wrongly, deems undesirable, the constitutional rights of a large minority of the school population to a desegregated education cannot be made to rise or fall on a similarly nice policy judgment. This Court in *Green v. School Board of New Kent County*, 391 U.S. 430, 436, 437-38, 442 (1968), asserted that to vindicate the "constitutional rights of Negro school children" school boards are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert a unitary system in which racial discrimination would be eliminated root and branch" and to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green* did not limit this duty to taking only the action that a school board (or court) might

consider reasonable in order to obtain other legitimate educational improvements, such as consolidating old schools or locating new ones. *Green* called for "whatever" steps may be necessary.

In addition, the "reasonable means" standard is exceedingly vague and openly invites circumvention of the constitutional right of black children to equal educational opportunities. As Judge Sobeloff observed below (212a-213a):

> Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome.

Green v. School Board of New Kent County, supra, establishes, or at least points to, a different standard by which the appropriateness of a desegregation plan ordered to be implemented by a district court should be measured. Where two plans for desegregation are before a district court, *Green* requires that the proponent of the plan that does the less effective job of desegregating the schools bear a "heavy burden" to justify its implementation. *A fortiori,* where a school board challenges a district court order requiring implementation of the more effective plan, that is, the plan that promises to work best now, it should bear a heavy burden to show why the more effective plan should not be carried out.

We read this language in *Green* as requiring a school board to carry a burden at least as heavy as this Court has imposed in equal protection cases involving fundamental constitutional rights arising in contexts other than racial discrimination, *i.e.*, rejection or modification of the more

effective desegregation plan must be shown to be necessary in order to serve a compelling governmental interest.

In *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), this Court struck down a welfare benefit waiting period because it served to penalize the exercise of the constitutional right to travel among the several states and had not been "shown to be necessary to promote a compelling governmental interest." The Court recognized that the waiting-period provisions resulted in a considerable savings of welfare costs, but this interest was not sufficiently compelling to justify inhibiting the exercise of constitutional rights. In *Williams v. Rhodes*, 393 U.S. 23, 24, 31 (1968), Ohio election laws making it "virtually impossible" for a new political party to obtain a place on the ballot to choose electors for the Presidency and Vice Presidency of the United States were invalidated. The rights of individuals to join together to advance their political beliefs and effectively to cast their votes were adversely affected by the Ohio statutes. This Court, quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963), held that only a compelling state interest, which Ohio had failed to show, could justify the infringement. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), held that a state could not disqualify a person for unemployment benefits because she was unavailable to work Saturday where her unavailability was due to the exercise of her religious beliefs. The Court considered "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right" and found none. See, also, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Kramer v. Union School District*, 395 U.S. 621, 626-27 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

In this case the no less fundamental rights of Negro school children to be freed completely of the disabilities of a dual school system are in issue. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969). These are rights that are personal to each black child assigned to a

segregated school. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950). A black child assigned to a black school such as Double Oaks or Lincoln Heights (126a, 127a) is afforded little consolation—and no vindication of his personal and immediate constitutional rights—by the fact that the School Board may afford other students an integrated education. In these circumstances a compelling governmental interest must be shown to justify school assignments that would infringe upon such rights by failing to desegregate the Charlotte-Mecklenburg elementary schools as effectively as the district court's order.

The question is how far the School Board must go to see to it that the constitutional rights of black school children are in fact realized. The answer, in our view, is that the School Board must go as far as it is necessary for it to go to eliminate the racial identity of schools within the system. It may stop short, if at all, only where a compelling government interest so warrants. The governmental interests involved in this case, both educational and financial, have been reviewed in detail in Part I of this Argument. They may not fairly be described as "compelling."

III.

In Any Event, Where a Black Residential Area Has Been Created in Part by State Action, a Compelling Governmental Interest, at the Least, Must Be Shown To Justify a Failure To Disestablish the Racial Identity of the Schools Within That Area.

Certainly, where a classification is based upon race, the need to show a compelling governmental interest is underscored. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958), rejected the contention that school desegregation in Little Rock, Arkansas, be postponed because otherwise civil violence and disruption, albeit inspired by state officials, would ensue. The Court observed that as far back as *Buchanan v. Warley*, 245 U.S. 60, 81 (1917), it had ruled that a zoning ordinance separating residential areas by race

could not be defended on the grounds that it would promote public peace by preventing race conflicts. See, also, *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). A classification based upon race is precisely what is in issue here.

Only additional bussing of the magnitude required by the district court can effectively eliminate the racial identity of the elementary schools in the Charlotte black ghetto (146a, 171a). The district court found (12a-14a, 86a-87a), and the court of appeals agreed (186a), that this segregated residential area was in part the work of federal, state and local governments. If only "reasonable means" need be used to desegregate the schools in the ghetto, and if the requisite additional bussing is not such "reasonable means", governmental authorities will be authorized to perpetuate a racially segregated dual school system by dividing neighborhoods by race and drawing geographic school zones upon those segregated neighborhoods. We contend that under these circumstances a compelling governmental interest, at the least, must assuredly be shown to justify use of a plan that will not desegregate the black neighborhood schools. Otherwise government would too readily be authorized to accomplish indirectly what it could not do directly, *i.e.*, separate students by race.

The district court found that (86a-87a):

> . . . [the] facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling

> the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods.

In more detail, the district court found that under the city's urban renewal program, thousands of Negroes were moved from the center of town west to the least-restrictively-zoned areas, that while this relocation involved many decisions by individuals and governments at various levels, it "occurred with heavy Federal financing and with active participation by the local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon-railroad area, or on its immediate eastern fringes," and that the School Board located new schools so as separately to serve the black population relocated to the northwest and the white population moving generally south and east so that such schools became black or nearly black in the northwest and white or nearly white in the east and southeast (13a-14a).

Governmental involvement in Charlotte's residential segregation is also historically evident. After *Buchanan v. Warley*, 245 U.S. 60 (1917), outlawed compulsory residential segregation, a principal impetus to neighborhood segregation was legal recognition and judicial enforcement of racially restrictive covenants.[7] The United States has taken the position that these become "in effect a local zoning ordinance binding those in the area subject to the restric-

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[7] The Supreme Court of North Carolina held such covenants legally enforceable as late as 1946. *Vernon v. R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710 (1946); *Phillips v. Wearn*, 226 N.C. 290, 37 S.E. 2d 895 (1946); *Eason v. Buffaloe*, 198 N.C. 520, 152 S.E. 496 (1930). In *Phillips* the Court upheld a racial restriction in a deed to a tract of land covering 380 lots in the eastern section of Charlotte, which it described as providing "[p]roperty not to be owned or occupied by persons of the negro race." 37 S.E. 2d at 896. In 1948 this Court held such covenants unenforceable. *Shelley v. Kraemer*, 334 U.S. 1.

tion . . . ."[8] Also, policies followed by the Federal Housing Authority and by local government in connection with public housing projects hage fostered residential segregation.[9]

In sum, the findings of fact made by the district court as well as the historical record of governmental action requiring and supporting residential segregation in Mecklenburg County provide ample support for that court's conclusion (87a) that Charlotte's black residential areas are the result of "so much state action . . . that the resulting segregation is not innocent or 'de facto.'" It is well established that " . . . the involvement of the State need [not] be exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral or its action was only

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[8] Brief of the United States in *Bell v. Maryland*, 378 U.S. 226 (1964), as quoted at 329 n. 16. See, also, the discussion of the grounds for decision of *Shelley v. Kraemer*, *supra*, in *Bell v. Maryland*, *supra*, at 328 *et seq.* (dissenting opinion of Mr. Justice Black).

[9] The FHA was urging racially restricted neighborhoods as late as 1938 and continued to treat racial integration as a reason to deny an application for mortgage insurance even after *Shelley v. Kraemer*, *supra*. See U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 254-255 (1967). State and local governments likewise fostered residential segregation in their administration of public housing projects long after *Shelley*. Segregated projects in Philadelphia for Negroes and whites were approved in *Favors v. Randall*, 40 F. Supp. 743 (E.D. Pa. 1941) and in 1955, the constitutionality of segregated projects in Detroit was being contested in the courts. *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir.). Even as late as 1969, federal courts were finding cities such as Chicago and Lansing, Michigan, to have maintained racially discriminatory policies for *Gautreaux v. Chicago Housing Authority*, 196 F.Supp. 907 (N.D. Ill. 1969); *Ranjel v. City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1969), *reversed on other grounds*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970).

only one of several cooperative forces leading to the constitutional violation." *United States v. Guest*, 383 U.S. 745, 755-756 (1966). In *Evans v. Newton*, 382 U.S. 296, 299 (1966), the Court declared, "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." See, also, *Marsh v. Alabama*, 326 U.S. 501 (1946); *Terry v. Adams*, 345 U.S. 461 (1953); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Under these circumstances, the Fourteenth Amendment requires that the school board avoid freezing black students into racially identifiable neighborhood schools. A State may not locate people in particular residential areas because of their race and then put them in all-black schools because of where they live. To do so is simply to put black neighborhood children in black neighborhood schools because they are black. This, under *Brown*, violates the Fourteenth Amendment.

A long line of lower court decisions holds that when residential racial segregation is caused in part by state action, a school board may not maintain neighborhood schools if to do so means perpetuation of all black schools. *Henry v. Clarksdale Munic. Sep. School District*, 409 F.2d 682, 689 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); *United States v. Greenwood Munic. Sep. School District*, 406 F.2d 1086, 1093 (5th Cir. 1969), *cert. denied*. 395 U.S. 907 (1969); *Valley v. Rapides Parish School Bd.*, 423 F.2d 1132 (5th Cir. 1970); *United States v. Board of Education of Baldwin County, Ga.*, 423 F.2d 1013 (5th Cir. 1970); *Kemp v. Beasley*, 423 F.2d 851 (8th Cir. 1970). *United States v. School Dist. 151 of Cook County, Ill.*, 286 F.Supp. 786, 798 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); *Dowell v. School Board of Oklahoma City*, 244 F.Supp. 971 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *Spangler and United States v. Pasadena City Bd. of Ed.*, 311 F. Supp.

501 (C.D. Calif. 1970); *Keyes v. School District No. 1, Denver*, 303 F.Supp. 79, 289 (D. Colo. 1969); see *Cato v. Parham*, 302 F.Supp. 129 (E.D. Ark. 1969). But see *Deal v. Cincinnati Board of Education*, 419 F.2d 1387, 1391-92 (6th Cir. 1968).

These rulings represent an application of the accepted proposition that, by indulging in one unconstitutional act (the causing of residential segregation), a state is barred from engaging in action otherwise within its power (neighborhood student assignment) because such action would perpetuate the unconstitutionality. Thus, an otherwise valid voter qualification may not be applied where it would raise standards above those applicable at a time when Negroes were discriminatorily excluded from the franchise, at least where white persons registered during such time remain on the registration rolls. *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964). See, also, *United States v. Ward*, 349 F.2d 795 (5th Cir. 1965) (requirement that voting applicant be identified by previously registered voters, who were all white); *United States v. Manning*, 205 F.Supp. 172, 173-174 (W.D. La. 1962) (same); *Ross v. Dyer*, 312 F.2d 191 (5th Cir. 1962) (requirement that siblings attend same school); *Board of Education Oklahoma City v. Dowell*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967) (same); *Franklin v. Parker*, 223 F.Supp. 724 (M.D. Ala. 1963), *modified and aff'd adopting the opinion of the district court*, 331 F.2d 841 (5th Cir. 1964) (requirement that graduate student have graduated from accredited college where Negroes could not attend any accredited college in the State); *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962) (requirement of alumni sponsorship where there are no black alumni); *Hunt v. Arnold*, 172 F.Supp. 847 (N.D. Ga. 1959) (same). This is also the rationale of cases like *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Miranda v. Arizona*, 384 U.S. 436 (1966): Constitutional protection becomes meaningless unless courts are watchful to nullify otherwise unobjectionable actions that serve to perpetuate the constitutional wrong.

Additionally, there are cases, such as *Brewer v. School Board of City of Norfolk*, 397 F.2d 37 (4th Cir. 1968),[10] and *Spangler and United States v. Pasadena City Bd. of Ed.*, 311 F.Supp. 501 (C.D. Calif. 1970), which strongly suggest that a school board may not maintain neighborhood schools for neighborhoods that are segregated as a result of private racial discrimination. These are consistent with the cases holding that the government may not encourage, extend, build upon, or involve itself in private discrimination. *E.g., Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (the State is forbidden by the Fourteenth Amendment from carrying out the racially discriminating provisions of a private will); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Keyes v. School District No. 1, Denver*, 303 F.Supp. 279, 289 (D. Colo. 1969). Here the black residential area in Charlotte was found to be the result of government action. Accepting the suggestion in *Brewer* that proof of private racial discrimination is enough, this case, where government action is involved, is *a fortiori*.

Steps short of eliminating the racial identity of ghetto schools under such circumstances will not do. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), and *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968), indicate the constitutional inadequacy of at least one of the alternatives suggested by the court of appeals—freedom of transfer with transportation. Negro students may not be assigned to all-black schools

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[10] In *Brewer*, the court instructed the district court to determine whether "the racial pattern of the districts results from racial discrimination with regard to housing" and concluded, "[a]ssignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to a Negro pupil solely on the ground of color." The court went further saying that it is immaterial that the residential patterns are the result of private discrimination: "The school board cannot build its exclusionary attendance upon private racial discrimination." 397 F.2d at 41-42.

and then asked to bear the burden of choosing a desegregated experience. *Ramey v. Board of Education of the Gould School District*. 391 U.S. 443, 447-48 (1968). The other alternatives suggested by the court of appeals are equally insufficient. Special integrated classes not only represent token desegregation that fails to comply with constitutional requirements, but they also may well be harmful to otherwise segregated blacks by reinforcing the feeling of inferiority that is so harmful to education. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 128 (1967). Subsequent assignment to integrated classrooms is not only contrary to the dictates of *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969), that schools be desegregated now and that no black student be "effectively excluded" from a classroom because of race, but it also deprives that student of the full benefits of a desegregated education that may be realized only if he is assigned to an integrated school at an early age. See pp. 18-19, *supra*.

In sum, where there is neighborhood segregation in part caused by state action, at the very least a school board may not retain neighborhood zones which result in segregated schools absent a compelling governmental interest necessitating the retention of those boundaries. In this case no compelling governmental interest was shown to justify such racial classifications.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and that part of the order of the district court vacated by the court of appeals reinstated.

Respectfully submitted,

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FILE COPY

Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1[illegible]3 281

SWANN,

Petitioner,

vs.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION,

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF APPLICATION TO EXPEDITE CAUSE AND TO CONVENE SPECIAL TERM OF COURT

STATE OF FLORIDA ex rel EARL FAIRCLOTH ATTORNEY GENERAL OF FLORIDA and FLOYD CHRISTIAN, COMMISSIONER OF EDUCATION OF FLORIDA, *Applicants.*

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICATION TO EXPEDITE CAUSE AND TO CONVENE SPECIAL TERM OF COURT

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Earl Faircloth, the duly elected Attorney General of the State of Florida, and Floyd Christian, the duly elected Commissioner of Education of the State of Florida, on behalf of all the citizens of Florida and all others similarly situated, respectfully request that this Court expedite final disposition of this cause through the convening of a Special Term of Court, pursuant to Rules 3 and 41 (4) of the Rules of this Court. Earl Faircloth and Floyd Christian further

state their intention to file yet another brief as *amicus curiae* in this cause if a Special Term is convened. Rule 42 (4). As grounds therefor, they state:

I. THIS COURT HAS AUTHORITY TO CONVENE A SPECIAL TERM OF COURT.

It is well established that this Court has the authority to convene a Special Term to hear and decide a particular case. *Ex Parte Quirin*, 317 U.S. 1 (1942); *Rosenberg v. United States*, 346 U.S. 273 (1953); *Cooper v. Aaron*, 358 U. S. 1 (1958). This authority should be exercised where "the public importance of the questions raised [necessitates consideration] without any avoidable delay." *Ex Parte Quirin*, 317 U.S. 1, 19 (1942).

II. THE PUBLIC SCHOOL DESEGREGATION CONTROVERSY HAS ALREADY BEEN FOUND TO WARRANT A SPECIAL TERM OF COURT.

This Court has already found that public school desegregation issues are questions of such great public importance as to warrant a Special Term of court. In 1958 a controversy arose over desegregation of the public schools of Little Rock, Arkansas. Review was sought of various lower federal court orders and this Court stated that since "the opening date of the High School will be September 15," (358 U.S. at 27) that convening of a Special Term was required. This Court then decided the cause in four days (petition for certiorari was filed by September 8 and the decision was announced September 12). *Cooper v.*

Aaron, 358 U.S. 5 (1958), [See 3 L.ed.2d 1-4].

Although the particular legal issues involved in that case might have been different than this one, the overriding general public concern over the desegregation issue remains the same. The perplexing issues still present in this area have escalated, not diminished, since *Cooper* was decided. Thus, this Court must, since it is composed of the only nine individuals on earth who can set these issues to rest, decide this cause now.

The chief distinction between this cause and *Cooper* is that in this cause the Court has already considered and granted the petition for certiorari and the parties have already had considerably more time to prepare their legal

arguments. Furthermore, this Court already has under consideration a motion to expedite the cause.

III. LOWER FEDERAL COURTS ARE IN HOPELESS CONFUSION OVER THE ISSUES PRESENTED BY THIS CAUSE.

The absence of any prior and clear binding pronouncement from this Court on the constitutionality *vel non* of *"de facto vs. de jure"* segregation, the requirement *vel non* of "massive busing" and other issues presented by this case, have left lower federal courts, the federal government, and the nation's school administrators without any guidelines on "the basic practical problems", *Northcross v. Board of Education*, ___U.S.___, 38 L.W. 4219, 4220 (1970) [Burger, C. J.], involved in compliance with constitutional mandates

re "a unitary school system." Chaos, confusion, resentment, defiance, and conflicting decisions have been the results.

It is not necessary to here cite at length the conflicting views adopted by various courts as they attempt to "predict" what the Constitution mandates. A significant number of them have already been collected. *Annot. 11 A. L. R. 3d 780 (1967)* [plus pocket supp.]. The courts of Florida have not found this task any easier and have met with similar conflicting results.

IV. IRREPARABLE HARM WILL OCCUR IF A SPECIAL TERM IS NOT CONVENED.

Failure to provide these "basic practical guidelines" before the next school year is well under way will result

in irreparable harm to the citizens and children of America, no matter which way this case is ultimately decided.

If this Court decides in the middle of the school year that, for example, "de facto segregation" is constitutional, then harm will be great. School districts which will have *already* been under *contrary* lower federal court orders will already have needlessly expended vast sums of taxpayers' money for extra buses, "pairing", etc. School children who will have already been picked up and moved to unfamiliar surroundings will then be told it was all unnecessary. Equally as unnecessary will have been the judicial and administrative time spent in implementing these lower court orders.

On the other hand, if this Court were to rule "de facto segregation" unconstitutional, equally irreparable harm would occur. School boards which will have *already* been under *contrary* lower federal court orders (or none at all) will suddenly have to purchase buses, pair schools, etc. Children will be forcibly moved to new and unfamiliar surroundings on a scale never before imagined. The "hiatus" which occurred last spring would be pale by comparison.

Clearly, if irreparable injury is to be avoided, this Court should provide "the basic practical guidelines" before the nation's school terms are significantly under way. In this case, to all parties concerned, "justice delayed, may well be justice denied." As this Court,

speaking through Chief Justice Marshall, noted over a century ago, in a different context:

> "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass by it because it is doubtful. With whatever doubts, or whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Va.*, 19 U.S. (6 Wheat.) 264, 403 (1821).

WHEREFORE, Earl Faircloth and Floyd Christian respectfully request that this cause be expedited and the Court be convened in a Special Term.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Amicus Curiae Brief in Support of Application to Expedite Cause and to Convene Special Term of Court to petitioner's counsel, the Honorables Jack Greenberg, James M. Nabrit, III, and Norman J. Chachkin, New York City, New York, J. LeVonne Chambers, Charlotte, North Carolina, and C. O. Pearson, Durham, North Carolina; to Respondent, Charlotte-Mecklenburg Board of Education; to the Honorable John N. Mitchell, Attorney General of the United States; and to the Attorneys General of each of the respective states of the United States, by mail, this_____day of August, 1970.

RONALD W. SABO
Assistant Attorney General

Of Counsel for the Applicants.

October Term, 1970

No. 281

JAMES E. SWANN, et al.,
Petitioners and Cross Respondents,

vs.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al.,
Respondents and Cross Petitioners.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE

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JAMES E. SWANN, et al.,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICUS CURIAE

By consent of the petitioners and the respondents and as authorized by the City Attorney of the City of Chattanooga, Tennessee, a political subdivision of the State of Tennessee, The Board of Education for the City of Chattanooga, created in 1941 by Act of the General Assembly of the State of Tennessee, files this brief, *Amicus Curiae.*

INTEREST OF THE AMICUS CURIAE

The *Amicus Curiae,* Chattanooga Board of Education, has an interest in this case in that said Board now has pending motions for further relief in the United States

District Court for the Eastern District of Tennessee, Southern Division in which racial proportions as to students in schools and classrooms, and as to faculties, are proposed as a required application of the Fourteenth Amendment of the Constitution of the United States, as interpreted in *Brown I and II* and later decisions of the Supreme Court of the United States.

A Charlotte-Mecklenburg type decision made applicable to the Chattanooga schools would have a drastic effect upon the quality of support that the voters would provide public education and upon the quality of the educational opportunity in the Chattanooga system — the only setting where the constitutional rights are given their ultimate reality — where the remedy is provided. That such would be detrimental, and substantial, is a certainty. An even more extreme prognosis cannot be rejected summarily. We prefer to err in the direction of understatement.

If the concepts reflected in Judge McMillan's opinion in Charlotte-Mecklenburg are adopted by the Supreme Court as proper constitutional principles, the Chattanooga Board can expect, based upon prior actions, that a Motion for Further Relief will be filed promptly in the District Court in Chattanooga, by plaintiffs demanding that the Charlotte-Mecklenburg concepts be implemented instanter. The Chattanooga Board can expect plaintiffs' attorneys (understandably) to give the broadest possible interpretation to a decision of the Supreme Court reflecting these concepts. The substantial factual differences between the two school systems will be ignored and any effort to explain upon such ground will be deprecated as irrelevant and suspect. It may well be impossible for the Board thereafter to defend its integrity to a substantial portion of its constituency. In a sense the Board may well have been condemned without a fair trial, and with no effective remedy.

The facts are different. Our judicial system is based upon each case being determined upon its own unique factual situations. The educational opportunity of 27,000 students is at risk.

SUMMARY OF ARGUMENT

A Charlotte-Mecklenburg type interpretation of the Fourteenth Amendment compels affirmative action by School Boards and individuals and thus threatens to exceed the capacity of judicial power (governmental power) to enforce its decisions so that the efficacy of the judiciary may suffer to the detriment of civilization. This exposure is a reality. Wisdom demands judicial restraint in the national interest.

The right involved is an equal educational opportunity. Desegregation, a unitary system, a concept expressed in varying language, only attains reality in an educational environment. Thus the former presupposes the latter. The quality of an educational opportunity is outside the ambit of judicial training, experience and competence. Thus the evaluation of factors, both beneficial and detrimental, bearing upon educational quality must repose with the duly constituted authorities selected by the citizens to perform this governmental function. School Boards exist and function (as does the Supreme Court) with the continuing consent of the governed. The judgment of a School Board arrived at in good faith should be afforded a presumption of validity where subjective judgment based upon imprecise facts is involved. Any interpretation of the reasonable limits of a constitutional right, or remedy for such right must be consistent with this basic fundamental, practical reality.

Diversity and freedom are interdependent for only when diversity exists is there a choice. And only when a choice exists, can individual freedom become more than an abstraction. Diversity is in the national interest. Diversity is essential to our way of life — the American way. Equal treatment does not mean the termination of diversity. For equal treatment does not mean the same, identical treatment for the reason that needs are met in a diversity of remedies. Communities have their similarities and their dissimilar aspects. School Boards reflect their communities. They are responsive to their communities, their constituency, their source of power. A two-school Kent County is not Charlotte. A rural system is not an urban system. An arbitrary solution capable of mathematical evaluation may be judicially feasible but it ignores our national interest in diversity. Reasonableness, rationality, judgment — all must exist and be supported.

THE CHATTANOOGA STORY

A brief summary of the Chattanooga situation is necessary to illustrate how school systems vary and pose unique factual situations.

The seven members of the Board of Education of the City of Chattanooga, Chattanooga, Tennessee have been selected by the people of the City of Chattanooga to operate their public school system. On the 10th day of the school year 1969-70, there were 27,024 students enrolled in the Chattanooga Public Schools. Of this number 12,880 or 47.7% were Negro and 14,144 or 52.3% were white. There are 48 separate schools in different locations. There are 9 junior high schools, grades 7-9; there are 5 high schools, one of which is a part of a 1-12 grade school. There are 33 elementary schools covering grades 1-6. In ad-

dition, there is one school covering grades 1-4, and one school covering grades 1-9.

There are 1322 staff members assigned to these schools, and to the central office administrative staff. Of this number 532 are black and 774 are white. 252 black or white teachers are now assigned to teaching positions where they are a minority with reference to race on the staff of the school to which they are assigned. Each teaching staff is desegregated and only one school, a junior high school, has as little as one teacher of the minority group. Nine schools have 2 teachers of the minority race on the faculty. All of the assignments have been on a voluntary basis under a policy established by the Board 4 years ago. In essence, this policy was that in filling vacancies in schools with either formerly all black faculties or formerly all white faculties, preference would be given to the employment of teachers of the minority race assuming substantially equivalent educational qualifications.

With reference to desegregation in terms of numbers of pupils, 17 of the formerly all-white elementary schools are desegregated in the sense that there is at least one black child in each such elementary school. The number of Negro children in formerly all-white elementary schools ranges from one to 672. All of the formerly all-white junior high schools with one exception have black children enrolled. Five elementary schools remain all white. All three of the formerly all-white high schools are desegregated with one school having 64 black students, one 83 black students and one 170 black students.

With reference to the formerly all-black elementary schools, 4 now have white pupils, although 5 remain composed entirely of black students. Neither of the two formerly all-black high schools have any white pupils. Two formerly all-black junior high schools have white

students and one formerly all-black junior high school remains all black at the present time.

The elementary schools and the junior high schools are zoned and transfers are and have been restricted to unusual circumstances. Transfers infiuenced by race have not been allowed for a number of years. There are no zones with reference to the high schools and such has been historical, and primarily because of the fact that the curriculum in each one of the 5 high schools vary from a technical high school education with no college preparatory aspect to a high school predominantly designed to prepare students for admission to college level work.

In the combined judgment of the Chattanooga Board of Education, the Chattanooga System is operated as "a unitary school system." No person has been "effectively excluded from any school because of race or color" within the Chattanooga system in the last 4 years. The defendant School Board has specifically requested legal counsel for the plaintiffs in the litigation continuing in the Federal District Court in Chattanooga to provide the School Board with any instances where any decision with reference to exclusion has been made on the basis of race. The Chattanooga School Board does not make decisions based upon race alone with the sole exception where vacancies exist in either formerly all-white faculties or formerly all-black faculties. In this instance, race is recognized and must be recognized and is in some instances the deciding factor in the employment and assignment of teachers.

The Chattanooga Board of Education authorized the filing of this brief Amicus Curiae because in its unanimous opinion, if the principles reflected in the *Mecklenburg* case become the law of the land, such will have an impact upon the quality of the educational process in the Chattanooga School System of an extreme and detrimental

nature. The Chattanooga Board is well aware of the fact that the precise and exact nature of the impact of the *Mecklenburg* principles upon the Chattanooga system requires the exercise of judgment and is subjective; impossible of precise approximation in advance.

Nevertheless, the Chattanooga Board of Education composed of 7 individuals is the only body legally responsible for the on-going educational process in the school system of the City of Chattanooga. Therefore, they must make this decision recognizing while making the decision that its joint judgment is at best an approximation and an educated guess. The Chattanooga Board does not see any alternative. It must exercise its best judgment for otherwise it will be abdicating its responsibility to the citizens and children of the Chattanooga Public School System.

If, given the opportunity, the Chattanooga Board could detail the basis of this judgment in a careful manner in order to give a court an opportunity to determine whether or not the 7 members of the Chattanooga Board of Education have acted in such a manner as to equate a good faith discharge of their responsibility as the appointed representative of the people of the City of Chattanooga. The Board does not insist that its decision is necessarily correct nor that its prediction or its fears will come true; the Chattanooga Board of Education merely represents that it has done its best to discharge its responsibility — and that no Board could do any more.

The Chattanooga Board sees the present conflict as one between two or more basic constitutional principles or national values. The obvious national commitment to the existence of public education, and to the ongoing effort to continually improve its quality cannot be questioned. As was said by this court in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) "Public education is perhaps

the most important single function of local government." The Chattanooga Board agrees with and is committed to this basic principle. Consequently, all factors that will support the ongoing improvement of public education should be identified and placed into operation if at all possible. On the other hand, all factors having a possible destructive effect upon the cause of public education should similarly be identified and should be avoided if at all possible. Anything less than the foregoing would amount to a shoddy performance by any of the selected Board of Education. This is the cause of public education.

There is an equivalent major principle — compliance with the Constitution of the United States. We are now directing our attention to what facts in a particular school situation will be held to be compliance with the Constitution of the United States.

It is apparent that there is a conflict among the learned judges of the Federal Bench both at the district court level and at the circuit court level with reference to the exact meaning or application of the language of the Supreme Court of the United States in this particular area in interpreting the Fourteenth Amendment as the same has a bearing upon public education in the United States. Based upon the assumption that others preparing briefs in this particular litigation will more than adequately cover the degree, nature, and extent of the variances among the various districts with reference to the specific application of the constitutional principles originally enunciated in *Brown* to the various factual situations presented, no repetition of this analysis will be reflected herein. Suffice it to say that the conflict in interpretation exists and is substantial.

The seven members of the Chattanooga Board of Education each have taken an oath to uphold the Constitution of the United States. This obligation can be met only as

the members of the Board comprehend the exact meaning of the Constitution within their own judgment and intelligence and as they are advised by legal counsel and particularly where courts cannot agree. Whether or not this oath is being honored and whether or not the community believes that this oath is being honored by the Board of Education has a direct bearing upon the kind and quality of support that the community gives to the Board of Education and, through it, to the quality of the educational program in Chattanooga.

The Chattanooga Board of Education, shortly after the second *Brown* decision on May 31, 1955, met to consider an appropriate policy statement with reference to the Board's response to the decision by the Supreme Court of the United States. Under date of July 22, 1955, the Board issued a public statement in which the first two paragraphs read as follows:

> "The Chattanooga Board of Education will comply with the decision of the United States Supreme Court on the matter of integration in the public schools.
>
> "We have come to this decision after careful deliberation, believing that respect for the law of the land is essentially vital to each and every individual and to the welfare and happiness of all."

Since that date, the Board of Education has been conscientiously and honestly attempting to comply with the Constitution of the United States as elaborated upon in *Brown* to the best of their ability and within the limits of their understanding, while at the same time continuing to meet and discharge the major obligation that they have assumed as Board members, with the maintenance of the highest quality of educational opportunity in the City of Chattanooga as is possible within the means afforded to

the Chattanooga Board, the Superintendent, his staff, and the teachers.

The Chattanooga Board made an early determination that the entire community would be involved in this decision. In its statement of July 22, 1955, the following is pertinent:

> "As we seek a solution we will make every effort to acquaint the entire community in conferences and through other media of communication of the various aspects involved. This is not your Board's decision alone. It is a community decision. Although the Board will officially make the decision, each individual in our community must accept his responsibility in solving this question.
>
> "Our decision will have its influence and impact upon ever phase of our community life. It is of the utmost importance that the great majority of the people accept our decision when finally made. This will be difficult for some — we fully realize this. The thoughtless action of a few could well present situations filled with danger. We know the community hopes and prays that such can be avoided. We know our people will make every effort to see that such is avoided. It has taken more than seventy-five years to bring our public school system to its present degree of service to the children and the community. It is of the utmost importance that the public school system continue to make progress. It is important that we proceed to a solution of this problem in such a manner that the strength of the public school system is not weakened. In this endeavor we must always be mindful of each and every family, and ever protect the rights of those citizens.
>
> "We earnestly request and hope that the community will proceed in its thinking and its actions in a spirit guided by a sense of justice, respect for the law, awareness of the difficulties involved and guided by recogni-

tion of the necessity of reaching a fair and just solution. With God's help, this can be accomplished."

The Board undertook to involve the community in the process of compliance utilizing an Interrracial Advisory Committee to assist in the elucidation phase of the Board's effort to comply. A systematic in depth approach to the community was undertaken.

Litigation was instigated against the Chattanooga Board of Education by a complaint filed on April 6, 1960. During the course of this litigation at the risk of over-simplification, but in the interest of brevity, the Chattanooga Board represents that it has consistently attempted to maintain a posture of compliance with the decisions in *Brown I and II* as it understood those decisions, and as the principles enunciated in these decisions seemed to be applicable to the particular factual situation existent in the school system of Chattanooga. During the course of litigation, contrary positions were taken by the plaintiffs and plaintiff's counsel. In accordance with established legal procedures, a clarification of the two contending viewpoints were evolved through the District Court and to the Circuit Court of Appeals for the Sixth Circuit. In every instance, the Chattanooga Board of Education has reacted to an interpretation by either the District judge or the judges of the Circuit Court of Appeals for the Sixth Circuit and performed in accordance with directives reflected in such decisions. In no instance and at no time has the Chattanooga Board of Education approached a posture of defiance with reference to the Federal Judiciary or the Constitution of the United States as interpreted by the Supreme Court of the United States.

As of the moment that this brief is being prepared, the Board of Education and its legal counsel are of the opinion that the Chattanooga Board of Education is in compliance

with the Constitution of the United States and the Fourteenth Amendment, in particular, and as the *Brown* decisions and other cases have been interpreted by the judges of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

The basic issues before the court upon this writ arising out of *Mecklenburg* are the questions of racial balance with reference to students in schools and classrooms and racial balance in the makeup of faculties in individual schools.

No matter what is said or how this issue may be avoided and postponed for whatever reasons, this is the issue. The bussing aspect of the decision is only a means to an end and illustrates the extreme nature of the affirmative responsibility argued for by the plaintiffs as a constitutional requirement in order to comply with the Fourteenth Amendment.

There is no ambiguity with reference to what the Court of Appeals for the Sixth Circuit believes to be a correct, constitutional interpretation on these points. We refer to *Deal* v. *Cincinnati Board of Education,* 419 F.2d 1387 (1969) at page 1388.

> "* * * the Board of Education was not required by the Constitution to bus Negro or white children out of the neighborhoods, or to transfer classes, for the sole purpose of alleviating racial imbalance which was not caused by any act of discrimination on the part of the Board, but resulted from the racial concentrations in the neighborhoods in which the schools were located, and further, that the Board had no like duty to select new school sites solely in furtherance of such a purpose."

And again with reference to bussing at page 1390:

"It is the contention of the appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty. Appellants are not the only children who have constitutional rights. There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neighborhoods in order to mix the races."

With reference to racial balance on teaching staffs, see page 1393 where the Court had the following to say:

"Appellants further complain of discrimination in hiring and assigning of school personnel. As of 1964-65, Negroes comprised 626.5 or 21.20% of the teaching staff. We find no evidence of discrimination. There was no constitutional duty on the part of the Board to balance the races in teachers' employment and assignments. Teachers should be selected primarily on the basis of merit."

See also *Goss* v. *Board of Education, City of Knoxville, Tennessee,* 406 F.2d 1183 (6th Cir. 1969).

This brief reference to the evidence of the Sixth Circuit's interpretation of *Brown* should be sufficient to sustain the representation that the Chattanooga Board of Education at the present time is in compliance with the Constitution of the United States and as such has discharged its oath to support the Constitution of the United States. If the Chattanooga Board of Education had been situate within the Fourth Circuit or the Fifth Circuit, a contrary conclusion would probably have been required although the fac-

tual distinctions should not be lightly cast aside and disregarded.

What are the alternatives available to this Court? One extreme is the philosophy set forth in *Mecklenburg* by District Judge McMillan. The Court could support the reasoning of the Sixth Circuit and that of decisions in the Seventh and Eighth Circuits. In the area in between, the Court could limit this decision to as narrow a ground as possible postponing further amplification of the constitutional principles to a later date and under differing and perhaps better developed factual situations.

In *Brown* v. *Board of Education of Topeka,* 347 U.S. at 493 the Court had this to say:

> "Today education is perhaps the most important function of state and local governments."

The Chattanooga Board of Education believes this statement to be true. The actual allocation of local financial resources to the cause of public education supports the commitment given by the community to the cause of public education.

Once we accept the validity of this basic commitment as a reflection of our national value system, it follows that all factors that support the continuing improvement in the quality of the educational process should be identified and implemented. It also follows that any factors that may have a detrimental effect upon the quality of public education should also be identified and avoided or excluded if at all possible.

And compliance with the Constitution of the United States at all levels of our national life is also of substantial and primary importance. *Brown I and II* are now a part of the Constitution of the United States, but the exact nature of the principles enunciated in these two cases have

not finally been determined and are the subject of the presentations to the Court. To exclude any child from any part of the public educational process solely because of the color of that child's skin violates the Constitution of the United States.

The factual situation in *Brown* was magnificent in its simplicity.

The reason for the exclusion was evident and could not be contradicted. Once the court found that segregated schools were unequal, (in an obvious reference to quality) then the logical decision in *Brown I and II* followed in a simple, forthright manner.

The above represents a decision by the state, followed by the action by the state, followed by detriment as a result of this action. And the final fact is that the decision had only one basis and that was that a black child was involved.

It is a long way from the factual situation in *Brown I and II* (and the philosophy involved) to the arbitrary actions required under Judge McMillan's decision in *Mecklenburg* where race continues to be the deciding factor with reference to the assigning of new pupils and teachers and the bussing of pupils. Race was used to penalize and to deny in *Brown I and II*. If race is used as a basis for preference or apparent preference or preferred treatment, is such any less demeaning than the exclusion from an activity because of race? Does the fact that race brings forth a preferred reaction make the importance of race any less demeaning?

At one time the Constitution of the United States was said to be color blind. If the decision in *Mecklenburg* becomes a correct interpretation of the Constitution of the United States, then obviously the Constitution is no longer color blind for color becomes the key decision with reference to the school that you may attend or may not attend no matter what neighborhood your parents selected in which to live.

If this court interprets the Constitution of the United States to mean in effect that it is color blind, then race cannot be recognized as a factor for the purpose of the creation of a category and thus the black-white ratios with reference to students and faculty as evidenced by the *Mecklenburg* decision are no longer constitutionally possible.

An in-between or temporary posture could be approved, such as that the color blind facet of the Constitution must be temporarily neutralized until the continuing result of dual school systems has been eliminated root and branch. If the Court decides that the color blind concept is still valid, but should be relaxed in order to alleviate the continuing evidences of an old wrong, then difficult areas of proof are created and they will demand resolution. In a sense, an additional Pandora's Box will be uncovered should the temporary exception to a constitutional principle be ratified and approved. What does the description of "vestigial remains of a dual school system" include? What do the vestiges of a dual system look like for this determination must be made before one can determine whether or not these vestiges have been removed. In many instances the fact of removal of a vestigial remain will be the determining factor when the Constitution can return to its color-blind attitude. The elimination of the vestigial remains of a dual school system will terminate the temporary period in which an unconstitutional principle is allowed to function.

Within a particular school system, the Board will have to determine at what day or under what circumstances the required vestigial remains have been removed from its system. Undoubtedly this judgment or factual decision will be disputed by one or more groups in the community. Should this dispute be substantial, then investigation and a final determination will be required. This will continue conflict and uncertainty.

Again, a part of the Pandora's outpourings will be the recognition that certain constitutional principles are capable of temporary suspension under limited circumstances. What encouragement will this give to future efforts to undermine constitutional principles when the cause and facts are particularly appealing and a time in our national life when a particular situation appears to have persuasive justification.

Should the Court come to the conclusion that there is no constitutional requirement that governmental agencies be color blind, such would remove one objection to the necessity for creating certain racial balance in schools and classrooms with reference to students and in faculties with reference to teachers.

On the other hand, racial proportions in classrooms will require school boards to make decisions as to what individual students are to be removed from their normal neighborhood schools and placed in a school in a different area. This will call for certain students to be exposed to the additional burden of travel time both to and from a school while some of their neighbors will not have to spend time in such fashion since they will attend the neighborhood school. This is a form of unequal treatment.

In addition, such will require capital expenditures of a substantial amount by school systems with regard to buses. It will increase the annual operational costs of the school system. Given an adequate opportunity, it could be proven that the assignment of students outside of their neighborhood creates a resentment among the parents and the students. It could also be proven that this resentment reflects itself in a negative way with reference to the total support of public education in the community. It could also be proven that the time required in waiting for bus transportation and in being transported was time that could be used for more productive educational processes.

It could also be proven to the satisfaction of a court that most school systems have serious financial deficiencies and have seldom even approached having adequate facilities to implement current knowledge with reference to approved educational procedures and techniques. The amount of money that is required for the acquisition of buses, plus the amount of money that is required for the operation of the buses would often have to be diverted from other aspects of the school systems that have been believed to be of substantial importance. For example, an educable mentally retarded program which is more expensive than the ordinary classroom activity could well have to be curtailed or discontinued in order to achieve the necessary bussing to balance classrooms and schools. Certainly those parents whose children were in the category of educable mentally retarded would be convinced that the quality of the educational process for their children had approached zero – because of the necessity of achieving racial desegregation.

Although opportunity has not yet been provided for the orderly presentation of proof upon this particular matter, the Court should be aware of the fact that should racial balance in the classrooms, schools, and bussing along with racial balance in faculties be required in school systems throughout the country, there will be a resentment against public education of an intensity and breadth that no person would welcome. The Chattanooga Board of Education is fearful of the impact upon its school system should the *Mecklenburg* decision become the approved interpretation of the Fourteenth Amendment of the Constitution of the United States. Believing this to be a reasonable consequence of the interpretation of the Constitution, this Board was under an obligation to make the results of its

joint judgment known to its constituency and to others that would listen.

The enunciation of the constitutional principle is the responsibility of the Supreme Court. The front line of implementation of these principles is the responsibility of the local school board. What degree of detriment to a public school system is acceptable in order to achieve a mathematical racial balance? Administratively, the use of racial balance and statistics make for a simple method of determining whether or not a particular school system is or is not in compliance with a constitutional principle. But is this administrative feasibility of sufficient importance to justify the exposure of the school system to substantial deterioration? And what body makes the assessment with reference to the degree of exposure? How does one determine in advance with any degree of accuracy the manner in which a community will express its resistence and the nature of the detrimental impact upon the school system as a result of this manner or method of expressing resentment? It would not seem to be wise to ignore this possibility. On the other hand, the possibility of a substantial negative reaction should not mean that the Constitution of the United States cannot be made applicable to a given situation, but the area in between these two postulates can be difficult, but important, particularly to the children whose daily educational opportunity is at stake.

It is true that the Supreme Court has said in *Brown II* ". . . the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." This same idea was expanded in *Cooper* v. *Aaron*, 358 U.S. 1 (1958). In this case the School Board relied upon the existence of "extreme public hostility, which . . . had been engendered largely by the official attitudes and actions of the Governor and the Legislature . . . ."

The Court went on to say on page 6, "The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of State action." Later on, the Court used this language:

> "In short, the Constitutional rights of children not to be discriminated against in school admissions on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by State Legislators or State Executive or Judicial Officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' "

It has been recognized over a long period of time that there are limits to the effectiveness of judicial power. If the Court defines the constitutional duty under *Brown I and II* to require the racial balancing reflected in *Mecklenburg,* good judgment would indicate that consideration should be given to the various possible reactions that the Mecklenburg-Charlotte community might have to this ruling. To illustrate, assume that under state law in North Carolina a bond issue would be necessary in order to provide the three million dollars plus that were required to purchase the number of buses necessary to implement the District Judge's opinion. Assume that a referendum was also required. Next, assume that the referendum is defeated and thus the School Board does not have available to it the funds necessary to purchase the required buses. Under these circumstances, what does the Charlotte-Mecklenburg Board do? What action does it take? It cannot carry out the judicial mandate without the required buses. It cannot purchase the buses without money, and the source of the money, the electorate or the people, will not agree to tax themselves to provide such funds and

the court mandate cannot be carried out without the availability of the buses. What happens next? Can the District Court order the people of Charlotte-Mecklenburg to pass a bond issue in order to carry out a mandate of the Federal District Court? How would the court carry out such an order?

We submit that the power of the Court, as the power of government, has its original source in the people. The consent of the governed remains an essential in our present day environment. This consent of the governed is not given at one time and for all time, but is given each passing day. In this particular instance the people of Charlotte-Mecklenburg would be withdrawing their consent in a limited way and as to a particular and peculiar aspect of government. When this happens, it would appear that the limits of judicial power have been reached. When and if the judiciary exceeds its judicial power and in a dramatic fashion, then the entire judicial framework has been weakened and undercut.

It is submitted that if the above is a real possibility, certainly this Court will move in such a direction and expose the judiciary to this factual criticism only in a most unusual circumstance.

If substantial bussing is required, what will be the means available to a court to enforce the District Court order when the parents of the children concerned refuse to place these children in a position where they can ride the bus? Will a Federal marshal be designated to physically take small children into custody and physically and through force deliver them to a school out of their neighborhood?

What will happen if the children decide they will not remain in school? Will there be a policeman or a Federal marshal in each classroom? It is submitted that the decision in *Mecklenburg* could well result in a pushing of the limits of judicial power to the breaking point. And

if this breaking point is actually reached, the entire society will suffer from the consequences.

But it will be said that this is not possible and thus it does not have to be considered. But what if it is possible? What if it happens? What kinds of remedies do we have to erase the dire consequences that may follow on this lack of judicial restraint? As was said by Justice Frankfurter in *Cooper* v. *Aaron,* page 21, "The use of force to further obedience to law is in any event the last resort and one not congenial to the spirit of our Nation."

In *Aaron,* Justice Frankfurter also had this to say. "Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society." But what if this resistance is not violent? And what if this resistance is reflected in an absolutely legal manner? To illustrate, there have been three bond issue referendums since the desegregation suit was initiated in Chattanooga in 1960. These were county-wide referenda. On November 3, 1964, with a $17,000,000 bond issue, the vote was overwhelmingly against with 40,261 voting against the bond issue and only 6,599 voting in favor of same. School construction was the sole basis for the bond issue. School construction and an addition and renovation was an issue in May 18, 1967, and the amount was $10,000,000. This was rejected by a vote of 10,217 to 8,913. In 1969 a $9,000,000 bond issue was rejected, 18,054 against and 12,591 for. The purpose of this was renovation and expansion of the existing school buildings and some new construction. In the typical, democratic fashion, the people of Hamilton County have spoken and said no.

With this background as to the will of the people expressed on school bond construction, coupled with many other facts available to the seven members of the Chattanooga Board of Education, what reaction could be expected

from the community if a two million dollar bond issue were necessary immediately in order to provide the buses necessary to comply with the District Court decree in Chattanooga similar to that in *Mecklenburg*. True, this is guesswork, but it is typical of the kinds of judgments that local Board members must make and do make and on many issues. Their proximity, their being a part of the local environment, their responsiveness to the constituencies that they serve — all of these factors go to supporting judgments made by school boards when made in good faith and in an honest effort to discharge the responsibility which the School Board has accepted.

DESEGREGATION - INTEGRATION

There has been a continuing failure to recognize the distinction between desegregation and integration in referring to public school education. (See article by Dr. Kenneth B. Clark, Teachers College Record, October 1960.) The desire to have physically demonstrable evidence of the fact that a change has been made in a school has led to an emphasis upon the number of black students physically present within any educational setting. This is a part of the concept of the "numbers game" which is referred to frequently in writings relating to school desegregation. The number of black children physically present has come to be equated with the attainment of the ultimate objective. Judges and others have been searching for rules of conduct, a formula, or other yardsticks that could be applied in any given situation to determine whether or not a school district had met the minimum standards of the Fourteenth Amendment as interpretated by *Brown I and II*. The Courts have been placed under intense pressure with regard to desegregation, and in certain cir-

cuits as a result have had an intense motivation to evolve and fabricate orders and procedures that can be easily understood, that are administratively feasible, and that can be evaluated by non-academic personnel. This has caused the remedy to be reflected in the "numbers game," in statistical information, with no regard for the educational environment or the classroom atmosphere essential to educational opportunity.

OBSESSION WITH NUMBERS

This obsession with numbers has brought about the racial balance concept which in turn has produced the necessity for affirmative action upon the parts of states such as is represented in bussing as a means of achieving some predetermined acceptable level of desegregation, or the numbers game again. This has introduced the concept of force upon the part of the state in order to create and maintain numerical balance in the classroom as continuing evidence of a school system operated in conformity with the Constitution of the United States.

A CONFUSED OBJECTIVE

In other words, desegregation has become the end-all in the sense that there must be so many individual students of the white race and so many students of the black race physically present in a classroom or in a school in order for that school or that school system to be in compliance with the Constitution. The end result of the obsession with numbers could well achieve desegregation, and in so doing, make forever impossible the integration that is essential if the Fourteenth Amendment is to be effective. If a classroom can attain, and maintain, a desegregated

condition only so long as the affirmative force of the State has entered into the picture and is constantly available, does not this continuing presence of force as an essential for desegregation prove that the classroom concerned is not integrated? What impact will there be upon black pupils if they are aware of the fact that the only reason why they are sitting along side white students is because of the presence of a governmental force in some form requiring them to remain where they are? If desegregation is only possible under these circumstances have we not allowed an obsession with the numbers game to steer us away from the basic constitutional right that got us here in the first place?

What the average Negro wants, as does every person, is to be accepted by his fellow human beings for what he is, and what he can be, without regard to the color of his skin, or any other condition outside of the responsibility of the person concerned.

If the State, acting through its school system is to treat black children fairly, it would appear to be the responsibility of the State (acting through its school board) to introduce a black student into a formerly all white classroom under such circumstances and conditions as to maximize the possibility that this child will be fully accepted by his peers in the classrooms. If this placing together in the classroom of whites and blacks is done through an excessive display of force, will there not be a tendency to create emotional and intellectual attitudes upon the part of the white students in the classroom of such a nature as to make it extraordinarily difficult for the black child to be accepted by his white peers? Acceptance as an individual is the goal of an integrated classroom. This acceptance flows from the other individuals in that classroom. It is beyond the power of the State. Consequently, it would seem good

judgment to identify in advance any factors that might reasonably contribute to the creation of a hostile attitude upon the part of the students in the classroom, and then to take whatever steps appear to be available to avoid the existence or intensification of such hostile attitudes. Unless we keep our eyes upon the real objectives of equal treatment under the Fourteenth Amendment, it may well be that ill-chosen means of achieving an apparent goal may result in a polarization of intensity in our national life which would be the antithesis of the integration and equal acceptance envisioned by the Constitution.

THE RIGHT AND THE REMEDY

The Court has declared the existence of the Constitutional right to admission to public schools without regard to race in order to meet the concept of equal treatment under the law implicit in the Fourteenth Amendment. The declaration of the right and the effectuation of the remedy are not the same. The Court is now concerned with the practicalities involved in making the right a reality. It is desirable to have education *and* compliance with the Constitution. But the Constitution may be interpreted so as to bring about the virtual destruction of public education. The Court could reach a conclusion reflecting a decision that desegregation is more important than education. The Chattanooga Board remains convinced that education is primary. Desegregation cannot be allowed to assume a value greater than public education. Such a radical change in our national value system should not take place through an errosive process stimulated and made possible by confused thinking.

If the Charlotte Board had done absolutely nothing, then the District Court would have been compelled to direct

affirmative steps to be taken. But such is not the case. The District Court has found in essence, that the Charlotte Board has not done enough. Its plan is inadequate, so the District Court says. Unless the Court can find that a local school board is acting in bad faith and is unreasonable, then the collective judgment of a local board should be presumed to be correct and the burden placed upon complainants to prove the Board's judgment to be incorrect.

COMMUNITIES DIFFER

Every school system is different. Each community is unique as is each individual. A rigid, inflexible, detailed plan for all school systems is impractical for it ignores the diversity existent within our land, a diversity that is a basic source of our national strength. Local school boards are responsible to this diversity and reflect this diversity in representing local voters as a school system is designed and administered, and re-designed from time to time. With reference to race and *Brown I and II,* if a school board has been recalcitrant, certain remedies such as racial balance may be demanded, but not as a constitutional principle.

The Court exercises judicial power under the Constitution having secured this power from the voters. School Board's exercise educational power conveyed to them from the same source. Certainly in areas filled with judgment factors, the local board's joint judgment should be given great weight so long as a Board has demonstrated good faith coupled with actions supporting such good faith.

CONCLUSION

The Court is urged to –

redirect the attention of the Nation to the real objectives of equal treatment in public education under *Brown I and II*, and in so doing to discourage the rigid use of numbers as proof of the implementation of the Constitutional rights recognized by *Brown I and II*.

recognize the diversity in communities and provide support to School Board's acting in good faith, such as Charlotte-Mecklenburg, where progress is clearly evident.

give joint judgment at the local level a chance to use reason and sound judgment within flexible principles in response to their constituency but always subject to judicial scrutiny and approval.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, ET AL.,

Respondents.

AMICUS CURIAE BRIEF OF GOVERNOR CLAUDE R. KIRK, JR.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

Respondents.

AMICUS CURIAE BRIEF OF GOVERNOR CLAUDE R. KIRK, JR.

INTRODUCTION

I.

CONSENT FOR FILING

In accordance with Rule 42 of the Supreme Court Rules, written consent to the filing of this Brief has been granted by the Petitioners and Respondents in this cause. (Appendix hereto Exhibit B 35—6)

II.

PRELIMINARY STATEMENT

Claude R. Kirk, Jr., as Governor of the State of Florida, files this Brief as Amicus Curiae for the purpose of presenting to this Court, legal considerations which may be of assistance in the ultimate disposition of the issues. Amicus respectfully submits that he is not conversant with all the factual considerations; and, consequently, will endeavor to rely upon the factual representations contained in the Briefs filed by the parties in the presentation of any legal considerations to this Court.

The Governor appeared as Amicus Curiae in the proceedings before the Fourth Circuit Court of Appeals. The Governor also has appeared both as a party and as Amicus in numerous judicial proceedings before the district courts of the State of Florida, Fifth Circuit Court of Appeals, and this Honorable Court. In an original suit instituted in this Court in January, the Governor sought to have this Court declare and define the meaning of a "unitary system," thereby fixing an ascertainable standard of conduct to be followed by the school boards in all states. The suit further sought to have this Court declare that no state of the United States, in establishing a unitary system, be compelled to transport pupils for the purpose of achieving a racial balance. Unfortunately, the Court dismissed the suit for lack of jurisdiction.

The legal issues involved in this cause are also strikingly similar to those previously considered by the Fifth Circuit Court of Appeals and the District Courts in Florida. Recent decisions by the Fifth Circuit and the District Court clearly demonstrate the necessity for this Court to resolve clearly and unmistakably, once and for all, questions of busing and balance.

III.

ISSUES INVOLVED

1. Does the Constitution require or permit the courts to order the busing of pupils for the purpose of achieving a racial balance?

2. Does the Constitution require or permit the courts to direct school boards to adopt plans designed to bring about mathematical racial balances within school systems?

IV.

DISCUSSION OF ISSUES

The Constitution neither requires nor permits the courts to direct the establishment of a mathematical racial balance whether by busing or otherwise.

It was the position of Amicus before the Fourth Circuit Court of Appeals, and it remains the position of Amicus before this Court, that the concept of forced busing, that is to say involuntary transportation of pupils from one school to another for the purpose of achieving racial balance, and the concept of establishing a racial balance, whether by busing or otherwise, is neither required nor permitted under the Constitution of the United States and is inconsistent with the Civil Rights Act of 1964, the statements made by the President of the United States on Elementary and Secondary School Desegregation and applicable judicial declarations.

Amicus respectfully submits that we are where we are today largely as a result of the failure of the Courts to provide the necessary guidance. This was so aptly pointed out by Judge

Coleman in his dissent in *Singleton v. Jackson Municipal Separate School District, et al.*, U.S.C.A., 5 Cir., Case No. 26,285 (January 21, 1970), when he observed:

"What I dissent from is the continuing failure of this Court to provide a lighthouse in the new storm which is upon us. The school authorities and the District Judges need something to steer by.

In United States v. Jefferson County Board of Education, 372 F.2d 836, 380 F.2d 385 (1966 and 1967), when freedom of choice was an acceptable method of seeking desegregation, this Court formulated a detailed decree for use by the District Courts and forbade any variation therefrom. Now that freedom of choice is held to have generally failed we lapse into silence and wash our hands in the water of taciturnity. I strongly protest this approach. In *Jefferson* I, 372, F.2d 836, 849 (1966), the majority announced, 'We grasp the nettle.' I think the District Courts need help. They are being forced to act without our answer to many unanswered questions. I shall discuss some of them and state my view of what answers ought to be.

On September 30, 1969, at an en banc session in New Orleans, this Court ordered the cases now before us to be considered en banc. We were acutely aware of the critical nature of the problem—critical for the eradication of unconstitutional discrimination and critical for the future of public education, the great hope of nearly all children, black and white. It was my understanding then that upon the en banc hearing in Houston on November 17, 1969, we would attempt to supply some judicial compasses for

use in a forest which had not been anticipated in 1966. Regrettably, we did not really do so.

Certainly as the Supreme Court said in *Brown* II, and as we have often repeated, local school authorities have the primary responsibility for elucidating, assessing, and solving these problems, 349 U.S. 299. *It does no good now to say that these school districts have had fifteen years in which to do something and have not done it. As a matter of fact, most of the school districts now before us, if not all of them, have been under the supervision of the federal courts for as much as five years. I think it is quite clear what this proves.*

Regardless of who is, or has been at fault, the Supreme Court has told us in no uncertain terms that it will brook no further delays. Do we, then, stand by and see innumerable schools go crashing on the rocks and educational processes seriously impaired or shall we bestir ourselves and advance judicial solutions which will dismantle the dual school system without dismantling the schools as well? Samson slew his enemies, all right, but he likewise destroyed the hall and liquidated himself—all because of bad judgment, previously exercised." (emphasis ours)

Judge Clark joined with Judge Coleman in a separate dissent in *Singleton*, supra, and also expressed a deep concern about the failure of the higher courts to provide the necessary specifics to assist the lower courts in determining constitutionally acceptable plans. Judge Clark keenly observed:

"Nobody knows what constitutes 'a unitary school system within which no person is to be effectively excluded from any school because of race or color.' This is not to

say that this court hasn't drawn some negative limits around the phrase 'unitary school.' We have frequently decreed that systems coming before us were not unitary for one reason or another. However, what is here urged is our duty to speak *affirmatively*, to tell the litigants, in advance of attacks made on them, precisely what such a 'unitary system' is. We have said such a system must be racially integrated and that its faculty must approximate the racial balance of the whole system. These are the only affirmatives known."

It was not until the decision by the Fifth Circuit Court of Appeals in *Ellis v. Orange County Board of Public Instruction*, U.S.C.A., 5 Cir., M.D. Fla. (February 17, 1970) No. 29,124, (see also *Singleton, et al. v. Jackson Municipal Separate School District, et al.*, U.S.C.A. 5 Cir., Case No. 29,226, May 5, 1970) that we had some indication of an acceptable educationally sound approach to the establishment of a unitary school system—namely the neighborhood school concept without the necessity of forced bussing. In *Ellis*, the Fifth Circuit Court observed in part:

"As stated, based on the supplemental findings of fact, it appears that a true neighborhood assignment system, assigning students to the school nearest the student's home up to the capacity of the given school, will result in the desegregation of eight of the remaining eleven all-Negro student body schools in the Orange County, system, leaving three elementary schools."

* * * * * *

"There are a number of all-white student body schools in the Orange County system. This is due to the preponderant white student population (82 percent) and to

residential patterns. The three all-Negro student body schools which will remain, if the neighborhood assignment system is properly invoked, are also the result of residential patterns. The majority to minority transfer provision under the leadership of the bi-racial committee is a tool to alleviate these conditions now. Site location, also under the guidance of the bi-racial committee, will guarantee elimination in the future. In addition, open housing, Title VIII, Civil Rights Act of 1968, 42 USCA, SS 3601, Et Seq., Jones v. Mayer, 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189, will serve to prevent neighborhood entrapment."

Ample precedent for the neighborhood school system is reflected in *Deal v. Cincinnati Board of Public Instruction*, U.S.C.A., 6 Cir., 1969, 419 F.2d. 1387, *1391–2* (*Deal* II):

"'The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through use of neutral, easily determined standards, and better home-school communications.'"

* * * * * *

"In *Northcross v. Board of Education of the City of Memphis, Tennessee.*, 302 F.2d. 818 (6th Cir. 1962), cert. denied, 370 U.S. 944, we outlined the minimal requirements for non-racial schools:

'Minimal requirements for non-racial schools are geographic zoning, according to the capacity and

> facilities of the buildings and admission to a school according to residence as a matter of right.' Id. at 823."

The plan which was approved by the District Court in this case, as we understand it, involves extensive busing for the purpose of achieving racial balance and, apparently, rejects the reasonable efforts made by the Charlotte-Mecklenburg Board of Education to implement an assignment plan based on the neighborhood school concept and not on racial quotas. Although there is some indication that the order of the District Court was not promulgated to achieve a "racial balance," the fact that the court directed the balancing of certain schools demonstrates that the achieving of a racial balance was a controlling factor in the court's determination. Although this may not have been the lower court's intention, the fact remains from our understanding of the approved plan, that there is extensive involuntary busing for the purpose of achieving a racial balance. The clear wording and the intent of the Civil Rights Act of 1964 completely negates any intention to approved forced busing.

Section 401(b) of the Civil Rights Act of 1964 provides as follows:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' *shall not mean the assignment of students to public schools in order to overcome racial imbalance.*" (emphasis ours)

Section 407(a) of the Civil Rights Act of 1964 provides in part as follows:

". . . provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. . ." (42 U.S.C. Sec. 2000c-6 (a))

In *U. S. v. Jefferson County Board of Education*, U.S.C.A., 5. Cir. (1966), 372 F.2d. 836 (*Jefferson* I) affirmed and adopted en banc 380 F.2d. 385, (*Jefferson* II) cert. denied sub. nom. *Caddo Parish School Board v. United States* (1967) 389 US 840, 88 S.Ct. 67, 19 L.Ed. 103, this Court, in *Jefferson* I observed at page 856:

". . . When Congress declares national policy, the duty the two other coordinate branches owe to the Nation requires that, within the law, the judiciary and the executive respect and carry out that policy. . ."

In the enactment of Section 407 (a), supra, Congress declared a national policy with regard to the busing of pupils solely to achieve a racial balance. Unless Section 407 (a), supra, is declared to be unconstitutional and void, having no force and effect, it is respectfully suggested that the provisions of this Act are applicable and controlling.

In *Deal v. Cincinnati Board of Education*, U.S.C.A., 6 Cir. (1966) 369 F.2d. 55, (*Deal* I) cert. denied 389 US 847, 88 S.Ct. 39, 19 L.Ed.2d. 114, the United States Court of Appeals for the Sixth Circuit held:

"We hold that there is no constitutional duty on the part of the Board *to bus* Negro or white children out of their

neighborhoods or to transfer classes *for the sole purpose of alleviating racial imbalance* that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose." (emphasis ours)

See also *Deal v. Cincinnati Board of Education*, supra, (Deal II); *Bivins v. Bibb County Board of Public Education*, U.S.D.C., M.D. Ga. (January 21, 1970) No. 1926; and *Thomie v. Houston County Board of Education*, U.S.D.C., M.D. Ga. (January 21, 1970) No. 2077.

In *Taylor v. Board of Education of City School District of New Rochelle*, U.S.C.A., 2 Cir. (1961) 294 F.2d. 36, Judge Moore, in his dissent observed at page 41:

"The best account of the problems presented to the Board during the last ten years (1950–1960) is found in the testimony of Kenneth B. Low who from 1950 to 1960 served on the Board and was its President from 1958 to 1960. He had had a distinguished career in the field of interracial relations and for seven years had served as Chairman of the Westchester County Council appointed by the State Commission Against Discrimination . . . '*Solutions*, he said, *which sent 'youngsters out of the district because of their race,' as discussed before the Board brought about discrimination in reverse because you are creating special conditions for people on account of their race and that it could and perhaps should apply equally to other schools which had either a racial imbalance or a religious imbalance of national backgrounds, and the result is that it would establish a precedent for sending children, because of any of these factors, to schools, which was believed to be a violation of basic principle.*' (One school was over 90% Jewish

and one over 90% Italian.) 'But (said Mr. Low) I am not going to violate what I consider to be basic constitutional principles, and the mere fact that this (Lincoln) happens to be a badly imbalanced racial school is not due to any act of the Board of Education. It is a residential condition.'" (emphasis ours)

If the courts are required to correct racial imbalances, then they would also be equally required to correct religious imbalances or imbalances of national backgrounds. It is respectfully suggested that the courts cannot constitutionally make a selective distinction between religious or racial imbalance and that it would be inviting the opening of a Pandora's box if correction of any type of mathematical imbalance becomes a constitutional imperative.

The comments made by Judge Coleman in *Carter v. West Feliciana Parish School Board, et al.*, U.S.D.C., S.D. Ala., Case No. 28,340, and *Singleton v. Jackson Municipal Separate School District*, supra, are indeed pertinent:

> "The High Court has never arbitrarily commanded that there must be racial balance in the student body of any school purely for the sake of racial balance. It has never commanded that little children be required to walk unreasonable distances, *or to be bussed to strange communities just to obtain racial balance*. It has ordered us to quit operating two systems within a system, one all black, and one all white, judges by five criteria, *not one*. Neither has it left the door open to tokenism." (emphasis ours)

Judge Cox, in his dissenting opinion, in *Henry v. Clarksdale Municipal Separate School District*, U.S.C.A., 5 Cir. (1969) 409 F.2d. 682 at page 692, refers to the holding in *Gilliam v.*

School Board of City of Hopewell, Va., U.S.C.A., 4 Cir., 345 F.2d. 325, as follows:

> "'. . . The constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools. . .'"

In *Jefferson* I, supra, at page 847, footnote 5, the Fifth Circuit, while indicating that in its opinion, racial balance was to be given a high priority, it is not constitutionally required:

> ". . . The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population. It does not require that each and every child shall attend a racially balanced school. . ."

In *Harvest, et al. v. Board of Public Instruction of Manatee County, et al.*, slip Opinion No. 29425, 5 Cir., June 26, 1970, Judge Clark in an opinion concurring with the majority commenting on the Fourth Circuit's decision in the instance cause observed in part:

> ". . . The court there emphasized what the district court here has consistently recognized—that racial balancing is not the sine qua non of a unitary system—that educational reasonableness and realities must prevail over any artificial racial ratios. . ."

In a dissenting opinion written by Judge Bell (Judge Bell wrote the majority opinion in *Ellis v. Board of Public Instruction of Orange County*, Supra) in *Jefferson* II, supra, it is observed in part at page 417:

". . . The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or that there be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to 'stick to our last' so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. Integration is not an end in itself; a fair chance to attain personal dignity *through equal educational opportunity is the goal.* . ." (emphasis ours)

In *Deal* I, supra, Chief Judge Weick similarly observed at page 59:

". . . If factors outside the schools operate to deprive some children of some of the existing choices, the school board is certainly not responsible therefor.

"Appellants, however, argue that the state must take affirmative steps to balance the schools to counteract the variety of private pressures that now operate to restrict the range of choices presented to each school child. Such a theory of constitutional duty would destroy the well-settled principle that the Fourteenth Amendment governs only state action. Under such a theory, all action would be state action, either because the state itself had moved directly, or because some private person had acted and thereby created the supposed duty of the state to counteract any consequences.

> The standard to be applied is '*equal educational opportunity*'. The Court in *Brown* cast its decision thus because it recognized that it was both unnecessary and impossible to require that each child come through the complex process of modern education with the same end result. This approach grants due respect for the unavoidable consequences of variations in individual ability, home environment, economic circumstances, and occupational aspirations. Equal opportunity requires that each child start the race without arbitrary official handicaps; it does not require that each shall finish in the same time." (emphasis ours)

It appears that whether busing to achieve racial balance is permissible has been held to depend on a so-called distinction between "de jure" or "de facto" segregation situations. In this regard, Judges Bell and Coleman in their dissent in *Jefferson* II, supra, observe at pages 413 and 418:

> "The unfairness which inheres in the majority opinion stems from the new doctrine which the original panel fashioned under the concept of classifying segregation into two types: de jure segregation, called apartheid, for the seventeen southern and border states formerly having legal segregation; and de facto segregation for the other states of the nation. This distinction, which must be without a difference and somewhat hollow to a deprived child wherever located, is used as a beginning. The original opinion then goes on to require affirmative action on the part of the school authorities in the de jure systems to integrate the schools. The neighborhood school systems of the nation with their de facto segregation are excused. The Constitution does not reach them.

"This reasoning is necessary to reach the end of compulsory integration in the so-called de jure states. It is the counterpart to overruling the settled construction of the Fourteenth Amendment, to be next discussed, that integration is not commanded. *The restrictions in the Civil Rights Act of 1964 against requiring school racial balances by assignment and transportation are written out of the law with respect to the de jure states by using the de jure-de facto theory.* Title IV, subsection 401(b), 407(a), 42 U.S.C.A. subsection 2000c(b), 2000c-6. The overruling of the constitutional limitation removes the other impediment to compulsory integration. The way is thus cleared for the new dimension. The only question left is when, and to what extent. The authority to HEW is carte blanche. We should disavow the de jure-de facto doctrine as being itself violative of the equal protection clause. It treats school systems differently. It treats children differently. It is reverse apartheid. It poses the question whether legally compelled integration is to be substituted for legally compelled segregation. It is unthinkable that our Constitution does not contemplate a middle ground-no compulsion one way or the other." (emphasis ours)

* * * * * *

"*I further believe that whatever the Fourteenth Amendment requires of any State it requires of all States.* If we are requiring something here in the enforcement of Fourteenth Amendment rights that should not be required of all fifty states then we have exceeded our authority and we have misapplied the Constitution. . ." (emphasis ours)

Judge Gewin in *Jefferson* II, supra, observes at page 398:

". . . One of the chief difficulties which I encounter with the opinion is that it concludes that the Constitution means one thing in 17 states of the nation and something else in the remaining states. This is done by a rather ingenious though illogical distinction between the terms de facto segregation and de jure segregation. While the opinion recognizes the evils common to both types, it relies heavily on background facts to justify the conclusion that the evil will be corrected in one area of the nation and not in the other. In my view the Constitution cannot be bent and twisted in such a manner as to justify or support such an incongruous result."

The application which some courts have given to the anti-bussing philosophy expressed in Section 407(a), supra, appears to have been occasioned by the apparent rejection of the decision in *Briggs v. Elliott*, E.D.S.C. (1955) 132 F.Supp. 776, where it was held at page 777:

". . . it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. *It has not decided that the federal courts are to take over or regulate the public schools of the states.* It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or *must deprive them of the right of choosing the schools they attend.* What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races

voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." (emphasis ours)

Judge Gewin in *Jefferson* II, supra, in commenting on the apparent rejection of the *Briggs* doctrine, supra, observed at page 409:

"If the alleged Briggs dictum is so clearly erroneous and constitutionally unsound, it is difficult to believe that it would have been accepted for a period of almost twelve years and quoted so many times. Even the majority concedes that the court in Briggs was composed of distinguished jurists, Judges Parker, Dobie and Timmerman. If the majority is correct, it is entirely likely that never before have so many judges been misled, including judges of this Court, for so long by such a clear, understandable direct, and concise holding as the language in Briggs which the opinion now condemns. The language is straightforward and simple: 'The Constitution, in other words, does not require integration. It merely forbids discrimination.'

It is interesting also to observe that the Supreme Court has never disturbed the Briggs language although it has

had numerous opportunities to do so. As a matter of fact, it has come very close to approving it; if it has not actually done so . . .

The majority rule requiring compulsory integration is new and novel, and it has not been accepted by the Supreme Court or by the other circuits. . ." (emphasis ours)

In this regard, Judge Young, who was the trial judge in the *Ellis* case, supra, observed as follows:

". . . A student who because of his color is scooped up within a gerrymandered zone to be transported to a distant school in the same zone and deprived of the right of attending a school a few blocks from his home which is placed in another zone (where such zones are gerrymandered for racial balance alone) is 'effectively excluded' from a school because of race or color which is contra to Alexander v. Holmes County Board of Education, supra." (emphasis ours)

Judge Clark in his dissent in *Singleton,* supra, very similarly observed:

"The assignment of specific racial quotas and the establishment of minimum, acceptable, percentage, racial guidelines for students, most assuredly cannot be the terms of definition, for when a child of any race wishes to attend a school because of its location close to home, because of the deemed excellence of its faculty or facilities, because it is attended by brothers or sisters or close friends or because it is on Dad's way to work or in Mother's car pool, and his wishes accord with valid edu-

cational policy, *yet that child winds up being excluded from that school solely because the color of his or her skin doesn't conform to a predetermined arbitrary racial quota or percentage guideline, that child's right to be free of racial distinctions is gone. By the very wording of the phrase to be defined, a school system can't be 'unitary' if a child is effectively excluded from any school because of his or her race or color.* It's easy to see what it isn't, the challenge is to show what it is." (emphasis ours)

(See also *Holland v. Board of Public Instruction of Palm Beach County*, U.S.C.A., 5 Cir. (1958) 258 F.2d. 730; *Bell v. School City of Gary, Indiana*, U.S.C.A., 7 Cir. (1963) 324 F.2d. 209; cert. denied, 377 US 924, 84 S.Ct. 1223, 12 L.Ed.2d. 216; *Downs v. Board of Education of Kansas City*, U.S.C.A. 10 Cir., (1964) 336 F.2d. 988, cert. denied, 380 US 914, 85 S.Ct. 898, 13 L.Ed. 2d. 800).

Amicus respectfully suggests that busing as contemplated by the District Court's order would be contrary to the principles set forth in *Alexander v. Holmes County*, (1969) 396 US 19, 24 L.Ed.2d. 19. As we understand it, the order of the District Court requires that the school children administered by the plan which the court has approved are to be bused on the basis of race so as to achieve proportionate racial representation in the schools; and, because of their race, certain children would be excluded from the school within the neighborhood of their choice and bused to another solely on the basis of race. This inherently violates the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution. In *Cassell v. Texas*, (1950) 339 U.S. 282, 287; 94 L.Ed. 840, 847, this Court said:

> ". . . Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race. . ."

At 339 U.S. 291, 94 L.Ed. 849, a concurring opinion speaking through Mr. Justice Frankfurter stated:

> ". . . But discrimination in this context means purposeful, systematic, non-inclusion because of color. . . It does not mean absence of proportional representation. . ."

The principle of Cassell has been re-announced in recent times in *Swain v. Alabama,* (1965) 380 U.S. 202, 208; 13 L.Ed.2d. 759, 766, wherein the following statement appears:

> "Similarly, since there can be no exclusion of Negroes as a race because of color, proportional limitation is not permissible. (Cassell v. Texas, 339 U.S. 292; 94 L.Ed. 839) . . ."

This court has given the *Cassell* principle some recognition in the cases of *U. S. v. Wiman,* U.S.C.A., 5 Cir. (1962) 304 F.2d. 53 and *Goins v. Allgood,* U.S.C.A., 5 Cir. (1968) 391 F.2d. 692, wherein it is said that proportionate representation is not required.

Each of the foregoing cases is concerned with jury selection. However, there is no difference between the constitutional prohibitions against discrimination in the assignment of jurors and the assignment of students. Proportionate representation is prohibited because it requires that the state exclude on the basis of race those who exceed the portion

allotted to their race. The law must be color-blind. If the law requires that the race of the administered be known in order to enforce the law, then clearly race is made a controlling characteristic or issue. The plan approved by the lower court can only be effectuated if the race of the child is disclosed. It is a plan clearly racial in characteristic and as such is unconstitutional per se. The plan requires that a child, on the basis of race, graduate in a high school other than that which he has attended for perhaps three and a half years. It requires that he be bused out of his neighborhood. If the child falsifies his race and leaves all other factors the same he achieves the desirable circumstance of stability. Change can be legitimately imposed on him but not on the basis of race. A law which clearly discriminates on the basis of race cannot gain a constitutional exception because it is thought to promote a desirable social amelioration.

The Court should also consider that the Fourteenth Amendment concludes with the provision:

> "Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Congress has exercised the power specifically given by passing legislation which prohibits busing. It is respectfully suggested that such legislation prohibits the racial discrimination characteristic of the plan in question. The Court should not give any construction of the Congressional enactment which would pervert any intent which may be clearly shown by the Congressional record or by the language of the act. Certainly the court should not say to its fountain head of jurisdictional power that it has not prohibited forced busing on the basis of race if only a distortion of the clear intent would permit such conclusion. To do so would require of

Congress that it limit the Court's power to review certain Congressional enactments by a provision in the Act so stating, because such provision would be the only method whereby Congress could effectively exercise the power specifically given by Amendment XIV, Section 5, of the Federal Constitution.

Congressional power to enforce the Fourteenth Amendment is not exclusive. However, in light of the specific provisions of Section 5, it must be controlling.

If the Fourteenth Amendment of the Federal Constitution permitted, without requiring, proportionate representation on the basis of race, the decision of a United States District Court requiring proportionate representation would have to be reversed as imposing what was not required. A fortiori the order of a U. S. District Court must be reversed for imposing proportional racial representation when such is actually prohibited by the Fourteenth Amendment. As the Honorable Thurgood Marshall stated in his Brief in *Brown v. Board of Education*, (1955) 349 U.S. 294, 99 L.Ed. 1083, 1089:

> "The Fourteenth Amendment requires that a decree be entered directing that appellants be admitted forthwith to public schools without distinction as to race or color."

Amicus asks but the same.

Amicus would be remiss in his responsibility to this Court if some comment were not made regarding the arguments of the parties in this proceeding. The Brief filed by the Charlotte-Mecklenburg Board of Education (Cross-Petitioner) sets forth with great particularity and specificity their opposition to compulsory busing and racial balancing. At page 29 of their Brief, the Cross-Petitioner states, in part,

that, "We do not think that the Constitution requires this racial balancing nor the busing necessary to implement it . . ." The Brief filed by James Swann, et al, (Petitioners) urges acceptance of the concept of a racially balanced school system and busing to achieve such balance; such concept, it is argued, as being the constitutional imperative which the school boards have been mandated by the courts to follow. Petitioner submits that these "techniques" are required to "eliminate segregation" and "integrate the school system."

Amicus respectfully submits that there is indeed a distinction between school systems which are "segregated" and school systems which vary in the degree of mathematical "integration." Amicus suggests that there is a vast difference between the elimination of school segregation as commanded by the Court in the *Brown* cases, and directing a more racially balanced system as ordered by the District Court. Amicus respectfully submits that the inability of the Courts to make this distinction has contributed to the judicial confusion. It has been commonplace and perhaps an oversimplification to interchange these two concepts. In many instances, the courts were, in reality, dealing with school systems which were not "segregated," but rather which did not have a sufficient degree of "integration" to "satisfy" the courts' concept of a unitary system.

The principle that this Court clearly enunciated in *Alexander vs. Holmes County Board of Education*, supra, was the necessity and requirement of school boards to establish a unitary system "within which no person is to be effectively excluded from any schools because of *race or color*."

In *Allen vs. Board of Public Instruction of Broward County*, slip Opinion Number 30032, August 18, 1970, the Fifth Circuit observed, in part, as follows:

> "The Supreme Court has commanded courts and school boards to eliminate *school segregation* 'root and branch,' *Green, supra*, 391 U.S. at 438, and to do it *now*. See *Green, supra; Alexander v. Holmes County Board of Education*, 1969, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed. 2d 19; *Carter v. West Feliciana Parish School Board*, 1970, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed. 2d 477. We must be responsive to this constitutional mandate." (emphasis ours)

Indeed, the courts must be responsive to this mandate—but what is this mystical mandate? Is it to command the establishment of a racially balanced school system? Must the courts forever be saddled with a perennial abacus, reviewing plans every term and every time the population shifts adjusting them mathematically? This certainly could not be the intent of *Alexander;* providing *equal educational opportunities* should be the goal.

The Petitioner attempts to distort this, as well as the significance of the opinion of the Fourth Circuit, in suggesting a "new" legal principle has been established below, to-wit: "that in each case a court must decide whether the goal of complete desegregation of all schools is a reasonable goal . . . whether the Court thinks desegregation is worthwhile, giving the circumstances of the district . . ." (page 24, Petitioner's Brief). This interpretation is completely inconsistent with the meaning and significance of the opinion of the Fourth Circuit. The question is not whether desegregation is worthwhile—this issue was resolved in 1954 by this Court and is no longer a matter to be resurrected. Nor is it fair to this Court to infer that the Fourth Circuit's decision is one that is in opposition to desegregation. This suggestion is nothing more than a smoke screen designed to obscure the real issues and divert attention from the resolution of these

issues. Nowhere in the majority opinion of the Fourth Circuit is there any intent to question the reasonableness of the goal of desegregation and this Court should pierce this illusory inference. The Fourth Circuit, in adopting what it referred to as "the test of reasonableness, instead of one that calls for absolutes" observed, in part:

> ". . . if a school board makes every *reasonable effort* to integrate the pupils under its control, an interactable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary school system. *Ellis vs. Board of Public Instruction of Orange County*, Number 29124, February 17, 1970—F.2d.—Fifth Circuit." (emphasis ours)

With regard to the question of busing, the Fourth Circuit went on to observe:

> "Bussing is a permissible tool for achieving integration, but is not a panacea. In determining who should be bussed and where they should be bussed, a school board should take into consideration the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources. The board should view bussing for integration in the light that it views bussing for other legitimate improvements, such as school consolidation and the location of new schools. In short, the board should draw on its experience with bussing in general—the benefits and the defects—so that it may intelligently plan the part that bussing will play in a unitary school system
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> • • • • • • •
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> ". . . The board, we believe, should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system."

•

The Petitioner expresses great concern about applying a "rule of reason," seemingly suggesting that this rule has some sinister connotation. The Petitioner submits that applying the test of reasonableness "must leave every board or court which seeks to apply the formula, essentially at sea." (page 39, Petitioner's Brief) Yet, while suggesting the vagueness of using a standard of reasonableness in approving the efforts of the school board in the adoption of a school plan, Petitioner unhesitatingly suggests that there is a "reasonable basis for the District Court's decision;" that the Fourth Circuit Court's order was not governed by traditional rules of appellate review because in order to set aside the equity decree, the appellant "must demonstrate that there was no *reasonable basis* for the District Court's decision." How does one determine or demonstrate the existence or non-existence of a "reasonable basis" for a District Court's decision, if the phrase or term "reasonable" is as vague as Petitioner suggests? Why is the test of reasonableness adopted by the Fourth Circuit, any the less vague than the test used by an appellate court or an appellant to sustain or set aside a lower court's decision.

The "rule of reason" which is the foundation for all jurisprudence is now alleged to be fraught with danger. Amicus would respectfully suggest that a determination of what is "reasonable" is perhaps far easier (and a much more equitable standard) than determining what is meant by a "unitary system," which latter phrase the courts have spoken of with such forcefulness and understanding—yet what does *that* phrase really mean?

In his Statement on Elementary and Secondary School Desegregation, made on March 24, 1970, President Nixon prophetically observed (even *before* the Fourth Circuit ruled):

". . . There is a Constitutional mandate that dual school systems and other forms of *de jure* segregation be eliminated totally. But within the framework of that requirement an area of flexibility—a "*rule of reason*"—exists, in which school boards, acting in good faith, can formulate plans of desegregation which best suit the needs of their own localities." (emphasis ours) (Appendix hereto Exhibit A 1—34, 12)

The issue is not whether the Fourth Circuit Court is correct in adopting a test based upon reasonableness; for no one can logically quarrel with any judicial determination founded upon a rule of reason. The issues are those which Mr. Chief Justice Burger correctly observed in *Northcross vs. Board of Education* this past March:

". . . whether, as a Constitutional matter, any particular racial balance must be achieved in the schools; to what extent the school districts or zones may or must be altered as a Constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court. . ." (—U.S.—, 25 L.Ed.2d 246, 250)

To these issues we must add: to what extent must school districts pair or cluster schools as a Constitutional matter, where such pairing is designed to achieve or maintain a racial balance. Pairing or clustering is a division of grade levels among several comparable schools located within a relatively short distance of each other. This is a device which many courts have utilized in improving the racial balance in school systems, in lieu of redrawing of zone lines. Although the question of whether to redraw zone lines (if done without

regard to race) or whether to utilize pairing and clustering, should be left to the sound discretion of the school boards, many courts have taken it upon themselves to direct pairing because the ratios of black to white within a given school system would be improved or more equally balanced.

Pairing and clustering have been criticized as being inconsistent with sound educational principles. Recently, the Superintendent of Schools of Broward County, Florida, prepared a report discussing implementation of the Fifth Circuit Court of Appeals order, entered on August 18, 1970. In this report, Dr. Benjamin C. Willis states in part:

> "The essential condition of school pairing by grade levels will work in direct opposition to the reorganization of our school program, which is already under way. All of these plans have been formulated, seeking only to provide the best possible, and most appropriate education for each child, considering him only as an individual and not as a racial statistic. . ."
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> • • • • • •
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> "The conclusion can be only that clustering/pairing, using only statistics, is educationally, logistically, economically unsound." (C 48, 52)

This Court's attention is also invited to this report, because it graphically demonstrates the frustrations in which educators and school systems have found themselves, as a result of educationally unrealistic judicial directives. (Appendix hereto Exhibit C 37—52)

Pairing and clustering have resulted in creating unnecessary safety hazards. Small children are now forced to walk

past a neighborhood school over heavily traveled and congested thoroughfares such as U. S. highways in order to reach their "paired" school. Many children are not eligible for normal school bus transportation because they live within two miles of their school (Florida Statutes 234.01). Fifth Circuit Court decisions reversals directing pairing and clustering have occurred a few days before school opening leaving school officials little time to adequately correct these hazardous conditions.

It is true, as the courts have announced, that this Court has stated that "there is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green vs. County School Board of New Kent County*, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689 20 F.2d 716. Yet it would seem that if a school system adopts a geographic zone plan and draws its zone lines in such a manner to insure that no person is effectively excluded from any school because of race or color, then a unitary system would be established and the mandate of this Court satisfied, notwithstanding that the particular method selected does not statistically provide as much of a racial balance as would pairing, clustering or other devices. No device or technique is a guaranteed panacea. There are numerous instances of hardship resulting from preoccupation with balance—classical examples are the parent whose seven children will now be attending six different grade schools, and the parent whose children have been transferred several times during the school year.

In attempting to summarize the prevailing trend of the judicial opinion, the President's statement observes:

". . . Where school boards have demonstrated a good-faith effort to comply with court rulings, the courts have generally allowed substantial latitude as to method—often making the explicit point that administrative choices should, wherever possible, be made by the local school authorities themselves." (A 11)

The President's statement also expresses his position on the neighborhood school concept and busing.

"The neighborhood school would be deemed the most appropriate base for such a system.

Transportation of pupils beyond normal geographic school zones for the purpose of achieving racial balance will not be required." (A 23)

* * * * * * *

"I am dedicated to continued progress toward a truly desegregated public school system. But, considering the always heavy demands for more school operating funds, I believe it is preferable, when we have to make the choice, to use limited financial resources for the improvement of education—for better teaching facilities, better methods, and advanced educational materials—and for the upgrading of the disadvantaged areas in the community rather than buying buses, tires and gasoline to transport young children miles away from their neighborhood schools." (A 10)

Of particular significance is the President's observation that:

"Demands that an arbitrary 'racial balance' be established as a matter of right misinterpret the law and misstate the priorities.

As a matter of educational policy, some schools have chosen to arrange their school systems in such a way as to provide a greater measure of racial integration. The important point to remember is that where the existing racial separation has not been caused by official action, this increased integration is and should remain a matter for local determination." (A 17)

CONCLUSION

The quandry in which many of the courts find themselves is a result of the absence of ascertainable standards. As Judge Clark in *Singleton, supra*, "The Court seeks to bring mighty things to pass, but just how is not explained . . ." ". . . The hard truth is that the courts have not fixed an adequate and a precise remedy. It is this court, not the school districts, that is to blame for any disparity between what the court now wants and what the districts actually are. . ."

Only a few days ago, Judge Miller, a Circuit Judge sitting as a District Judge, by designation, in the Middle District of Tennessee, refused to implement a school plan, observing in part as follows:

". . . In the absence of further and more specific guidelines from the Supreme Court, no lower federal court is in a position to make a definitive ruling on these important issues . . . therefore, the Court is of the opinion that the implementation of such a plan, by order of this Court, might result in harm to those whose interests must be deemed paramount, the students . . ." (*Kelley, et al. v. Metropolitan County Board of Education of Nashville and Davidson County, Tenn., et al.*, U.S.D.C. Nashville Div., M.D., Aug. 25, 1970)

Therefore, the necessity for this Court to set forth specific guidelines cannot sufficiently be over-emphasized. Consideration of race, whether it be for the purposes of segregation or integration, is unconstitutional and as objectionable as would the consideration of religion or national origin. The Constitution must be color blind, *not* color conscious. The goal is not the level of integration to be achieved; instead, the goal is as Judge Bell pointed out in his dissent in *Jefferson* II, supra, "a fair chance to attain personal dignity through equal educational opportunity. . ."

President Nixon, in his school statement, supra, makes several pertinent observations which merit quotation:

"One of the mistakes of past policy has been to demand too much of our schools: They have been expected not only to educate but also to accomplish a social transformation. Children in many instances have not been served, but used—in what all too often has proved a tragically futile effort to achieve in the schools the kind of a multiracial society which the adult community has failed to achieve for itself.

If we are to be realists, we must recognize that in a free society there are limits to the amount of government coercion that can reasonably be used; that in achieving desegregation we must proceed with the least possible disruption of the education of the nation's children; and that our children are highly sensitive to conflict, and highly vulnerable to lasting psychic injury.

Failing to recognize these factors, past policies have placed on the schools and the children too great a share

of the burden of eliminating racial disparities throughout our society. A major part of this task falls to the schools. But they cannot do it all or even most of it by themselves. Other institutions can share the burden of breaking down racial barriers, but only the schools can perform the task of education itself. If our schools fail to educate, then whatever they may achieve in integrating the races will turn out to be only a pyrhhic victory." (A 16—17)

In his concluding comments in his dissent in *Singleton*, supra, Judge Clark summed up the position in which he felt the Court was now finding itself. Judge Clark observed:

"With the glare of this publicity turned on us, this court is no less than on trial itself—on trial to see if it can make justice the handmaiden of liberty, or whether we make her serve tyranny. There is more at stake here than the tremendously valuable rights that lie on the surface of this controversy. Much of the vitality of the rule of law hangs in the balance, for we here deal not only with a vast number of people but also with perhaps the most sensitive area to any citizen—the welfare of his children. Respect for courts and for their decrees is a *sine qua non* to the acceptance of law as an ingrained way of life. We should do all we can as judges to promote that respect . . ."

This Court has the opportunity to resolve the issues which have caused wide-spread concern and confusion. The time has long passed for the formulation of realistic guidelines which are consistent with sound constitutional and educational imperatives. It is respectfully requested that this Court

reject the concept of balancing and busing and inst
recognize the goal of equal educational opportunity throu
reasonable means.

Respectfully submitted,

s/ Claude R. Kirk

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APPENDIX

Statement by the President on Elementary and Secondary School Desegregation 1A–34B

Consent to File 35B–36B

Statement by Superintendent of Education of Broward County 37C–52C

EMBARGOED FOR *ALL* WIRE TRANSMISSION
UNTIL 10:00 A.M., EST, MARCH 24, 1970
EMBARGOED FOR RELEASE UNTIL 11:00 A.M., EST

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT ON ELEMENTARY AND SECONDARY SCHOOL DESEGREGATION

My purpose in this statement is to set forth in detail this Administration's policies on the subject of desegregation of America's elementary and secondary schools.

Few public issues are so emotionally charged as that of school desegregation, few so wrapped in confusion and clouded with misunderstanding. None is more important to our national unity and progress.

This issue is not partisan. It is not sectional. It is an American issue, of direct and immediate concern to every citizen.

I hope that this statement will reduce the prevailing confusion and will help place public discusion of the issue on a more rational and realistic level in all parts of the nation. It is time to strip away the hypocrisy, the prejudice and the ignorance that too long have characterized discussion of this issue.

My specific objectives in this statement are:

—To reaffirm my personal belief that the 1954 decision of the Supreme Court in *Brown* v. *Board of Education* was right in both Constitutional and human terms.

—To assess our progress in the 16 years since *Brown* and to point the way to continuing progress.

—To clarify the present state of the law, as developed by the courts and the Congress, and the Administration policies guided by it.

—To discuss some of the difficulties encountered by courts and communities as desegregation has accelerated in recent years, and to suggest approaches that can mitigate such problems as we complete the process of compliance with *Brown*.

—To place the question of school desegregation in its larger context, as part of America's historic commitment to the achievement of a free and open society.

Anxiety over this issue has been fed by many sources.

On the one hand, some have interpreted various Administration statements and actions as a backing away from the principle of *Brown*—and have therefore feared that the painstaking work of a decade and a half might be undermined. We are not backing away. The Constitutional mandate will be enforced.

On the other hand, several recent decisions by lower courts have raised widespread fears that the nation might face a massive disruption of public education: that wholesale compulsory busing may be ordered and the neighborhood school virtually doomed. A comprehensive review of school desegregation cases

indicates that these latter are untypical decisions, and that prevailing trend of judicial opinion is by no means so extreme.

Certain changes are needed in the nation's approach to school desegregation. It would be remarkable if sixteen years of hard, often tempestuous experience had not taught us something about how better to manage the task with a decent regard for the legitimate interests of all concerned—and especially the children. Drawing on this experience, I am confident the remaining problems can be overcome.

WHAT THE LAW REQUIRES

In order to determine what ought to be done, it is important first to be as clear as possible about what *must* be done.

We are dealing fundamentally with inalienable human rights, some of them constitutionally protected. The final arbiter of Constitutional questions is the United States Supreme Court.

The President's Responsibility

There are a number of questions involved in the school controversy on which the Supreme Court has not yet spoken definitively. Where it has spoken, its decrees are the law. Where it has not spoken, where Congress has not acted, and where differing lower courts have left the issue in doubt, my responsibilities as Chief Executive make it necessary that I determine, on the basis of my best judgment, what must be done.

In reaching that determination, I have sought to ascertain the prevailing judicial view as developed in decisions by the Supreme Court and the various Circuit Courts of Appeals. In this

statement I list a number of principles derived from the prevailing judicial view. I accept those principles and shall be guided by them. The Departments and agencies of the Government will adhere to them.

A few recent cases in the lower courts have gone beyond those generally accepted principles. Unless affirmed by the Supreme Court, I will not consider them as precedents to guide Administration policy elsewhere.

What the Supreme Court Has Said

To determine the present state of the law, we must first remind ourselves of the recent history of Supreme Court rulings in this area.

This begins with the *Brown* case in 1954, when the Court laid down the principle that deliberate segregation of students by race in the public schools was unconstitutional. In that historic ruling, the court gave legal sanction to two fundamental truths—that separation by law establishes schools that are inherently unequal, and that a promise of equality before the law cannot be squared with use of the law to establish two classes of people, one black and one white.

The Court requested further argument, however, and propounded the following questions, among others:

"Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"a. would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"b. may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

In its second *Brown* decision the following year, the Court addressed itself to these questions of manner and timing of compliance. Its ruling included these principles:

—Local school problems vary: school authorities have the primary responsibility for solving these problems; courts must consider whether these authorities are acting in good faith.

—The courts should be guided by principles of equity, which traditionally are "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

—Compliance must be achieved "with all deliberate speed," including "a prompt and reasonable start" toward achieveing full compliance "at the earliest practicable date."

In 1964, the Supreme Court spoke again: "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these . . . children their constitutional rights."

At the same time, Congress also added to the impetus of desegregation by passing the Civil Rights Act of 1964, an Act that as a private citizen I endorsed and supported.

Although the Supreme Court in the *Brown* cases concerned itself primarily, if not exclusively, with pupil assignments, its decree applied also to teacher assignments and school facilities as a whole.

In 1968, the Supreme Court reiterated the principle enunciated in prior decisions, that teacher assignments are an important aspect of the basic task of achieving a public school system wholly freed from racial discrimination. During that same year, in another group of Supreme Court decisions, a significant and new set of principles also emerged.

—That a school board must establish "that its proposed plan promises meaningful and immediate progress toward disestablishing State-imposed segregation," and that the plan must "have real prospects for dismantling the State-imposed dual system 'at the earliest practicable date.'"

—That one test of whether a school board has met its "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" is the extent to which racial separation persists under its plan.

—That the argument that effective desegregation might cause white families to flee the neighborhood cannot be used to sustain devices designed to perpetuate segregation.

—That when geographic zoning is combined with "free transfers," and the effect of the transfer privilege is to perpetuate segregation despite the zoning, the plan is unacceptable.

The most recent decisions by the Supreme Court have now rejected any further delay, adding to the Court's mandate:

—"The obligation of every school district is to terminate dual systems at once and to operate now and hereafter only unitary schools."

—That the obligation of such districts is an affirmative one and not a passive one.

—That freedom of choice plans could no longer be considered as an appropriate substitute for the affirmative obligation imposed by the Court unless they, in fact, discharge that obligation immediately.

The Court has dealt only in very general terms with the question of what constitutes a "unitary" system, referring to it it as one "within which no person is to be effectively excluded from any school because of race or color." It has not spoken definitely on whether or not, or the extent to which, "desegregation" may mean "integration."

In an opinion earlier this month, Chief Justice Burger pointed out a number of "basic practical problems" which the Court had not yet resolved, "including whether, as a Constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a Constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of this Court."

One of these areas of legal uncertainty cited by Chief Justice Burger—school transportation—involves Congressional pronouncements.

In the 1964 Civil Rights Act, the Congress stated, ". . . nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the

existing power of the court to insure compliance with constitutional standards."

In the 1966 amendments to the Elementary and Secondary Education Act, the Congress further stated, ". . . nothing contained in this Act shall . . . require the assignment or transportation of students or teachers in order to overcome racial imbalance."

I am advised that these provisions cannot constitutionally be applied to *de jure* segregation. However, not all segregation as it exists today is *de jure*.

I have consistently expressed my opposition to any compulsory busing of pupils beyond normal geographic school zones for the purpose of achieving racial balance.

What the Lower Courts Have Said

In the absence of definitive Supreme Court rulings, these and other "basic practical problems" have been left for case-by-case determination in the lower courts—and both real and apparent contradictions among some of these lower court rulings have generated considerable public confusion about what the law really requires.

In an often-cited case in 1955 (*Briggs* v. *Elliott*), a District Court held that " the Constitution . . . does not require integration. . . . It merely forbids the use of governmental power to enforce segregation."

But in 1966 another court took issue with this doctrine, pointing out that it had been used as justifying "techniques for perpetuating school segregation," and declaring that:

". . . the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration."

In 1969, the 4th Circuit Court of Appeals declared:

"The famous *Briggs* v. *Elliott* dictum—adhered to by this court for many years—that the Constitution forbids segregation but does not require integration . . . is now dead."

Cases in two circuit courts have held that the continued existence of some all-black schools in a formerly segregated district did *not* demonstrate unconstitutionality, with one noting that there is "no duty to balance the races in the school system in conformity with some mathematical formula."

Another circuit court decision declared that even though a district's geographic zones were based on objective, non-racial criteria, the fact that they failed to produce any signficant degree of integration meant that they *were* unconstitutional.

Two very recent Federal court decisions continue to illustrate the range of opinion: a plan of a southern school district has been upheld even though three schools would remain all-black, but a northern school system has been ordered by another Federal court to integrate all of its schools completely "by the revising of boundary lines for attendance purposes as well as busing so as to achieve maximum racial integration."

This range of differences demonstrates that lawyers and judges have honest disagreements about what the law requires. There have been some rulings that would divert such huge sums of money to non-educational purposes, and would create such severe dislocations of public school systems, as to impair

the primary function of providing a good education. In one, for example—probably the most extreme judicial decree so far—a California State court recently ordered the Los Angeles School Board to establish a virtually uniform racial balance throughout its 711 square mile district, with its 775,000 children in 561 schools. Local leaders anticipate that this decree would impose an expenditure of $40,000,000 over the next school year to lease 1,600 buses, to acquire site locations to house them, to hire drivers, and to defray operating costs. Subsequent costs would approximate $20,000,000 annually. Some recent rulings by federal district courts applicable to other school districts appear to be no less severe.

I am dedicated to continued progress toward a truly desegregated public school system. But, considering the always heavy demands for more school operating funds, I believe it is preferable, when we have to make the choice, to use limited financial resources for the improvement of education—for better teaching facilities, better methods, and advanced educational materials—and for the upgrading of the disadvantaged areas in the community rather than buying buses, tires and gasoline to transport young children miles away from their neighborhood schools.

What Most of the Courts Agree On

Despite the obvious confusion, a careful survey of rulings both by the Supreme Court and by the Circuit Courts of Appeals suggests that the basic judicial approach may be more reasonable than some have feared. Whatever a few lower courts might have held to the contrary, the prevailing trend of judicial opinion appears to be summed up in these principles:

—There is a fundamental distinction between so-called "*de jure*" and "*de facto*" segregation: *de jure* segregation

arises by law or by the deliberate act of school officials and is unconstitutional; *de facto* segregation results from residential housing patterns and does not violate the Constitution. (The clearest example of *de jure* segregation is the dual school system as it existed in the South prior to the decision in *Brown*—two schools, one Negro and one White, comprised of the same grades and serving the same geographical area. This is the system with which most of the decisions, and the Supreme Court cases up until now, have been concerned.)

—Where school boards have demonstrated a good-faith effort to comply with court rulings, the courts have generally allowed substantial latitude as to method—often making the explicit point that administrative choices should, wherever possible, be made by the local school authorities themselves.

—In devising particular plans, questions of cost, capacity, and convenience for pupils and parents are relevant considerations.

—Whatever the racial composition of student bodies, faculties and staff must be assigned in a way that does not contribute to identifying a given school as "Negro" or "White."

—In school districts that previously operated dual systems, affirmative steps toward integration are a key element in disestablishing the dual system. This positive integration, however, does not necessarily have to result in "racial balance" throughout the system. When there is racial separation in housing, the Constitutional requirement has been held satisfied even though some schools remained all-black.

—While the dual school system is the most obvious example, *de jure* segregation is also found in more subtle forms. Where authorities have deliberately drawn attendance zones or chosen school locations for the express purpose of creating and maintaining racially separate schools, *de jure* segregation is held to exist. In such a case the school board has a positive duty to remedy it. This is so even though the board ostensibly operates a unitary system.

—In determining whether school authorities are responsible for existing racial separation—and thus whether they are Constitutionally required to remedy it—the *intent* of their action in locating schools, drawing zones, etc., is a crucial factor.

—In the case of genuine *de facto* segregation (i.e., where housing patterns produce substantially all-Negro or all-White schools, and where this racial separation has not been caused by deliberate official action) school authorities are not Constitutionally required to take any positive steps to correct the imbalance.

To summarize: There is a Constitutional mandate that dual school systems and other forms of *de jure* segregation be eliminated totally. But within the framework of that requirement an area of flexibility—a "*rule of reason*"—exists, in which school boards, acting in good faith, can formulate plans of desegregation which best suit the needs of their own localities. (emphasis ours)

De Facto segregation, which exists in many areas both North and South, is undesirable but is not generally held to violate the Constitution. Thus, residential housing patterns may result in the continued existence of some all-Negro schools even in a system which fully meets Constitutional standards. But in any event, local school officials *may*, if they so choose, take steps

beyond the Constitutional minimums to diminish racial separation.

SCHOOL DESEGREGATION TODAY

The Progress

Though it began slowly, the momentum of school desegregation has become dramatic.

Thousands of school districts throughout the South have met the requirements of law.

In the past year alone, the number of black children attending southern schools held to be in compliance has doubled, from less than 600,000 to nearly 1,200,000—representing 40 per cent of the Negro student population.

In most cases, this has been peacefully achieved.

However, serious problems are being encountered both by communities and by courts—in part as a consequence of this accelerating pace.

The Problems

In some communities, racially mixed schools have brought the community greater interracial harmony; in others they have heightened racial tension and exacerbated racial frictions. Integration is no longer seen automatically and necessarily as an unmixed blessing for the Negro, Puerto Rican or Mexican-American child. "Racial balance" has been discovered to be neither a static nor a finite condition; in many cases it has turned out to be only a way station on the road to resegregation. Whites have deserted the public schools, often for grossly inadequate private schools. They have left the now re-segregated public schools foundering for lack of support. And when whites flee the central city in pursuit of all- or predominantly-white

schools in the suburbs, it is not only the central city schools that become racially isolated, but the central city itself.

These are not theoretical problems, but actual problems. They exist not just in the realm of law, but in the realm of human attitudes and human behavior. They are part of the real world, and we have to take account of them.

The Complexities

Courts are confronted with problems of equity, and administrators with problems of policy. For example: To what extent does desegregation of dual systems require positive steps to achieve integration? How are the rights of individual children and their parents to be guarded in the process of enforcement? What are the educational impacts of the various means of desegregation—and where they appear to conflict, how should the claims of education be balanced against those of integration? To what extent should desegregation plans attempt to anticipate the problem of *re*segregation?

These questions suggest the complexity of the problems. These problems confront us in the North as well as the South, and in rural communities, suburbs and central cities.

The troubles in our schools have many sources. They stem in part from deeply rooted racial attitudes; in part from differences in social, economic and behavioral patterns; in part from weaknesses and inequities in the educational system itself; in part from the fact that by making schools the primary focus of efforts to remedy longstanding social ills, in some cases greater pressure has been brought to bear on the schools than they could withstand.

The Context

Progress toward school desegregation is part of two larger processes, each equally essential:

—The improvement of educational opportunities for all of America's children.

—The lowering of artificial racial barriers in all aspects of American life.

Only if we keep each of these considerations clearly in mind—and only if we recognize their separate natures—can we approach the question of school desegregation realistically.

It may be helpful to step back for a moment, and to consider the problem of school desegregation in its larger context.

The school stands in a unique relationship to the community, to the family, and to the individual student. It is a focal point of community life. It has a powerful impact on the future of all who attend. It is a place not only of learning, but also of living—where a child's friendships center, where he learns to measure himself against others, to share, to compete, to cooperate—and it is the one institution above all others with which the parent shares his child.

Thus it is natural that whatever affects the schools stirs deep feelings among parents, and in the community at large.

Whatever threatens the schools, parents perceive—rightly—as a threat to their children.

Whatever makes the schools more distant from the family undermines one of the important supports of learning.

Quite understandably, the prospect of any abrupt change in the schools is seen as a threat.

As we look back over these sixteen years, we find that many changes that stirred fears when they first were ordered have turned out well. In many Southern communities, black and

white children now learn together—and both the schools and the communities are better where the essential changes have been accomplished in a peaceful way.

But we also have seen situations in which the changes have not worked well. These have tended to command the headlines, thus increasing the anxieties of those still facing change.

Overburdening the Schools

One of the mistakes of past policy has been to demand too much of our schools: They have been expected not only to educate, but also to accomplish a social transformation. Children in many instances have not been served, but used—in what all too often has proved a tragically futile effort to achieve in the schools the kind of a multiracial society which the adult community has failed to achieve for itself.

If we are to be realists, we must recognize that in a free society there are limits to the amount of government coercion that can reasonably be used; that in achieving desegregation we must proceed with the least possible disruption of the education of the nation's children; and that our children are highly sensitive to conflict, and highly vulnerable to lasting psychic injury.

Failing to recognize these factors, past policies have placed on the schools and the children too great a share of the burden of eliminating racial disparities throughout our society. A major part of this task falls to the schools. But they cannot do it all or even most of it by themselves. Other institutions can share the burden of breaking down racial barriers, but only the schools can perform the task of education itself. If our schools

fail to educate, then whatever they may achieve in integrating the races will turn out to be only a pyrrhic victory.

With housing patterns what they are in many places in the nation, the sheer numbers of pupils and the distances between schools make full and prompt school integration in every such community impractical—even if there were a sufficient desire on the part of the community to achieve it. In Los Angeles, 78 per cent of all Negro pupils attend schools that are 95 per cent or more black. In Chicago the figure is 85 per cent—the same as in Mobile, Alabama. Many smaller cities have the same patterns. Nationwide, 61 per cent of all Negro students attend schools which are 95 per cent or more black.

Demands that an arbitrary "racial balance" be established as a matter of right misinterpret the law and misstate the priorities.

As a matter of educational policy, some school boards have chosen to arrange their school systems in such a way as to provide a greater measure of racial integration. The important point to bear in mind is that where the existing racial separation has not been caused by official action, this increased integration is and should remain a matter for local determination.

Pupil assignments involve problems which do not arise in the case of the assignment of teachers. If school administrators were truly color blind and teacher assignments did not reflect the color of the teacher's skin, the law of averages would eventually dictate an approximate racial balance of teachers in each school within a system.

Not Just a Matter of Race

Available data on the educational effects of integration are neither definitive nor comprehensive. But such data as we have

suggest strongly that, under the appropriate conditions, racial integration in the classroom can be a significant factor in improving the quality of education for the disadvantaged. At the same time, the data lead us into several more of the complexities that surround the desegregation issue.

For one thing, they serve as a reminder that, from an educational standpoint, to approach school questions solely in terms of race is to go astray. The data tell us that in educational terms, the significant factor is not race but rather the educational environment in the home—and indeed, that the single most important educational factor in a school is the kind of home environment its pupils come from. As a general rule, children from families whose home environment encourages learning—whatever their race—are higher achievers; those from homes offering little encouragement are lower achievers.

Which effect the home environment has depends on such things as whether books and magazines are available, whether the family subscribes to a newspaper, the educational level of the parents, and their attitude toward the child's education.

The data strongly suggest, also, that in order for the positive benefits of integration to be achieved, the school must have a majority of children from environments that encourage learning—recognizing, again, that the key factor is not race but the kind of home the child comes from. The greater concentration of pupils whose homes encourage learning—of whatever race—the higher the achievement levels not only of those pupils, but also of others in the same school. Students learn from students. The reverse is also true: the greater concentration of pupils from homes that discourage learning, the lower the achievement levels of all.

We should bear very carefully in mind, therefore, the distinction between educational difficulty as a result of race, and edu-

cational difficulty as a result of social or economic levels, of family background, of cultural patterns, or simply of bad schools. Providing better education for the disadvantaged requires a more sophisticated approach than mere racial mathematics.

In this same connection, we should recognize that a smug paternalism has characterized the attitudes of many white Americans toward school questions. There has been an implicit assumption that blacks or others of minority races would be improved by association with whites. The notion that an all-black or predominantly-black school is automatically inferior to one which is all or predominantly-white—even though not a product of a dual system—inescapably carries racist overtones. And, of course, we know of hypocrisy; not a few of those in the North most stridently demanding racial integration of public schools in the South at the same time send their children to private schools to avoid the assumed inferiority of mixed public schools.

It is unquestionably true that most black schools—though by no means all—are in fact inferior to most white schools. This is due in part to past neglect or shortchanging of the black schools; and in part to long-term patterns of racial discrimination which caused a greater proportion of Negroes to be left behind educationally, left out culturally, and trapped in low paying jobs. It is not really because they serve black children that most of these schools are inferior, but rather because they serve poor children who often lack the home environment that encourages learning.

Innovative Approaches

Most public discussion of overcoming racial isolation centers on such concepts as compulsory "busing"—taking children out

of the schools they would normally attend, and forcing them instead to attend others more distant, often in strange or even hostile neighborhoods. Massive "busing" is seen by some as the only alternative to massive racial isolation.

However, a number of new educational ideas are being developed, designed to provide the educational benefits of integration without depriving the student of his own neighborhood school.

For example, rather than attempting dislocation of whole schools, a portion of a child's educational activities may be shared with children from other schools. Some of his education is in a "home-base" school, but some outside it. This "outside learning" is in settings that are defined neither as black nor white, and sometimes in settings that are not even in traditional school buildings. It may range all the way from intensive work in reading to training in technical skills, and to joint efforts such as drama and athletics.

By bringing the children together on "neutral" territory friction may be dispelled; by limiting it to part-time activities no one would be deprived of his own neighborhood school; and the activities themselves provide the children with better education.

This sort of innovative approach demonstrates that the alternatives are not limited to perpetuating racial isolation on the one hand, and massively disrupting existing school patterns on the other. Without uprooting students, devices of this kind can provide an additional educational experience within an integrated setting. The child gains both ways.

Good Faith and The Courts

Where desegregation proceeds under the mandate of law, the best results require that the plans be carefully adapted to local circumstances.

A sense of compassionate balance is indispensable. The concept of balance is no stranger to our Constitution. Even First Amendment freedoms are not absolute and unlimited; rather the scales of that "balance" have been adjusted with minute care, case by case, and the process continues.

In my discussion of the status of school desegregation law, I indicated that the Supreme Court has left a substantial degree of latitude within which specific desegregation plans can be designed. Many lower courts have left a comparable degree of latitude. This does not mean that the courts will tolerate or the Administration condone evasions or subterfuges; it does mean that if the essential element of good faith is present, it should ordinarily be possible to achieve legal compliance with a minimum of educational disruption, and through a plan designed to be responsive to the community's own local circumstances.

This matter of good faith is critical.

Thus the far-sighted local leaders who have demonstrated good faith by smoothing the path of compliance in their communities have helped lay the basis for judicial attitudes taking more fully into account the practical problems of compliance.

How the Supreme Court finally rules on the major issues it has not yet determined can have a crucial impact on the future of public education in the United States.

Traditionally, the Court has refrained from deciding Constitutional questions until it became necessary. This period of legal uncertainty has occasioned vigorous controversy over what the thrust of the law should be.

As a nation, we should create a climate in which these questions, when they finally are decided by the Court, can be decided in a framework most conducive to reasonable and realistic interpretation.

We should not provoke any court to push a Constitutional principle beyond its ultimate limit in order to compel compliance with the court's essential, but more modest, mandate. The best way to avoid this is for the nation to demonstrate that it does intend to carry out the full spirit of the Constitutional mandate.

POLICIES OF THIS ADMINISTRATION

It will be the purpose of this Administration to carry out the law fully and fairly. And where problems exist that are beyond the mandate of legal requirements, it will be our purpose to seek solutions that are both realistic and appropriate.

I have instructed the Attorney General, the Secretary of Health, Education and Welfare, and other appropriate officials of the Government to be guided by these basic principles and policies:

Principles of Enforcement

—Deliberate racial segregation of pupils by official action is unlawful, wherever it exists. In the words of the Supreme

Court, it must be eliminated "root and branch"—and it must be eliminated at once.

—Segregation of teachers must be eliminated. To this end, each school system in this nation, North and South, East and West, must move immediately, as the Supreme Court has ruled, toward a goal under which "in each school the ratio of White to Negro faculty members is substantially the same as it is throughout the system."

—With respect to school facilities, school administrators throughout the nation, North and South, East and West, must move immediately, also in conformance with the Court's ruling, to assure that schools within individual school districts do not discriminate with respect to the quality of facilities or the quality of education delivered to the children within the district.

—In devising local compliance plans, primary weight should be given to the considered judgment of local school boards—provided they act in good faith, and within Constitutional limits.

—The neighborhood school will be deemed the most appropriate base for such a system.

—Transportation of pupils beyond normal geographic school zones for the purpose of achieving racial balance will not be required.

—Federal advice and assistance will be made available on request, but Federal officials should not go beyond the requirements of law in attempting to impose their own judgment on the local school district.

—School boards will be encouraged to be flexible and creative in formulating plans that are educationally sound and that result in effective desegregation.

—Racial imbalance in a school system may be partly *de jure* in origin, and partly *de facto*. In such a case, it is appropriate to insist on remedy for the *de jure* portion, which is unlawful, without insisting on a remedy for the lawful *de facto* portion.

—*De facto* racial separation, resulting genuinely from housing patterns, exist in the South as well as the North; in neither area should this condition by itself be cause for Federal enforcement actions. *De jure* segregation brought about by deliberate schoolboard gerrymandering exists in the North as the South; in both areas this must be remedied. In all respects, the law should be applied equally, North and South, East and West.

This is one nation. We are one people. I feel strongly that as Americans we must be done, now and for all future time, with the divisive notion that these problems are sectional.

Policies for Progress

—In those communities facing desegregation orders, the leaders of the communities will be encouraged to lead—not in defiance, but in smoothing the way of compliance. One clear lesson of experience is that local leadership is a fundamental factor in determining success or failure. Where leadership has been present, where it has been mobilized, where it has been effective, many districts have found that they could, after all, desegregate their schools successfully. Where local leadership has failed, the com-

munity has failed—and the schools and the children have borne the brunt of that failure.

—We shall launch a concerted, sustained and honest effort to assemble and evaluate the lessons of experience: to determine what methods of school desegregation have worked, in what situations, and why—and also what has not worked. The Cabinet-level working group I recently appointed will have as one of its principal functions amassing just this sort of information and helping make it available to the communities in need of assistance.

—We shall attempt to develop a far greater body of reliable data than now exists on the effects of various integration patterns on the learning process. Our effort must always be to preserve the educational benefit for the children.

—We shall explore ways of sharing more broadly the burdens of social transition that have been laid disproportionately on the schools—ways, that is, of shifting to other public institutions a greater share of the task of undoing the effects of racial isolation.

—We shall seek to develop and test a varied set of approaches to the problems associated with "*de facto*" segregation, North as well as South.

—We shall intensify our efforts to ensure that the gifted child—the potential leader—is not stifled intellectually merely because he is black or brown or lives in a slum.

—While raising the quality of education in all schools, we shall concentrate especially on racially-impacted schools,

and particularly on equalizing those schools that are furthest behind.

Words often ring empty without deeds. In government, words can ring even emptier without dollars.

In order to give substance to these commitments, I shall ask Congress to divert $500 million from my previous budget requests for other domestic programs for Fiscal 1971, to be put instead into programs for improving education in racially-impacted areas, North and South, and for assisting school districts in meeting special problems incident to court-ordered desegregation. For Fiscal 1972, I have ordered that $1 billion be budgeted for the same purposes.

I am not content simply to see this money spent, and then to count the spending as the measure of accomplishment. For much too long, national "commitments" have been measured by the number of Federal dollars spent rather than by more valid measures such as the quality of imagination displayed, the amount of private energy enlisted or, even more to the point, the results achieved.

If this $1.5 billion accomplishes nothing, then the commitment will mean nothing.

If it enables us to break significant new ground, then the commitment will mean everything.

This I deeply believe:

Communities desegregating their schools face special needs—for classrooms, facilities, teachers, teacher training—and the nation should help meet those needs.

The nation also has a vital and special stake in upgrading education where de facto segregation persists—and where extra efforts are needed if the schools are to do their job. These schools, too, need extra money for teachers and facilities.

Beyond this, we need to press forward with innovative new ways of overcoming the effects of racial isolation and of making up for environmental deficiencies among the poor.

I have asked the Vice President's Cabinet Committee on School Desegregation, together with the Secretary of Health, Education and Welfare, to consult with experts in and out of government and prepare a set of recommended criteria for the allocation of these funds.

I have specified that these criteria should give special weight to four categories of need:

—The special needs of desegregating (or recently desegregated) districts for additional facilities, personnel and training required to get the new, unitary system successfully started.

—The special needs of racially-impacted schools where *de facto* segregation persists—and where immediate infusions of money can make a real difference in terms of educational effectiveness.

—The special needs of those districts that have the furthest to go to catch up educationally with the rest of the nation.

—The financing of innovative techniques for providing educationally sound inter-racial experiences for children in racially isolated schools.

This money—the $500 million next year, and $1 billion in Fiscal 1972—must come from other programs. Inevitably, it represents a further reordering of priorities on the domestic scene. It represents a heightened priority for making school desegregation work, and for helping the victims of racial isolation learn.

Nothing is more vital to the future of our nation than the education of its children; and at the heart of equal opportunity is equal educational opportunity. These funds will be an investment in both the quality and the equality of that opportunity.

This money is meant to provide help *now*, where help is needed now.

As we look to the longer-term future, it is vital that we concentrate more effort on understanding the process of learning—and improving the process of teaching. The educational needs we face cannot be met simply with more books, more classrooms and more teachers—however urgently these are needed now in schools that face shortages. We need more effective methods of teaching, and especially of teaching those children who are hardest to reach and most lacking in a home environment that encourages learning.

In my message on education reform earlier this month, I proposed creation of a National Institute of Education to conduct and to sponsor basic and applied educational research—with special emphasis on compensatory education for the disadvantaged, on the Right to Read, on experimental schools and on the use of television for educational purposes.

I repeat that proposal—and I ask that the Congress consider it a matter of high priority.

A FREE AND OPEN SOCIETY

The goal of this Administration is a free and open society. In saying this, I use the words "free" and "open" quite precisely.

Freedom has two essential elements: the *right* to choose, and the *ability* to choose. The right to move out of a mid-city slum, for example, means little without the means of doing so. The right to apply for a good job means little without access to the skills that make it attainable. By the same token, those skills are of little use if arbitrary policies exclude the person who has them because of race or other distinction.

Similarly, an "open" society is one of open choices—and one in which the individual has the mobility to take advantage of those choices.

In speaking of "desegregation" or "integration," we often lose sight if what these mean within the context of a free, open, pluralistic society. We cannot be free, and at the same time be required to fit our lives into prescribed places on a racial grid—whether segregated or integrated, and whether by some mathematical formula or by automatic assignment. Neither can we be free, and at the same time be denied—because of race—the right to associate with our fellow-citizens on a basis of human equality.

An open society does not have to be homogeneous, or even fully integrated. There is room within it for many communities. Especially in a nation like America, it is natural that people with a common heritage retain special ties; it is natural and right that we have Italian or Irish or Negro or Norwegian neighborhoods; it is natural and right that members of those

communities feel a sense of group identity and group pride. In terms of an open society, what matters is mobility: the right and the ability of each person to decide for himself where and how he wants to live, whether as part of the ethnic enclave or as part of the larger society—or, as many do, share the life of both.

We are richer for our cultural diversity; mobility is what allows us to enjoy it.

Economic, educational, social mobility—all these, too, are essential elements of the open society. When we speak of equal opportunity we mean just that: that each person should have an equal chance at the starting line, and an equal chance to go just as high and as far as his talents and energies will take him.

This Administration's programs for helping the poor, for equal opportunity, for expanded opportunity, all have taken a significantly changed direction from those of previous years—and those principles of a free and open society are the keys to the new direction.

Instead of making a man's decisions for him, we aim to give him both the *right* and *ability* to choose for himself—and the mobility to move upward. Instead of creating a permanent welfare class catered to by a permanent welfare bureaucracy, for example, my welfare reform proposal provides job training and a job requirement for all those able to work—and also a regular Family Assistance payment instead of the demeaning welfare handout.

By pressing hard for the "Philadelphia Plan," we have sought to crack the color bar in the construction unions—and thus to give black and other minority Americans both the right and

the ability to choose jobs in the construction trades, among the highest paid in the nation.

We have inaugurated new Minority Business Enterprise programs—not only to help minority members get started in business themselves, but also, by developing more black and brown entrepreneurs, to demonstrate to young blacks, Mexican-Americans and others that they, too, can aspire to this same sort of upward economic mobility.

In our education programs, we have stressed the need for far greater diversity in offerings to match the diversity of individual needs—including more and better vocational and technical training, and a greater development of 2-year community colleges.

Such approaches have been based essentially on faith in the individual—knowing that he sometimes needs help, but believing that in the long run he usually knows what is best for himself. Through them also runs a belief that education is the key that opens the door to personal progress.

As we strive to make our schools places of equal educational opportunity, we should keep our eye fixed on this goal: To achieve a set of conditions in which neither the laws nor the institutions supported by law any longer draw an invidious distinction based on race; and going one step further, we must seek to repair the human damage wrought by past segregation. We must give the minority child, that equal place at the starting line that his parents were denied—and the pride, the dignity, the self-respect, that are the birthright of a free American.

We can do no less and still be true to our conscience and our Constitution. I believe that most Americans today, whether North or South, accept this as their duty.

The issues involved in desegregating schools, reducing racial isolation and providing equal educational opportunity are not simple. Many of the questions are profound, the factors complex, the legitimate considerations in conflict, and the answers elusive. Our continuing search, therefore, must be not for the perfect set of answers, but for the most nearly perfect and the most constructive.

I am aware that there are many sincere Americans who believe deeply in instant solutions and who will say that my approach does not go far enough fast enough. They feel that the only way to bring about social justice is to integrate all schools now, everywhere, no matter what the cost in the disruption of education.

I am aware, too, that there are many equally sincere citizens—North and South, black and white—who believe that racial separation is right, and wish the clock of progress would stop or be turned back to 1953. They will be disappointed, too.

But the call for equal educational opportunity today is in the American tradition. From the outset of the nation, one of the great struggles in America has been to transform the system of education into one that truly provided equal opportunity for all. At first, the focus was on economic discrimination. The system of "fee schools" and "pauper schools" persisted well into the 19th century.

Heated debates preceded the establishment of universal free public education—and even in such States as New York, New Jersey and Connecticut, the system is barely a century old.

Even today, inequities persist. Children in poor areas often are served by poor schools—and unlike the children of the

wealthy, they cannot escape to private schools. But we have been narrowing the gap—providing more and better education in more of the public schools, and making higher education more widely available through free tuition, scholarships and loans.

In other areas, too, there were long struggles to eliminate discrimination that had nothing to do with race. Property and even religious qualifications for voting persisted well into the 19th century—and not until 1920 were women finally guaranteed the right to vote.

Now the focus is on race—and on the dismantling of all racial bars to equality of opportunity in the schools. As with the lowering of economic barriers, the pull of conscience and the pull of national self-interest both are in the same direction. A system that leaves any segment of its people poorly educated serves the nation badly; a system that educates all of its people well serves the nation well.

We have overcome many problems in our 190 years as a nation. We can overcome this problem. We have managed to extend opportunity in other areas. We can extend it in this area. Just as other rights have been secured, so too can these rights be secured—and once again the nation will be better for having done so.

I am confident that we can preserve and improve our schools, carry out the mandate of our Constitution, and be true to our national conscience.

* * * * * *

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August 17, 1970

The Honorable Clerk of Supreme Court
of the United States
Washington, D.C. 20543

Re: Swann et al v. Charlotte-Mecklenburg Board of Education et al, No. 281, October Term 1970—Consent to Filing Brief Amicus Curiae.

Dear Sir:

Pursuant to Rule 42 to the Supreme Court Rules, the Charlotte-Mecklenburg Board of Education consents to the Honorable Claude R. Kirk, Jr., Governor of the State of Florida, filing a brief Amicus Curiae in the above action now pending in the Supreme Court.

Very sincerely yours,

Benj. S. Horack

/k

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 281

JAMES E. SWANN, et al.,
Petitioners

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.,
Respondents.

CONSENT

Pursuant to Rule 42 of the Rules of the Supreme Court, James E. Swann, et al., Petitioners, do hereby consent to the filing of brief amicus curiae by the Honorable Claude R. Kirk, Jr., Governor of the State of Florida.

This 31st day of August, 1970.

J LeVONNE CHAMBERS
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216 West Tenth Street
Charlotte, North Carolina

Attorneys for Petitioners

37C

IMPLEMENTATION

OF

THE FIFTH CIRCUIT COURT OF APPEALS ORDER

NO. 30032

Benjamin C. Willis
Superintendent of Schools
August 24, 1970

The School Board of Broward County, Florida
1320 Southwest Fourth Street
Fort Lauderdale, Florida 33312

For dedicated service to education in Broward County and for performance above and beyond the call of defined duties, I gratefully acknowledge the assistance of the following people in the formulation and compilation of this document.

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TOPICAL OUTLINE

Commendation

Historical Background and Accomplishments

Concerns of Implementation

Discriminatory Aspects and Conclusions

Imposed Mediocrity

Summary

The imposition of a social decree can be as delicate as the dew, as omnipotent as the sun, and as accepted as both—it is the timing that that makes it bitter or sweet.

INTRODUCTION

On April 30, 1970, the School Board of Broward County, Florida accepted from Judge Cabot the final order of District Court for achieving a "unitary school system" in Broward County. The Board appreciates the fact that Judge Cabot carefully considered its own plan for school integration which he measured against constitutional standards.

In his comprehensive review of the matter, Judge Cabot supported the Board's contention that the pairing of schools is educationally unsound by specifically rejecting the recommendations for pairing of schools submitted by the Desegregation Consulting Center with whom staff members of the Broward School System had worked on orders of the District Court itself.

In this current review of the issue, the School Board of Broward County and its staff wishes to pay tribute to the careful procedures and judicious understanding of Judge Cabot in formulating a decision which, while it was a difficult one to execute in a period of three and one-half months, has been accomplished without a serious disruption of the improving race relations in our community and without threatening a sound instructional program for the 120,000 elementary and secondary school students in Broward County.

The School Board of Broward County is dismayed at the untimely and seemingly arbitrary ruling of the Fifth Circuit Court of Appeals in New Orleans which so abruptly dismisses the "decidedly impressive" efforts of its staff members to effect, by the opening of school on August 31, 1970, the order of Judge Cabot, which was accepted, developed, and implemented in good faith. It is to Judge Cabot's credit and it is a measure

of his astute grasp of the issues involved that he provided an adequate, if not ample, time period within which multitudinous problems could be defined and solutions found.

HISTORICAL BACKGROUND AND ACCOMPLISHMENTS

Even prior to the decision handed down by Judge Cabot, the Broward School Board, its Superintendent and Staff had worked in good faith to meet the requirements for a unitary school system as it was then understood. The plans called for an educationally sound desegregation schedule that began in the early 1960's, and was given impetus by the passage of a 108.6 million dollar bond issue in 1968. This bond issue provided facilities for an orderly change from a partially segregated system to a unitary system. All grades 6–12 were to be desegregated by a plan commensurate with sound educational research. Elementary schools were to remain as neighborhood schools.

As judicial interpretations of the 1954 decision changed, the school system worked with various agencies as necessary, always in good faith, to make the changes necessary to implement the ever new and changing guidelines that developed, seemingly on the whim of the hour. At various times they worked with representatives of the Department of Health, Education, and Welfare both at Washington and Atlanta as well as the Desegregation Consulting Center at the University of Miami.

The plans called for a desegregation schedule beginning in 1968 for completion by 1973. All secondary schools were to have been desegregated, with elementary schools remaining as neighborhood schools.

The school system has always believed in the educational soundness of the neighborhood school concept especially at the elementary level, although agencies and courts seem continually to attack the plans predicated on this concept. This order effectively destroys the neighborhood school for certain groups of students.

On March, 16, 1970, Judge Cabot ordered the School Board of Broward County to establish a unitary school system by April 9, 1970. Since that date, school boundaries have been altered to comply with the order, parents have been notified and 24,000 students have been reassigned.

A new organizational pattern was implemented to change elementary schools from grades one through six to Kindergarten through five; junior high schools from grades seven through nine to middle schools with grades six through eight; and senior high schools from grades ten through twelve to nine through twelve. Additionally, two new high schools were organized for grades nine through twelve.

A plan for teacher reassignment was devised by a group selected by the Superintendent and under this plan 1127 teachers have been reassigned to new school centers. Principals cooperated with the Personnel Division in the selection of those persons to be reassigned so they would best fit the educational needs of the schools. For example, combinations were established so that teachers would not leave a flexible school but were reassigned to another flexible school. Teachers in self-contained type school centers were reassigned, insofar as possible, to other self-contained type centers.

Teachers with experience in individualized instructional programs were assigned to schools with similar programs

wherever possible. As a part of this plan, an inservice training program was prepared and has been carried out. The program was begun with a county-wide television program conducted by the Superintendent and his staff. It was telecast into all schools. All members of the profession were given the opportunity to phone in their questions so that each person would understand the impact of the integration order on his particular situation.

Additionally, inservice programs in the form of workshops were held for teachers who were transferred from familiar programs into others with which they had no familiarity, e.g., a teacher with self-contained classroom experience transferred to an individualized program was given the opportunity to learn some of the techniques to be expected of him in 1970–71.

Human relations specialists have addressed education groups to prepare personnel for some of the problems of integration which they might encounter. There have been a total of 515 participants in a series of inservice programs.

Other human relations workshops were conducted for principals, assistant administrators, and guidance personnel to prepare them for the special problems they will have to deal with in the desegregation process. For these workshops consultants were obtained from other school systems in Florida which have experienced this change.

Special workshops were held during the week of August 10 to August 17 for teachers newly assigned to flexible school programs as a result of plans for desegregation. The number of participants was 136.

Also there has been a program of school intervisitation based on system of faculty exchange which has allowed teachers with little experience in integrated school settings to see first hand the operation of fully integrated schools.

In the current plan the percentage of teachers to be relocated reflects directly the number of students of each race at the elementary, junior, and senior high school level. This is in compliance with Judge Cabot's order for a unitary school system.

Special efforts to obtain the textbooks appropriate for the changed student body in newly integrated schools were made by the Textbook Department and the supervisory staff working with school building principals.

The Supervisor of Instructional Materials has conducted an analysis of school libraries to make sure that adequate and appropriate materials were available for students in newly integrated schools.

Budgets for the current year, which are prepared for schools on a per pupil cost basis, have already been computed on the basis of enrollments expected as a result of implementing Judge Cabot's order.

Principals have received these budgets, assigned the funds to supplies and materials categories appropriate to their instructional program for the new year, and have returned those budgets to the county for processing. A tremendous amount of supplies and materials have already been bought to support the instructional program anticipated in each school for the 1970–71 school year.

Bus routes in Broward County which cover a total of 16,000 miles per day have had to be substantially changed to accommodate new school boundaries resulting from Judge Cabot's order. Additional miles of travel required amount to an increase of 5500 miles per day, one million miles per year, at a cost of approximately $370,000. An additional 4,000 students will have to be transported; special authorization for transporting 159 students has been given because of hazardous conditions on new access routes.

The driver's day has been increased from 7½ hours to 8½ hours per day which places most of the drivers into the overtime pay category. Ten drivers have resigned because of this increase in length of working day and because of problems inherent in the integration process—real and imagined. At this point, the System needs 40 additional drivers. These drivers have to go through a minimum training program of 40 hours which requires a minimum of two weeks until that driver is hired and assigned to a permanent route.

Buildings and programs originally designed to accommodate one age group of students have been to a great extent redesigned to accommodate new groupings of students. Furniture, equipment, library books and textbooks, materials and supplies have been shifted from school to school in order to accommodate these new grade groupings and ages of students.

Broward County has a totally accredited school system in grades 1–12. This accreditation is based on adequate program and building design, adequate equipment and materials, and the training of teachers. Implementation of Judge Cabot's order required that standards be kept in mind at all times in order not to jeopardize the accreditation of the Broward County School System. Large student enrollments in the senior high

schools and the result of double sessioning of these schools has required the addition of 30 school administrators to absorb the administrative load with this size program. This cost $360,000.

The tremendous number of students shifted and the tracking problem involved in order to insure their records followed them, and followed them in a up-to-date condition, required that administrators, guidance personnel, and secretaries be employed for an additional 19 days; 53 people worked during the summer at an estimated cost of $37,000.

A primary concern of school and community leaders alike, as they planned to implement District Court orders, was the health and safety of the thousands of children who would be required to travel greater distances or over new routes to get to school. Many special provisions have been made to guarantee their welfare:

new streets and sidewalks have been built

many walk ways have been extended

new signal lights have been installed

adults have been hired as crossing guards

needed school zones and markings have been made

traffic control devices have been obtained

security officers have been assigned to some schools

Civic leaders and school personnel have worked diligently for the past four months to build healthy attitudes within the

nmunities to be most severely affected by the new endance regulations. These efforts have been aimed specific goals:

the fears of parents whose children will have to rom a familiar school to a new one

g access routes to all schools to assure safety for

; positive relationships between parents and new faculty members

izing students with the new schools they would be ng

Judge Cabot had wisely permitted a period of ad- for implementing his decision, school and community ave been able successfully to overcome the initial, notional reaction which followed the order in some ties. The importance of the factor of time cannot be phasized, for although buildings can be altered and moved on schedule, the attitudes and feelings of specially on a matter so vital as the education of their need time to adjust.

ONCERNS OF IMPLEMENTATION

cational Problems

specially alarming to the School Board of Broward Florida, to contemplate that a judicial decision made Orleans might have the effect of subverting recent efforts of the whole school system to reorganize its

instructional program in a way to provide a continuous and effective learning experience for all students. Tremendous amounts of money, time, and effort have been invested in teacher training, materials development and experimentation with innovative uses of space and time within the school day.

These massive efforts have resulted in a break-through in education organization which promises to effect great strides in educational achievement countywide. Careful planning has guaranteed that no disruption of this progress will occur in the implementation of Judge Cabot's decision; however, if school pairing is to be forced on our school communities to meet the demands of one definition of a unitary school system time and effort have been wasted and the promises to our children will remain unfulfilled.

The essential cindition of school pairing by grade levels will work in direct opposition to the reorganization of our school program which is already under way. All of these plans have been formulated seeking only to provide the best possible and most appropriate education for each child considering him only as an individual and not as a racial statistic. An essential part of a continuous individualized program is the gradual reduction of grade level barriers which can hinder student progress.

A court decision which requires segregation of students into fixed grade levels without concern for their individual needs is the result of an impaired vision which cannot discriminate the needs of an individual as an individual.

Clustering or pairing under all the court-ordered plans presented, causes a conflict in the educational continuum for the student, e.g., adjusting to a traditional program in one school, the student is then required to adjust to a flexible type program the next year.

The possible loss of the kindergartens in the affected schools because of grade assignments would be another educational loss.

Facility Problems

Relocating portable building to effect the changes.

Relocate the furniture to accomodate the size of the students.

Renovation of facility to accomodate the new age group housed in the facility, i.e., chalk boards, washrooms, and drinking fountains.

Relocate the instructional materials to correspond to the program.

People Problems

Reorientation program for the community, parents, teachers to gain reacceptance and renewed cooperation in implementing the plan.

Family adjustment to children in as many as three elementary schools with a variation in opening and closing times for each. The family readjusts to the loss of the services of the older children in supervising the younger ones in going to and from school, only to find that they must now belong to threee P.T.A.'s.

Program variation between paired schools minimizes the effectiveness of family involvement in assisting each other with school work.

Many teachers will require additional inservice training in order to utilize effectively the new instructional environment into what they have been reassigned. This disruptive effect on

the teachers will carry over to their interaction with students.

Already successfully integrated situations are destroyed, and may never be rebuilt, and the new ones required take at least as long to build as the old ones did.

Safety Problems

The clustering has not considered the time, effort, and money expended by the various communities and agencies in providing sidewalks, traffic control, crossing guards, and the marking of safety lanes required for the safe movement of students to their presently assigned schools. In addition, nine student crossings will have to be constructed over Interstate I-95, and two crossings over the Sunshine State Parkway. Construction work on I-95 presents additional problems.

Transportation Problems

Lack of trained drivers and substitute drivers.

Bus routing is circuitous, causing riding times to be unnecessarily long for the younger students.

New transportation equipment cannot be obtained, thus adjustments must be made in timing routes and school opening and closing.

DISCRIMINATORY ASPECTS AND CONCLUSIONS

Discrimination

A careful study of the Court's plans reveals it to be discriminatory in several ways. In the first place, the schools being di-

ected to pair are located within the central and more densely opulated areas of the county. Residential areas near the ocean nd in the growing western section of the county where a pre- lominance of upper-middle class white families live remain elatively unaffected. It would be difficult not to interpret this most recent court order as discriminatory in favor of these more affluent areas of the county.

In addition, any court order directing a specific reorganization of schools is discriminatory against a local community which has a unique history and characteristics of which a remote panel of judges can be only statistically aware. It is presumptuous to think that the judiciary can protect the rights of all communities before the law if it presumes to prescribe particular procedures for desegregation in the wide diversity of communities that constitute America. When judges assume the prerogatives of locally appointed school administrators, they misconstrue their proper role as impartial interpreters of the law.

In the present instance, the decision of the judges of the Fifth District Court of Appeals not only confuses the role of the judiciary and is, in effect, discriminatory against a segment of the community of Broward County—but even more alarmingly it destroys the concept of the elementary school which is not a local institution, but a national one. Should the pairing problems which have been ordered in Broward County be equally required throughout the United States, it would have the effect of subjecting the public school system to the judiciary and thus destroying it as a free American institution.

Review

The administrative and educational problems have been enumerated in detail, but demand repetition here to provide

concise reviewing of the problems. Referring to any one of the clusters, they contain people, young people, one-sixth of whom are going to school for the first time this fall. They contain the teaching staffs which have been assigned for almost four months.

It is unthinkable; it is amazing, that anyone could interpret this as a situation that could be completely redirected as suddenly as the court demands. The more information one gets from those who are familiar with the schools, streets, highways, and the people the more the impracticability of a headlong rush into implementation becomes apparent. The implementation of decision on student and teacher reassignment is overwhelming. The preparation of the facility for different students and the accumulating of instructional materials for the grades assigned presents an ardous logistics problem. All of these compounded with problems of transportation, safety, and community relation makes unreasonable the implementation of the order in the manner prescribed.

The additional financial burden of accomplishing these changes would put a strain on the already strained financial condition of the system. Implementation as required would demand the expenditures of resources which could otherwise be directed towards the implementation of a desegregation which the community, parents, students, and educators had planned in good faith, worked for in good faith, and were going to implement in good faith.

The conclusion can be only that cluster/pairing using only statistics is educationally, logistically, and economically unsound.

CERTIFICATE OF SERVICE

This is to certify that copies of Brief of Amicus Curiae were served upon each of the attorneys named below by depositing the same in the United States mail, postage prepaid on this 4 day of September, 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL.,
Petitioners

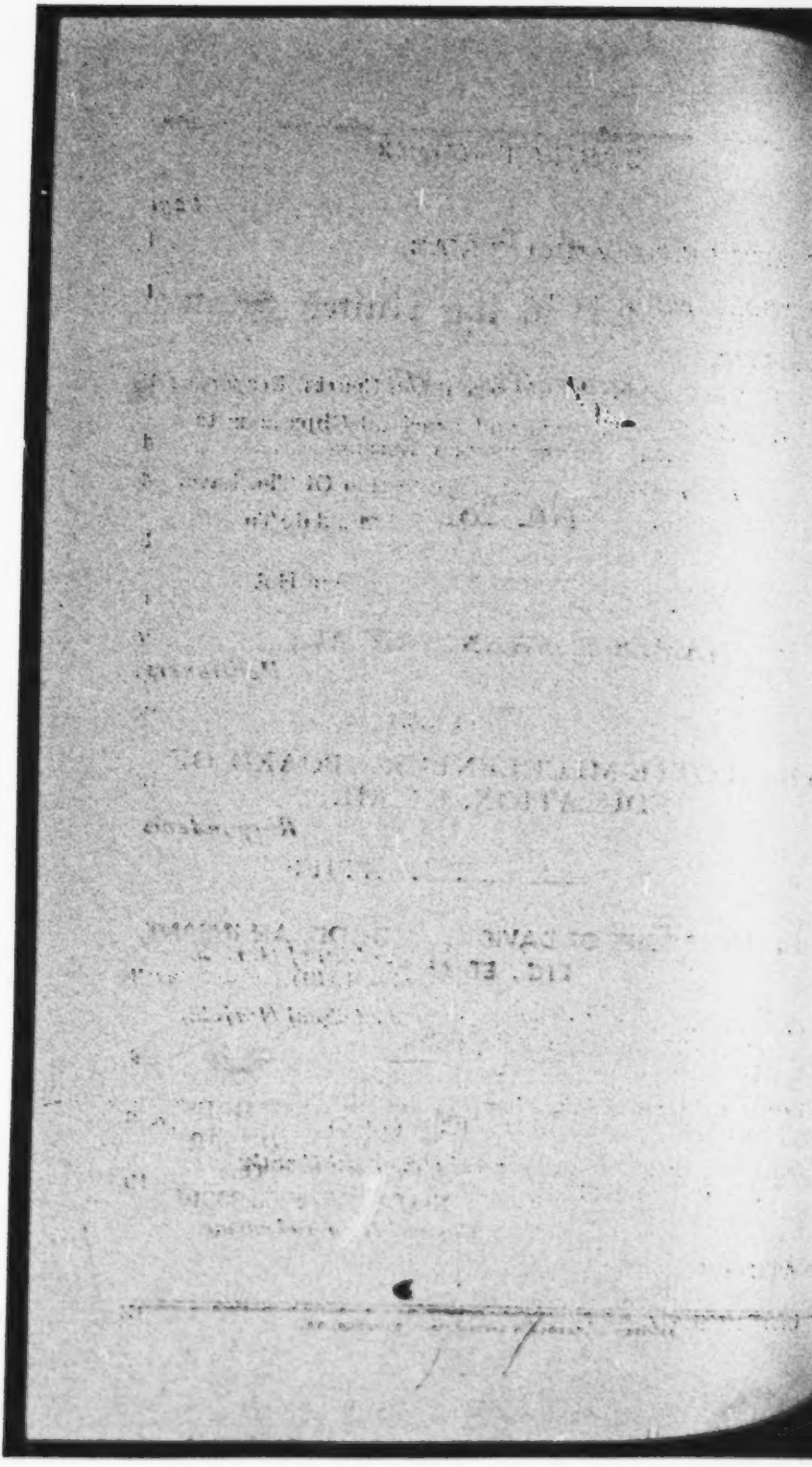
v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,
Respondents

AMICI CURIAE BRIEF OF DAVID E. ALLGOOD, AN INFANT, ETC., ET AL

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QUESTIONS ADDRESSED

al Balancing and Bussing Required or Permitted Constitution?

ace Be the Prime Consideration in School Assign-

HE INTEREST OF THE AMICI CURIAE

brief is filed on behalf of David E. Allgood, his father, Lloyd C. Allgood, and others, here-ferred to as Concerned Citizens of Norfolk, efendant-intervenors in the Norfolk, Virginia, egregation case *Beckett, et al.* v. *The School*

Board of the City of Norfolk, Virginia, et al., now on appeal to the Court of Appeals for the Fourth Circuit. These defendant-intervenors are a class consisting of Norfolk school children and their parents. Most of the children were born after the 1954 *Brown* decision; many of the children are entering for the first time a school system in a state that formerly had legally segregated schools. The Concerned Citizens of Norfolk are both black and white.

The order of the district court in the Norfolk school case, according to the findings of fact contained therein, arbitrarily busses Norfolk children, many living within walking distance of a school which can accommodate them, to a distant school against their will merely to place them with children of another race.

In the present case, the children of Charlotte and Mecklenburg County, North Carolina, are under court order which affects them in the same way as the children of Norfolk are affected. The decision in this case will determine the outcome of the Norfolk case. This brief is filed with the consent of the parties to assist the court in reaching a decision that will not deny equal protection of the law to the Charlotte and Mecklenburg County children or the Norfolk children and one that will not require these children to attend a school under a plan not required by the Constitution.

ARGUMENT

I—THE FACTUAL SITUATION AND THE COURTS' RESPONSE

To describe the racial composition of Charlotte and Mecklenburg County is to describe the racial composition of Norfolk, Virginia; Atlanta, Georgia; Washington, D. C.; and every other large city or metropolitan area in the country with significant numbers of

oth blacks and whites. Each has black sections, white ections, and transitional sections. Because the white ections initially are relatively large in area they are ipt to be a considerable distance from the black areas. Historically, but particularly in the past ten to fifteen years, the black sections have grown, the transitional sections have turned black and the white sections have become transitional then black.

Even though these facts have been present in all of the city school cases, each District Court and each Court of Appeals has come up with a different set of rules for desegregating the schools. This has been justified by holdings that each case rests on its own facts. A look at what has happened within the past six months shows this is not accurate. In the present case the District Court set racial balancing as the goal and ordered into effect the plan that came closest to achieving this. The District Court in the Norfolk School case has ordered racial balancing to the extent permitted by available transportation. The District Court in Richmond, Virginia, has ordered racial balancing for the 1971/72 school year. The District Court in Roanoke, Virginia, has rejected all plans that use bussing solely to achieve racial mixing.

These widely different decisions have not been the result of different factual situations in these cities. They have been the result of different interpretations of the rulings of this court.

We have not had the lower courts experimenting with different desegregation tools and different factual situations in an effort to eliminate dual school systems. We have had the lower courts experimenting with the meaning of desegregation and the meaning of "unitary school system." The need for definitions, for objective

standards, is critical. Disruption and litigation will continue and grow until such standards are established.

Most lower courts have taken the view that *regardless of any other factors* a school system is not desegregated if some of its schools contain all or almost all black pupils or some of its schools contain all or almost all white pupils. These courts have ordered bussing to eliminate schools of all black pupils and schools of all white pupils.

If this court should decree that each school district must take all feasible steps to racially balance its pupils then we would have a fairly objective standard by which school systems could be judged. We believe, however, that such a solution or standard necessarily involves insurmountable constitutional and practical objections.

II—THE CONSTITUTIONAL AND PRACTICAL OBJECTIONS TO RACIAL BALANCING AND BUSSING

[A] A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The Court has ruled that in order for children to have equal protection of the laws, no government must effectively exclude any child from any school because of his race or color. Racial balancing, however, the goal set by the lower courts, does just this. Under any city racial balancing plan, many black and white children who live within walking distance of a school which can accommodate them will be required to ride buses to distant schools solely because of their race. They will not be allowed to attend the school closest to their home solely because of their race. This effectively excludes many from their neighborhood schools solely because of their race. It is discrimination and, as such, a denial of equal protection of the laws. It is the very thing outlawed in *Brown* v. *Board of Education,* 347 U.S. 483, 99 L.Ed. 1089, (1954).

The avowed purpose in the racial-balancing-bussing schemes is equal educational opportunity. It cannot be concluded that this will be the result unless as a matter of law (since there is no evidence on the subject) it is concluded that schools with all black pupils will be inferior to other schools regardless of any other factors which may be present.

Scores on learning, progress, or intelligence tests of black pupils attending all black schools are significantly lower than the national average. It is claimed that this proves the inferiority of schools with all black pupils and their lack of equal educational opportunity. This would not be true, however, unless each child taking these tests entered a school system with the same motivations and the same level of learning as all other children. This is not the case. Much can and should be done to raise the general educational level of the culturally-deprived but this is not a Constitutional mandate. Schools can and should have faculties chosen without regard to their color. If appropriate, such faculties may be trained to meet the special needs of pupils such as culturally-deprived children. Interscholastic activities, athletic, academic, and social, should be conducted in a nondiscriminatory manner. School zone lines should be drawn in a nondiscriminatory manner. These steps effectively desegregate schools regardless of the color of pupils, without depriving any of their constitutional rights. They will provide the equal educational opportunity required.

Exactly what an equal educational opportunity entails should be given serious consideration by this court for this is involved in all questions now presented in the school cases. It does mean that each child must be given the same *opportunity* to learn. Attempts to do more than this (such as giving culturally-deprived children

the opportunity to acquire such motivation, learning, and other factors as will place them on the same footing as others except for basic intelligence) through racial balancing and bussing, do not equalize educational opportunity, but impinge upon rights of others. The ends sought do not justify or require these means.

[B] THERE IS NO CONSTITUTIONAL MANDATE TO RACIALLY BALANCING OR BUS.

This court has held that the Constitution requires a unitary school system, one in which no child is effectively excluded from any school because of his color. This court has held that all vestiges of the dual school systems must be eliminated so that there are no longer black schools or white schools, but just schools. This court has approved desegregation plans ordered into effect by District Courts when such courts have found discrimination to exist. These previous holdings of this court do not constitute a mandate to racially balance schools or even to make reasonable attempts to do so. These holdings do not require bussing solely to mix pupils. They have been so interpreted, however, which makes it imperative that these questions now be answered.

The Constitution is and must be color-blind. It is the only way that every person can receive the equal protection of the laws. Justice Marshall, then representing the NAACP, in his brief and in oral argument before this court in *Brown* v. *Board of Education, supra,* so stated. This is the premise upon which the *Brown* decision rests.

[C] RACIAL BALANCING AND BUSSING ARE NOT REASONABLE.

Even though the term *reasonable* is one familiar to the law, its meaning varies so from person to person, lawyer to lawyer and court to court, it has no real sig-

nificance. In spite of this a few lower courts (notably those in the fourth circuit—at the direction of the fourth circuit) and certain sections of the U. S. Government have adopted a desegregation policy of reasonableness. In practice this means that a school district must do everything reasonable to racially balance its schools including rezoning, bussing, pairing, grouping and relocating schools. It is submitted that all bussing for racial reasons is unreasonable, that all rezoning for racial reasons is unreasonable and that all other "tools" when employed solely for racial reasons are unreasonable.

It has been pointed out quite correctly that all these "tools" have been used in the past for valid educational reasons and also for maintaining segregated schools. This is said to justify their use to mix colors. Certainly use of such tools for valid educational purposes is reasonable and it may result in mixing of pupils. Unless such use, however, is tied to valid educational purposes (other than mixing, if this be one) those affected will consider the use unreasonable and respond accordingly, as they have in the past. Reasonableness cannot be determined in a vacuum. It must be determined with regard to those affected and their response. It has been clearly shown by the Coleman Report and all other studies that the use of these tools solely to mix the races is not generally accepted and, where employed, the middle class (white) child does not long attend the school assigned. Unless this sad fact (of white or middle class flight) is ignored, reasonableness must rule out the use of such tools solely for mixing different colored pupils.

III—NEIGHBORHOOD SCHOOLS

In a concurring opinion in the Norfolk school case, *Brewer, et al.* v. *The School Board of the City of Norfolk, Virginia* C.A. 4th Cir. (June 22, 1970), Judge Bryan stated:

". . . I express the belief that the expertise of the Board and the seasoned judgment of the District Court can formulate a design — not impinging Brown—consisting of ungerrymandered neighborhood schools supplemented by freedom of choice and other pertinent factors . . . .

"Accordingly, on account of the peculiar layout of residential Norfolk, I think the neighborhood school plan there would be altogether valid if supplemented by the freedom of choice privilege and provision for transportation at the expense of school authorities, wherever transportation is needed to make the schools accessible to the neighborhood pupils or to those exercising their freedom of choice of other schools . . ."

This is the prayer of the Concerned Citizens of Norfolk and of concerned citizens everywhere. As we previously pointed out, the residential pattern in Norfolk (with regard to race) is basically the same as in every other city or metropolitan area with significant numbers of both races. A neighborhood plan such as this effectively excludes no one from any school because of his race. It eliminates black schools and white schools. As late as 1963 in the Norfolk school case, the NAACP was asking the court for just such a school plan. It appears that throughout the fifties and the early sixties this was the prayer of the NAACP in all school cases. If such a plan was constitutional during those years, it is constitutional now.

Opposition to neighborhood school plans is based upon the fact that such plans do not eliminate schools with only black pupils and schools with only white pupils. It is contended that the placement of schools, discriminatory housing and zoning laws, and other gov-

rnmental acts caused racially segregated housing patterns which perpetuate school segregation under neighborhood plans. It is further contended that when white children are not in an obvious majority status in a school (which will occur in any neighborhood plan) they will gradually desert the school.

We do not believe such objections are constitutionally sound. Certainly there will be schools with only black pupils and schools with only white pupils. Any constitutional objection to these can be easily eliminated, however, by the nonracial assignment of teachers and administrative personnel and by nondiscriminatory interscholastic activities.

If governmental action has caused racially segregated housing patterns, ungerrymandered school zones do perpetuate dual school systems. In the present case the district court has found as a fact that segregated housing patterns were the result of governmental action. The similarity between the housing patterns in Charlotte, Mecklenburg County and those in northern cities was declared to be more apparent than real. Such a finding must be challenged for it ignores one of the cardinal precepts of the law, that of proximate cause. Experience throughout the entire country establishes without any doubt that most neighborhoods will be racially homogeneous regardless of governmental action. This fact effectively eliminates governmental action as the cause. In the Norfolk school case, *Brewer* v. *The School Board of the City of Norfolk* 308 Fed. Supp. 1274, 1303, (1969) this was recognized by the district court which found as a fact in similar circumstances that governmental action did not play a significant part in the segregation of neighborhoods.

During the past few years all discrimination in laws relating to housing has been struck down. Laws and regulations have been put into effect which actually severely discourage private discrimination in the sale and rental of housing. The location of all new schools has been under the control of the courts for the past few years. As a result, any family wishing to move knows that it will not be limited by race in choosing a new location. Further, no one can point to any particular school and say that it would not be in its present location if the school district were all one color. *Nevertheless, objections such as this to the neighborhood plan are met by a fairly administered majority to minority freedom of choice provision.* Freedom of choice has been struck down by this Court only when there has been a finding that it was administered unfairly (*Green* v. *County School Board of New Kent County,* 391 U.S. 430, [1968]). This suggests, and it is certainly true, that the success of any freedom of choice plan depends on it being administered fairly without discrimination, *not upon it mixing any particular number of different colored bodies.* There well may be only a few transfers in any freedom of choice plan. Not surprisingly, most people wish their children to go to school with those who are from backgrounds similar to theirs. If they have a constitutional right to go to school with those of another color, must they be *forced* to exercise it?

IV—WHITE FLIGHT

Most important to any decision regarding the method of desegregation (or its meaning) is the fact that "*de jure* integration" brought about by racial balancing and bussing, does not work. The refusal of white and middle-class families to send their children to schools where their race and class does not predominate is well documented. The most dramatic example is found in

the District of Columbia. In 1954 white pupil enrollment was 39 per cent of the total (about 40,000 white pupils). Since then an ambitious program of integration (as opposed to desegregation) has been undertaken. Pupil achievement in the District, which was close to the United States norm in 1954, dropped to a point far below the United States norm in 1969. Although total student enrollment rose, the number of white pupils fell to 5.6 per cent of the total in 1969 or less than 8,500 pupils out of a total of about 149,000. A study of individual schools in the District shows that when black pupil enrollment approached 30 per cent in a school, the percentage rose to 75 per cent in about four years and quickly thereafter the school had all black pupils. Over 99 per cent of the District's black pupils attend schools where they are in the great majority.

Atlanta, Georgia, did not start its school desegregation until 1960. Its experience has been the same as Washington's. In 1960, about 60 per cent of total pupils enrolled were white. In 1970 this fell to 35 per cent. At the present rate of change, Atlanta schools will have about 90 per cent black pupils in seven to ten years. New York City has had a similar experience following its school board's requirement of racial balance.

Other cities faced with the same school situation are experiencing the same change. If the present *"de jure* integration" policies continue, our large cities soon will become all black.

The net result of all this will be inevitably the destruction of confidence in public education and the erosion of the tax base upon which all school systems depend. We have already seen the beginning of this in thousands of private schools that have sprung up and are flourishing. It is now the rule rather than the

exception for school bond issues to be defeated in referenda throughout the country. This will be the end of meaningful education for most of this country's blacks.

V—THE CIVIL RIGHTS ACT OF 1964

It was within the power of Congress, specifically granted by the 14th Amendment, to enforce the Constitutional mandate to desegregate the schools. It would be most unreasonable if this power did not include the right to define terms and to set out procedures to be followed and to be avoided. This was done in the Civil Rights Act of 1964. Desegregation does not mean racial balancing and the Act so states. Bussing is neither reasonable, required nor constitutional and the Act so states. This Act can and should be given effect as an exercise of Congress's power to enforce the 14th Amendment.

CONCLUSION

The Constitutional mandate to desegregate schools, to abolish dual school systems and all vestiges of it is met when school districts are contiguous to the schools; when zone lines are drawn in a nondiscriminatory manner without regard to race; when faculties are assigned to schools without regard to race; when interscholastic activities, academic, athletic, and social, are conducted without regard to race; when, in those school districts that have Government-imposed segregated housing patterns, there is a majority to minority transfer provision; and where deviations from the above are for valid educational reasons only. This plan will not mix enough different colored pupils to suit many but it is the only plan that meets the Constitutional test of equal educational opportunity and will not completely destroy the public educational system in this country. It is the only plan that will assure to all the equal protection of the law.

Respectfully submitted,

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I.

INTRODUCTION

The Commonwealth of Virginia, because of the immediate effect that the decision in this case will have on many thousands of its citizens, requests the Court to consider its views outlined in this brief. It seeks modification of the opinions of both of the courts below and an expression of principles that will guide all courts throughout the nation in this most difficult area of basic human relationships.

II.

THE INTEREST OF VIRGINIA

In Virginia, segregation by race in the public schools was required by constitution and statute prior to 1954. In fact, one of the cases decided here under the style of *Brown* v. *Board of Education*[1] came to this Court from a Virginia locality.[2]

It would be erroneous to assert that Virginia localities welcomed *Brown I* and began at once to put into effect the remedial steps required by *Brown II*[3]; in most places they did not. There was, instead, intense public opposition and much delay. As a result, litigation arose in many communities.[4] The march toward what more recently has been termed

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[1] 347 U.S. 483 (1954).

[2] *Davis* v. *County School Bd.*, 103 F. Supp. 337 (E.D.Va. 1952), reversed by the *Brown* decisions.

[3] 349 U.S. 294 (1955).

[4] *See, e.g., Thompson* v. *County School Bd.*, 144 F. Supp. 239 (1956), *aff'd sub. nom School Bd.* v. *Allen*, 240 F.2d 59 (1956), *cert. denied*, 353 U.S. 910, 911 (1957), *opinion supplemented*, 159 F. Supp. 567 (1957), *aff'd* 252 F.2d 929 (1958), *cert. denied*, 356 U.S. 958 (1958), *injunction dissolved*, 204 F. Supp. 620 (1962); *Daniels* v. *School Bd.*, 145 F. Supp. 261 (1956); *Atkins* v. *School Bd.* 148 F. Supp. 430 (1957), *aff'd* 246 F.2d 325 (1957), *cert. denied*, 355 U.S. 855 (1957); *James* v. *Almond*, 170 F.Supp. 331 (1959), *appeal dismissed*, 359 U.S. 1006 (1959).

a "unitary" system of public schools proceeded inexorably in Virginia but, for a decade, it was an unwilling march prodded by the courts of the United States.

It is now fair to say that Virginia localities[5] are attempting in good faith to comply with the mandate of the Equal Protection Clause. But the courts have failed to make it clear exactly what compliance entails. The dual system must be replaced by a unitary school system,[6] but how this is to be accomplished is still far from apparent.

The result has been a chaotic condition in several of Virginia's school systems. Two of its largest school divisions, as the local systems are called, are located in Richmond and Norfolk, Virginia's two largest cities. Litigation affecting both of these cities has produced orders in August of this year substantially rearranging school attendance areas and inevitably requiring extensive pupil busing.[7] This has resulted in major disruption of public education and confusion among white and black parents, students, faculty and staff; it often has led to resentment and even fear.

The educational process is difficult enough without such disruption. The time has come to think first of education and the whole body of children to be educated. That, in our view, can be accomplished only by the establishment by this Court of the parameters within which school officials are to act and by which their action is to be judged by the courts.

The factual situation existing in Charlotte, North Carolina, presents certain striking similarities to the situations presented by Norfolk and Richmond. All three cities are

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[5] In Virginia local school boards, pursuant to the State constitution, have the primary responsibility to operate the public schools.

[6] *Green* v. *County School Bd.*, 391 U.S. 430, 438 (1968); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19, 21 (1968).

[7] *Bradley* v. *School Bd.*, Civil Action No. 3353 (E.D. Va., Aug. 17, 1970) (Richmond); *Beckett* v. *School Bd.*, Civil Action No. 2214 (E.D. Va., Aug. 27, 1970) (Norfolk).

localities where, prior to 1954, segregation by race was required by law. In all three, the percentage of black students in the school population is significant, the 70% white and 30% black ratio of Charlotte becoming 60% white and 40% black in Norfolk and reversing to less than 40% white and more than 60% black in Richmond.

Plans proposed by HEW and others presented by the Norfolk and Richmond School Boards were rejected because, the courts said, racial imbalance was not eliminated in sufficient degree.[8] That result obtains equally in this case from Charlotte. In each of these cases the court's solution was to require greater racial balance and, inevitably, massive compulsory busing of students.

The question in those cases, as here, was whether racial balance is an end in itself; if substantial racial balance must be achieved, regardless of other educational factors that are of significance in the situation presented, then the District Courts were right in Charlotte and Richmond and the Court of Appeals was right in Norfolk. If, as we urge, other factors are also relevant, those courts were in error.

What will be decided here is, therefore, entirely relevant in the two most critical Virginia situations. For that reason, the decision here may be determinative in Virginia. Therein lies Virginia's interest.

There are, of course, substantial points of difference between Charlotte and the Virginia cities. The difference in the racial mix has already been mentioned. This results primarily from the fact that, by and large, the Norfolk and Richmond school divisions are entirely urban rather than both rural and urban as is the case in Charlotte. Norfolk is

[8] *Bradley* v. *School*, Civil Action No. 3353 (E.D. Va., Aug. 17, 1970) (memorandum opinion); *Brewer* v. *School Bd.*, No. 14,544 (4th Cir., June 22, 1970), *cert. denied*, 38 U.S.L.W. 3522 (U.S. June 29, 1970) (No. 1753).

adjoined by two cities, Chesapeake and Virginia Beach; in them the percentage of black students is relatively small. Richmond is bounded by two counties, Chesterfield and Henrico; again their black student percentages are drastically lower than is that of Richmond. As urban systems, the two Virginia cities do not normally provide transportation for pupils. The transportation problem presented by the racial balance requirement is therefore more acute because of the lack of facilities.

A brief word may be relevant as to the Norfolk and Richmond plans that were rejected by the United States courts. In both cities, the rejected plans provide for the effective integration of all senior high schools and all junior high schools or middle schools. In both plans, the respective school boards go far beyond neutral or objective zoning plans, gerrymandering natural attendance zones in a manner designed to increase the degree of integration in the systems and to overcome the segregative effects of racial residential patterns. Both plans include a majority-to-minority transfer provision. The Richmond plan calls for "learning centers" where weekly or bi-weekly interracial educational experiences are to be provided for each child in the system who attends a school with a population 90% or more of the same race. Principles of the Norfolk plan were explicitly based on the best available social science data, including the highly regarded research projects sponsored by the U.S. Office of Education[9] and the U.S. Commission on Civil Rights.[10]

In sum, both plans adopt a neighborhood or community concept in the sense that attendance areas for elementary

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[9] *Equality of Educational Opportunity,* Office of Education, U.S. Dept. of Health, Education and Welfare (1966).

[10] *Racial Isolation in the Public Schools,* U.S. Comm'n on Civil Rights (1967).

schools are served by one or several schools and the advantages of convenience and close school-family relationships are retained where practical. Overlaying this concept, however, is the use in each plan of all feasible alternatives to maximize integration. A number of subsidiary concepts, such as pairing, consolidation and closing of schools, are incorporated in the plans. No alternative plan was offered at any hearing which would have the effect of increasing the amount of desegregation that would result from the school board plans, short of a plan which would require compulsory massive busing to attain racial balance throughout each system.

The question before the Virginia federal courts was, accordingly, much the same as that presented in Charlotte: is racial balance a constitutional requirement? The difficulties of busing in an urban system were presented to the courts in both Virginia cases. The expense of initiation of school transportation systems, a factor not present in Charlotte, and the inadequacy of existing public transportation systems were explored. The plaintiffs nevertheless sought approval of plans requiring cross-busing, even of the youngest children. Those plans, in essence, received ultimate judicial confirmation.

Virginia opposes racial balance as a constitutional requirement. It believes that such balance must be considered; but it should not be the controlling consideration. It seems to us that racial balance alone was the determining factor in Charlotte, Norfolk and Richmond. We suggest to the Court that racial balance is not a desideratum in itself and that this Court should declare the constitutional mandate to be the best available quality of education for *all* regardless of race or color.

III.

THE ISSUE BEFORE THE COURT

The central issue before the Court is whether racial balance is an end in itself, required by the Constitution without regard to other educational considerations or other values.

IV.

SUMMARY OF ARGUMENT

A.

The Origin Of Racial Segregation Is Irrelevant

The proposition that one set of rules applies where the origin of racial segregation was *de jure* and another where the origin was *de facto* is without substance. History is irrelevant to the enforcement of a constitutional right. Racial segregation has almost everywhere received State support. Thus no racial segregation is purely *de facto*. Because the State maintains public schools, a segregated system constitutes State action. Its existence, without regard to its origin, thus raises a substantial constitutional question. The same rules must apply to non-unitary systems wherever found.

B.

Racial Balance Is Not Required

Racial balance in the schools is not a constitutional imperative. No decision of this Court has established such a mandate. It is effective neither to accomplish integration nor to improve education. Racial balance once prescribed may be outdated by population shifts before it becomes effective. The effort to attain racial balance promotes resegre-

gation and movement to suburbia. These results defeat the goal of racial balancing, adversely affect education and contribute to urban deterioration.

C.

The Highest Quality Of Education Must Be The Goal

The goal of the desegregation movement must be to achieve the highest quality of education. That has been the thrust of previous decisions of this Court. Equal opportunity is not to be measured purely by equality of resource application and racial balance; that system best conforms to the constitutional mandate that provides, through equal opportunity for every student, the highest level of achievement for all students of every race, compensating appropriately for any deficiencies that may have resulted from previous racial segregation. The court below failed to recognize that the best educational achievement for all is what the Constitution demands.

D.

The Court Below Misapplied Its Rule Of Reason

The court below unduly emphasized racial balance. It also failed to recognize the relevance of the neighborhood school and the disadvantages for all races of extensive compulsory busing. The neighborhood school has obvious social and educational advantages, particularly at the elementary level. It can be used with a number of related techniques reasonably applied, without destroying neighborhood advantages. Modern social scientists have developed many considerations that ought to be taken into account in devising the plan that, giving weight to all relevant disparities, best promotes the educational achievement of students of all races.

V.

ARGUMENT

A.

The Origin Of Racial Segregation Is Irrelevant

In its consideration of the question presented here, the Court of Appeals, in the plurality opinion, went to some lengths to determine that the segregated pattern of housing in Charlotte results from governmental action. We consider this investigation irrelevant. We consider it more than irrelevant; it may be pernicious. It could lead to one set of rules applying in one area of our nation and another set applying in another. The constitutional right at issue here should be available to all citizens without regard to the fortuitous circumstance of the racial history of the places in which they live.

An Unsound Distinction

Such an investigation presupposes that one set of rules applies where the origin of racial segregation was *de jure* and another set where the origin was *de facto*. As an example of this distinction, reference is made to *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967). There, the Sixth Circuit held that the school board has no duty to bus students ". . . for the sole purpose of alleviating racial imbalance that it did not cause . . . ." (369 F.2d at 61).[11]

First, the question is not whether the State action is limited to schools; it is a matter of State action in all phases of race relationships such as public housing and zoning. In this context, it is probable that all racial segregation in the

[11] See also *Bell* v. *School City*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

United States, wherever occurring, has at some time been maintained or supported by governmental action.[12] Thus there is no such thing as *de facto* segregation that is not of *de jure* origin in some degree. The distinction purportedly made in *Deal* cannot, then, be factually supported.[13]

State Action is Inevitable

But the vice lies deeper. Public schools are creatures of the State, and a State may not continue to operate through its local school boards or otherwise a system which denies a constitutional right. Thus, a school system which denies equal educational opportunity infringes protected rights. Whether such a system was State created or State assisted or merely State perpetuated is beside the point. If it deprives children of equal educational opportunity, the Equal Protection Clause is infringed.

Uniformity of Constitutional Rights

This conclusion is not only sound doctrine but desirable public policy. If non-unitary school systems must be eliminated because they perpetuate racial segregation, they must be extirpated everywhere and not just in the former Confederate states. A constitutional right ought not to be en-

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[12] In Appendix C to his opinion, Judge Hoffman complied a summary of governmental action in the various states. *Beckett* v. *School Bd.*, 308 F. Supp. 1274, 1304, 1311-15. See also *Racial Isolation in The Public Schools*, U.S. Comm'n on Civil Rights 245, 254-59 (1967); M. Weinberg, *Race and Place*, Office of Education, U.S. Dept. of Health, Education and Welfare (1967).

[13] See Freund, *Civil Rights and the Limits of Law*, 14 Buffalo L. Rev. 199, 205 (1964). On July 7, 1970, Ramsey Clark, former Attorney General of the United States, testifying before the Senate Select Committee on Equal Educational Opportunity, said:

"In fact, there is no *de facto* segregation. All segregation reflects some past actions of our governments."

forced in Virginia and denied enforcement in Ohio or Indiana because of the vagaries of history.

Professor Bickel has commented on this double standard. As he points out: "Outside the South . . . school segregation is massive, and has, indeed, increased substantially in recent years . . . caused mainly by residential patterns. Nevertheless, very few federal courts have tried to intervene [and] none has done so without qualification."[14]

In commenting on the incongruity of different rules issuing "out of the same federal judiciary" Professor Bickel spoke of "one binding rule of constitutional law for Manhasset, New York" and "a different rule of constitutional law for New York City."[15]

Such a situation, without precedent in constitutional doctrine, cannot be tolerated. Citizens are entitled to enforcement of constitutional rights evenly and consistently throughout the United States. The Constitution requires no less.[16]

B.

Racial Balance Is Not Required

Opponents of the school board plans insist upon substantial racial balancing in *each* school in a system. If, as in

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[14] A. Bickel, *The Supreme Court and the Idea of Progress* 131 (1970). See also *Racial Isolation in the Public Schools, supra,* at 2-10.

[15] *Id.* at p. 133. The Manhasset decision is found in *Blocker* v. *Board of Educ.,* 229 F. Supp. 709 (E.D.N.Y. 1964).

[16] This is, among other things, the purpose of S. 4167, 91st Cong., 2d Sess. (1970), introduced by Senator William B. Spong of Virginia (and a similar bill introduced in the House of Representatives). Hearings on these bills have been held before appropriate committees in both houses. See also Sobeloff and Winter, JJ., concurring specially in *Brewer* v. *School Bd.,* No. 14,544 (4th Cir., June 22, 1970) (Norfolk).

Richmond, the overall student population ratio is 60% black and 40% white, these opponents contend that each school in the system must have substantially this ratio both of pupils and teachers.[17]

It is submitted that the racial balance concept is neither required by the Constitution nor is in the public interest. Indeed, if established as the "law of the land," its consequences could be disastrous to public education.

The Decisions of This Court

What *Brown I* required, to assure equal educational opportunity, was the elimination of racial segregation in the schools. Subsequent cases have added the affirmative mandate that dual school systems must be eliminated and unitary systems established.[18] These are the terms with which local school boards and lower courts have struggled. Some have construed them to require racial balancing; others, more perceptive we think, have recognized that this Court has never projected a mechanistic solution for a problem of such delicacy and diversity. *Brown I* states:

> "... because of the wide applicability of this decision, and because of the great variety of local conditions, the formulating of decrees in these cases presents problems of considerable complexity." 347 U.S. at 495.

When the Court came to the problem of formulating decrees, it provided substantial latitude:

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[17] *Beckett* v. *School Bd.*, 308 F. Supp. 1274, 1276 (E.D.Va. 1969), stating the position of the plaintiffs. See Winter and Sobeloff, JJ., concurring in part and dissenting in part, in the court below in this case.

[18] *Green* v. *County School Bd.*, 391 U.S. 430 (1968); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana School Bd.*, 396 U.S. 290 (1970).

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." 349 U.S. at 300.

Further along in that opinion, Mr. Chief Justice Warren recognized that there were a number of areas of consideration. He said:

> "To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at 300-01.

The approach remains unchanged. In *Green* v. *County School Board,* 391 U.S. 430 (1968), Mr. Justice Brennan said, speaking for the Court:

> "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in the light of the circumstances present and the options available in each instance." 391 U.S. at 439.

See also *United States* v. *Montgomery Board of Education,* 395 U.S. 225, 235 (1969). And Mr. Chief Justice Burger has made clear his view that there are a number of areas other than (but including) transportation that must be given consideration. He said, concurring in the result in *Northcross* v. *Board of Education,* 397 U.S. 232 (1970):

"... we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." 397 U.S. at 237.

This Court could hardly have more clearly stated its refusal to enunciate a mechanistic rule of racial balance in every case.

Racial Balance is Illusory

The issue before this Court is whether such a rule should now be established. Those who support it argue that it has the virtue of exactitude; that it would be easy for courts to adopt and administer; and that it would put an end to the inevitable litigation resulting from the application of a less definitive rule.

We suggest that these views misconceive both the constitutional requirements and the realities of public education.

The racial mix varies widely among the cities and counties of this country. The range is from school districts which are perhaps 90% black (Washington, D. C. and Clarendon County, South Carolina[19]) to many districts which are nearly all white. The demography also constantly varies, especially within cities. The population ratio changes as citizens move to suburban areas, and white and black families

[19] See *Brunson* v. *Board of Trustees*, No. 14,571 (4th Cir., June 5, 1970).

are constantly moving within cities. Racial balance established one year would rarely be valid two or three years later.

The City of Richmond is not atypical. In 1960 the school population ratio was 55% black and 45% white. Prior to the annexation of a portion of Chesterfield County on January 1, 1970, population shifts—some perhaps related to integration, but most to the normal desire to live in suburbia—had increased the ratio of black to 70%. Annexation temporarily reversed this trend, so that the black majority was reduced to about 60%. At the opening of the present school session, it has grown to 64%. No one believes it will remain there for as much as a year.

As shown in the Richmond case, population shifts *within* the city have been equally dramatic. Many previously white areas are now all black. But despite this shifting there are in Richmond—as in scores of cities in the North and South—large areas populated entirely by blacks, with the fringes populated by the poorer whites.[20]

To impose, as urged by plaintiffs, an arbitrary percentage mixing in every school in Richmond would be as unrealistic as to impose such a scheme upon New York, Chicago, Philadelphia or Pittsburgh. Yet, if racial balance is a constitutional imperative, it is applicable to all communities at all times.

Racial Balance is Regressive

One wonders why compulsory racial balancing is advocated. It would be difficult to conceive of a more certain way to assure a return, in countless communities, to essentially separate schools—if not for whites and blacks, certainly for those in the lower income levels of both races.

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[20] *Racial Isolation in the Public Schools, supra,* at 19-20, 31.

The shorthand term, often used critically, is "white flight." Concurring opinions below criticize this exercise of freedom.[21]

But the connotation of "white flight" misconceives the fundamentals. It is obviously true that since *Brown* the white exodus to suburbia has accelerated. It must be remembered, however, that the population movement from congested urban areas into suburban environments has long been characteristic of the American scene.[22] It antedated *Brown;* it exists throughout our country, and indeed abroad; in its genesis, it bore no relation whatever to school integration. Indeed, the desire to move upward economically and socially—so basic to the American ideal—reflects itself nowhere as strongly as in the urge for a better residential environment. Often access to a particular neighborhood school is a dominant factor in selecting a new home site.

These ambitions cannot be suppressed by court decrees. The movement from congested urban areas will continue regardless of how this case is decided. But few would doubt that it will accelerate geometrically if the concept of racial balance is enforced by law.[23] Examples of the inevitable

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[21] See Sobeloff and Winter, JJ., concurring in part and dissenting in part in this case and in *Brunson* v. *Board of Trustees, supra,* at n. 19. White flight is, of course, an erroneous term because middle income citizens of both races are seeking suburbia.

[22] *United States Census of Population: 1960, Standard Metropolitan Statistical Areas,* Bureau of the Census, U.S. Dept. of Commerce 1-257 (1963).

[23] The trend toward private schools, especially in the South, will also be accelerated. There are some who say that the "remedy" for this is the outlawing of private schools or withdrawing of their tax advantages. But this drastic solution would scarcely be acceptable to the public generally. In addition, it would require the overruling of *Pierce* v. *Society of Sisters,* 268 U.S. 511 (1925).

resegregation[24] process are numerous, but Washington, D. C. suffices.

It is thus evident that enforced racial balance is both regressive and unproductive. It frustrates the aspirations of *Brown,* namely, the promotion of equal education opportunity; it assures in time the resegregation of most of the blacks in many urban communities. This will result in deteriorating educational opportunities both for the poorer blacks and whites who cannot afford to move.

In short, the end result is precisely the opposite of that desired; it widens the disparities between the lower and the middle-income families of both races.

The adverse economic and social consequences of resegregation, however caused, also are disquieting. Property values deteriorate; sources of local taxation shrink; all municipal services—as well as education—suffer; and—worst of all—the quality of civic leadership erodes.[25]

The foregoing results, now known from experience to be predictable, are scarcely in the public interest. They suggest the need for careful rethinking of proposals such as enforced racial balance which accelerate the process of urban deterioration.[26]

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[24] "[A]t the critical point—whatever it is—a formerly stable state of integration tends to deteriorate, being reflected by the exodus of white pupils. At the same time that this process is going on in the schools, the exodus of white residents is also apparent in the turnover of housing to the Negroes at only a slightly slower pace." *Civil Rights U.S.A.: Public Schools North and West,* U.S. Comm'n on Civil Rights 185-86 (1962).

[25] Kerner et al., *Report of the National Advisory Commission on Civil Disorders* 220 (1968).

[26] Indeed, the integration of schools is only one aspect of the complex of problems associated with urban life. The courts are ill-equipped to deal with these problems, which lie primarily within the province of the legislative and executive branches. The time may have come, with respect to the schools, for greater reliance upon the Congress as contemplated by Section 5 of the Fourteenth Amendment.

Restructuring of Governmental Relationships

The results of enforced racial balance could be sufficiently serious to prompt demands for restructuring of federal and state relationships. The facile answer to population withdrawal from urban areas is to enlarge the boundaries of school districts.[27] But this cannot be done, either by judicial decree or federal legislation, without uprooting state constitutional and statutory provisions with respect to the autonomy and authority of local school boards and governmental subdivisions. And new and enlarged boundaries, wherever drawn, would not long contain a mobile and unwilling population.

C.

The Highest Quality Of Education Must Be The Goal

If not racial balance, what is the alternative that is compatible with the Constitution and the goal of quality education for all? We think there can be no single, inflexible rule. We start from principles settled by this Court: Racial discrimination is a denial of equal educational opportunity; dual or segregated school systems are proscribed; and school authorities have an affirmative duty to establish unitary systems. These principles must be observed and applied, not as ends in themselves but as means of achieving the educational goal. The alternative then, to simplistic racial mixing pursuant to formula, is to recognize that reasonable discretion must be allowed in the assignment of pupils and the administration of a school system so long as the foregoing principles are not contravened and the measures taken comport with the educational goal.

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[27] See *Hobson* v. *Hanson*, 269 F. Supp. 401, 515-16 (D.D.C. 1967), *aff'd sub nom., Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

That education of the best quality is the goal was clearly recognized in *Brown I*:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . . " 347 U.S. at 493.

It seems clear that desegregation by race is only one step along the road toward equal educational opportunity—an equal chance to obtain the best education that the particular system can provide. The goal is the best education for all; racial segregation is an impediment to be removed in striving to achieve that goal.

The best education, however, is not achieved *solely* through racial integration. In a recent article, Dr. David K. Cohen states that "three major criteria of equality seem to compete as policy alternatives: equal resource allocation, desegregation, and equality of educational outcome. . . ." Cohen, *Defining Racial Equality in Education,* 16 U.C.L.A. L. Rev. 255 (1969). But, as Dr. James Coleman, author of the famous Coleman Report,[28] has concluded, equal resource allocation plus desegregation does not necessarily result in improved educational output. He said that "[t]he result of

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[28] *Equality of Educational Opportunity*, Office of Education, U.S. Dept. of Health, Education and Welfare (1966).

the first two approaches (tangible input to the school, and [de]segregation) can certainly be translated into policy, but there is no good evidence that these policies will improve education's effects. . . ." Coleman, *The Concept of Equality of Educational Opportunity,* 38 Harv. Educ. Rev. 7, 17 (1968). And the goal is, after all, the improvement of the effect of education.

This conclusion has received the concurrence of Dr. Cohen. He states:

> "The problem, however, is that although desegregation and equal resources are educationally salient, both seem a good deal less strategic than achievement. Judgments about the quality of students' education in America are certainly not made on a purely meritocratic basis, but students' achievement still weighs more heavily in the balance than either the degree of racial integration, or the quality of resources in their schools. The same thing is true of the standards presently employed in assessing schools' effectiveness. Equal achievement seems the most relevant standard of racial equality." Cohen, *Defining Racial Equality in Education,* 16 U.C.L.A. L. Rev. 255, 278 (1969).

Dr. Cohen concludes that the implicit assumption of *Brown I* that desegregation and proper resource allocation would result in equal achievement was an erroneous one:

> "Experience and knowledge gained since then have shown that the two standards cannot be met by the same measures." *Id.* at 280.

What, therefore, is the criterion? In Dr. Cohen's words, it is equal achievement; in Dr. Coleman's, it is educational output. What, in simpler terms, the school boards must seek and the courts must approve is the means to promote equal educational opportunity, regardless of race, in a system structured for the highest achievement.

It seems strange that this goal is not mentioned by the court below. It places no emphasis whatsoever on the quality of education. It seems mesmerized by race; it hardly seems to recognize that we are presented with an educational problem of which race is merely a facet.[29]

D.

The Court Below Misapplied Its Rule Of Reason

The Court of Appeals in the Charlotte case adopted a "test of reasonableness," saying:

> 1. "not every school in a unitary school system need be integrated."
>
> 2. "school boards must use all reasonable means to integrate the schools in their jurisdiction."
>
> 3. Where all schools cannot reasonably be integrated, "school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race."

These views, we think, are compatible with the opinions of this Court. They do not accept the mechanistic rule of racial balance.

But we believe the Court of Appeals misconceived the application of its own test. The focus, as is evident from the rejection of the school board plans in Charlotte, Norfolk and Richmond, was upon desegregation with little or no visible concern for the object of desegregation, namely, improved educational opportunity for all students. We think that the Court below departed from an appropriate test of reasonableness particularly with respect to (i) its emphasis on

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[29] The District Judge in the Norfolk case commented correctly that the word "education" does not even appear in the opinion of the Court of Appeals reversing his general approval of the Norfolk School Board's plan. *Beckett* v. *School Bd.*, Civil Action No. 2214 (E.D.Va., Aug. 14, 1970).

extensive compulsory busing and (ii) its misappreciation of the educational relevance of neighborhood or community schools.

Compulsory Busing

There is nothing inherently wrong with transporting school children where this is necessary. In every rural school district busing is a necessity. In such districts in the South it was used for decades to implement segregation. In the Charlotte case, involving a large urban-rural school district, there was substantial necessary busing before the District Court undertook in effect to impose racial balance by extensive cross busing.

Even in an urban district some busing may be appropriate, contributing both to integration and sound education. The problem, one so familiar in law, is one of degree and reasonableness. A notable example of unreasonable busing in pursuit of racial balance is that ordered in *Crawford* v. *Board of Education*.[30] In that case the Los Angeles school board was ordered to establish a rigorously uniform racial balance throughout its 711-square-mile district, with its 775,000 children in 561 schools. This order, if upheld on appeal, would require the busing of 240,000 students at a cost of $40 million for the first year and $20 million for each year thereafter with the result that the deficit of $34-54 million already confronting the school board would be increased by these amounts.[31]

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[30] No. 822, 854 (Cal. Super. Ct., Feb. 11, 1970).

[31] N.Y. Times, Feb. 12, 1970, at 1, col. 5 (city ed.). President Nixon, in his statement of March 24, 1970, aptly states that rulings of this character ". . . would divert such huge sums of money to non-educational purposes, and would create such severe disruption of public school systems, as to impair the primary function of providing a good education." *Desegregation of America's Elementary and Secondary Schools*, Weekly Compilation of Presidential Documents (March 30, 1970).

The preoccupation with "racial mixing of bodies"[32] has often caused the overlooking of the social and educational disadvantages of busing, especially at the elementary level.[33] It removes a child from a familiar environment and places him in a strange one; it separates the child from parental supervision for longer periods of time; it undermines the neighborhood or community school, so desirable at the elementary level; and it adds to already strained budgetary demands.

These are the considerations which have prompted the Congress, reflecting overwhelming public sentiment, three times to record its opposition to enforced busing merely to achieve racial balance.[34]

The Neighborhood School

We think that the Court below also largely ignored the educational advantages of the neighborhood school at the elementary level. The geographic neighborhood is the most common unit of organization of urban elementary public schools.[35] The neighborhood unit provides for ease of access to schools for students, minimizing costs and time of

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[32] In his memorandum decision of August 14, 1970, attempting to implement the mandate of the Circuit Court, Judge Hoffman commented "that the benefits of sound education have now been clearly subordinated to the requirement that racial bodies be mixed." See also *Beckett* v. *School Bd.*, 308 F. Supp. at 1302.

[33] A disturbing aspect of seeking racial balance at any cost is that children too often are treated as pawns to produce sociological changes that are related more to other factors, such as housing, than to education.

[34] Civil Rights Act of 1964, 42 U.S.C. § 2000c(b) (1964); Elementary and Secondary Education Act of 1965, 20 U.S.C. § 884 (1966), amending 20 U.S.C. § 884 (1965); Education Appropriations Act of 1971, P.L. 91-380, 91st Cong., 2d Sess., §§ 209, 210 (1970).

[35] New York City's current experiment in decentralization is further evidence of the vitality of the neighborhood or community concept. N.Y. Times, Sept. 13, 1970, at 1, col. 2.

travel to and from school, and thus maximizing the potential extracurricular role schools can play in the lives both of parents and children. These factors, along with the associational benefits of attending school with friends which, particularly for elementary school children, ease the psychological stress of initial adjustment to school, have led such a noted educator as James B. Conant, former President of Harvard University, to the conclusion that "[a]t the elementary school level the issue seems clear. To send young children day after day to distant schools seems out of the question."[36]

The quality of a community's education depends ultimately upon the level of public suport.[37] A willingness to pay increased taxes and to vote for bond issues can evaporate quickly in the face of enforced busing and dismantling of neighborhood schools where such actions do not contribute to improved education for all.

Educational effectiveness also is dependent on the attitude of parents toward their children's education, and rationally configured systems of neighborhood schools play a vital role. Parental support of their children's schooling normally reinforces the efforts of their children's teachers in substantial measure;[38] to the degree that schools can involve parents with their children's education as such,[39] or broaden the parents' own educational horizons,[40] this end is served. Community schools, when designed in such a way as to avoid the feelings of disaffection which attend systematic

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[36] J. Conant, *Slums and Suburbs* 29 (1961).

[37] A current dramatic example of the financial crisis in public education across the country is found in St. Louis, Missouri, where taxpayers in four suburban school districts north of the city have shut 46,000 pupils out of classes by consistently defeating school tax levies. N.Y. Times, Sept. 14, 1970, at 1, col. 3.

[38] M. Weinberg, *Desegregation Research: An Analysis* 140-41 (1968).

[39] Christian Science Monitor, Aug. 14, 1970, at 11, col. 1.

[40] C. Hansen, *Danger in Washington* 81 (1968).

ghettoization, whatever its origin, foster such an active parental role because of their very accessibility.

Further, the accessibility of community schools minimizes the cost of school transportation for students. Provision of substantial transportation at public cost solely for the purpose of attaining racial balance diverts resources which might otherwise be used, in a neighborhood scheme consistent with students' constitutional rights, for more directly constructive educational purposes. Where the cost of such transportation is borne privately by the families of students—assuming that public transportation facilities are adequate to cover the necessary specialized routes—it strikes regressively, imposing a heavier burden on the poor than on the affluent.

This Court in *Brown II*, in suggesting "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis"[41] as a means of complying with the equal-educational-opportunity requirement of *Brown I*, implicitly recognized the advantages of the community school system.[42]

The unique educational advantages of the neighborhood school system, where it is administered in a manner consistent with the Equal Protection Clause, result in the accomplishment of the ultimate goal of that clause: the best possible education for all children. Pursuit of absolute racial balance in major metropolitan areas through the use of extensive busing of students deprives the school system of the singular advantages of the neighborhood concept, and in at least this respect thwarts the attainment of equal educational opportunity.

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[41] 349 U.S. at 300-01.

[42] These advantages were well expressed in *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied* 359 U.S. 847 (1967).

It has frequently been pointed out that neighborhood school systems have, on occasion, come into existence for the purpose of fostering racial segregation.[43] But this fact should no more prejudice consideration of the intrinsic educational merits of a racially satisfactory neighborhood school system than should these merits justify it when it is administered in a fashion which entrenches unconstitutional racial imbalance.

Other Considerations

The community school concept is capable of flexible administration: zoning, pairing, clustering, and siting of school buildings all are techniques which may be used, consistent with its advantages, and should be, when reasonable, to fulfill constitutional requirements. In addition, a majority-to-minority transfer option and specialized learning centers may be provided to ameliorate the effect of residential segregation. Techniques which destroy the advantages of the community school in pursuit only of mechanistic racial balance in the name of the Fourteenth Amendment tend to negate the very educational values in whose service they are invoked.

But these are measures that are customarily used in the racial desegregation context; they are by no means all of the factors to be taken into account in devising a plan designed to promote educational achievement for all students to the utmost.

Modern social scientists have developed studies that take into account a number of other factors. These include a determination of the racial mix that will maximize educational achievement, development of plans that maximize use of physical facilities, teachers and staff, avoidance of

[43] See, *e.g.*, *Racial Isolation in the Public Schools*, U.S. Comm'n on Civil Rights 252 (1967).

resegregation and "white flight," consideration of the desirable socio-economic mix, preservation of the cultural uniqueness and autonomy of the individual student, giving effect to positive and realistic educational and vocational aspirations and other relevant factors of equal importance."[44]

Such evidence is sound and available.[45] Plans based on such studies will result in greater educational achievement. Education is not based on race alone. That plan is the best plan that provides the best opportunity for educational achievement for all students. In the preparation of such a plan, racial imbalance is a consideration, but it is not the controlling factor.

It is in this light, we conceive, that the rule of reason postulated by the court below should be applied. The rule of reason makes little sense when it is couched in purely racial terms. The creation of racial balance by massive busing may eliminate racial segregation, but it may harm the general level of educational achievement. What schools need desperately is to improve that level. This Court should provide a more realistic approach to achieve that end.

VI.

CONCLUSION

The Court has the opportunity in this case to resolve the principal issues which have confused and divided the lower

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[44] See, *e.g.*, M. Weinberg, *Desegregation Research: An Analysis, supra; Equality of Educational Opportunity, supra.*

[45] Evidence of this nature was presented in the Norfolk case by Dr. Thomas F. Pettigrew and disregarded without mention by the Circuit Court. But Dr. Pettigrew's evidence in the Norfolk case is substantially the entire basis for the opinion of three of the judges in the *Clarendon* case. See Craven, J., concurring and dissenting in *Brunson* v. *Board of Trustees,* No. 14,571 (4th Cir., June 5, 1970). If testimony of this character may be used as a basis for decision in one case, it clearly deserves consideration in another.

courts and school authorities. We respectfully suggest, for the reasons that we have stated, the following:

(i) The purported distinction between *de jure* and *de facto* racial segregation should be rejected. It can be supported neither factually nor consistently with constitutional principles. The right to equal educational opportunity must be uniform throughout the United States.

(ii) The concept of racial balance is not a constitutional imperative. If pursued as an end in itself, rather than as a factor to be considered, this concept accelerates the process of resegregation and frustrates the attainment of sound educational goals.

(iii) The Constitution does not delineate the extent to which the transportation of pupils may or must be provided to achieve and maintain a unitary school system. Nor does the Constitution prescribe the extent to which school attendance zones may or must be altered for this purpose.

(iv) The principles settled by this Court must be observed: racial discrimination is a denial of equal educational opportunity; dual or segregated school systems are proscribed; and school authorities have an affirmative duty to maintain unitary systems. But these principles must be applied as the means of maximizing the educational opportunity for all students. A reasonable discretion must be allowed school authorities in assigning pupils and administering a school system so long as these principles are not contravened and the measures taken comport with the educational goal.

(v) School authorities should give appropriate weight to the educational advantages of the neighborhood or community schools and the disadvantages of extensive cross busing in urban areas, especially for young children.

(vi) In devising plans to assure a unitary school system, all relevant techniques may be considered, including the realignment of attendance zones, the flexible utilization of school facilities, and the assurance of opportunities for interracial learning experience.

(vii) Perhaps the overriding need is to shift the emphasis from a mechanistic approach of integration as an end in itself to the goal desired by every citizen: Equal educational opportunity in a school system structured for the highest achievement by all students.

It is not too much to say that public education is in a state of serious disarray, with increasing evidence of eroding public support. The problems and confusion relating to integration are a contributing though not the only cause. The time has come for a clarification of the principles to be applied by the courts. We respectfully submit that those outlined above are consistent both with constitutional requirements and the urgent need for improved education.

Dated September 16, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, et al.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al.,

Respondents.

BRIEF OF RESPONDENTS

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CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al,

Respondents.

BRIEF OF RESPONDENTS

INTRODUCTORY STATEMENT REGARDING BRIEF

The briefs submitted in the companion cases Nos. 281 and 349 are identical. This statement is made so that this Court may be spared the inconvenience of a separate detailed analysis of both briefs.

Case No. 281 relates to the Petition filed by the plaintiffs for a review of the decision of the Circuit Court of Appeals

for the Fourth Circuit. Case No. 349 relates to the Cross-Petition of the defendants from the same decision. The plaintiff's Petition in case 281 was granted on June 29, 1970. Although action on the defendants' Cross-Petition has been deferred until the convening of this Court at its October 12, Term, 1970, this Court has advised that both cases will be heard on October 12, 1970, and has instructed the defendants to file briefs in both cases. The two cases have not been consolidated for briefing.

Each of the two cases involves the same school system, the same orders of the district court and Circuit Court and the same issues. In order to be of as much assistance as possible to this Court, it is prudent that one comprehensive presentation shall be made. It is for this reason that, although separate briefs are filed, their text and content are the same.

OPINIONS BELOW

The opinions of the courts below are set forth in Brief for Petitioners filed in No. 281 on pages 1 through 3 thereof.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 26, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The Petition for Writ of Certiorari was filed in this court on July 2, 1970. On August 31, 1970, the Chief Justice deferred action on Cross Respondents' pending Petition for Writ of Certiorari and directed filing of briefs and set this case for oral argument on Monday, October 12, 1970.

QUESTIONS PRESENTED

1. Did the Court of Appeals join in the error of the trial court in rejecting the desegregation plan offered by the Board of Education where 68% of the black students would attend schools in which their race was in the minority and where the remaining 32% of the black students would attend schools having white ratios of 17% to 1% and these black students would be taught by a predominantly white faculty and further where such black students were offered more generous freedom of transfer than that offered by the customary majority to minority transfers?

2. Did the Court of Appeals join in the error of the trial court in rejecting the plan for desegregation of the 72 elementary schools prepared and offered by the Board of Education, where the plan left no all-black schools, though nine of 72 schools had white ratios of 1% to 17% and black students attending those schools would have an untrammeled right to transfer to any one of the 63 remaining elementary schools, and upon departure from elementary schools would be assured of a desegregated education during the remainder of their schooling?

3. Did the Court of Appeals join in the error of the trial court in rejecting (by the trial court's offering the Board a "Hobson's choice") the Board plan for desegregation of junior high schools where only one of 21 junior high schools would have more than a 39% black student ratio and the remaining predominately black school would house 758 black and 84 white students and have a predominately white faculty by imposing a requirement on the Board to create nine black satellite districts containing approximately 2,700 black students and assigning them to predominately white suburban junior high schools?

4. Did the Court of Appeals join in the error of the trial court in rejecting the Board plan for desegregation of senior high schools where the plan provided that no school would have more than a 36% black ratio and that each school would

have a predominately white faculty and in imposing a further requirement upon the Board that 300 black students residing in four designated grids would be bussed a substantial distance from the northwestern part of the city to a high school serving the extreme southeastern portion of the county?

5. Did the Court of Appeals join in the error of the trial court in imposing racial balances in junior and senior high schools in contravention of Title 42 U.S.C. 2000(c)(b) and 6(a)(2) (Sections 401(b) and 407(a)(2)) of the Civil Rights Act of 1964.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, Section 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. 2000(c)(b) and 6(a)(2)].

PRELIMINARY STATEMENT

The principal question presented by the several appeals herein relates to whether or not the Charlotte-Mecklenburg public school system may retain one or more predominately black schools. If the absolutists are to prevail, then the presentation which follows is wholly irrelevant. The Court of Appeals held that no such absolute requirement exists as desegregation of the predominately black schools will be adjudged by the "test of reasonableness."

In order to answer the question, one must have an understanding of this school system. The system involves 103 schools, 4 kindergarten programs and one learning academy, which last year served approximately 84,500 students of which 29% were black and 71% were white. The system is expected to grow by an approximate 3,000 students this

school year. In comparison to other school systems in this nation, the system ranks 43rd largest.

As an urban school district, it shares the same problem of other urban school systems. Since 1954, the black student population has increased from 10,000 to 24,000 students and during this period eleven formerly all-white schools are now almost entirely black (691a). The transition has been rapid. In 1965 these eleven schools housed a 35% black student population. During the 1969-70 school year, these schools housed an 81% black population and the areas in which this transition has taken place are located generally in the older white neighborhoods. Charlotte has experienced phenomenal growth and, therefore, the older neighborhoods are primarily located near the center of the city, which serves as the base for the expanding black areas as whites on the economic move improve their position; blacks improving their position take over the white homes. This had led to the transition of schools from white to black. Today, 95% of the black students reside in the northwestern inner-city quadrant or the fringes thereof.

The Board was in the process of combating this problem by construction of schools in areas which would offer more stable desegregation, the most notable of which were Olympic High School, originally scheduled for construction in a predominately black neighborhood, and Randolph Junior High which was also scheduled for construction in a similar neighborhood (72a-73a).

Further efforts of the Board involved closing and consolidating of twenty schools; creation of a single athletic league; nondiscriminatory employment practices; substantial desegregation of school faculties with total desegregation to follow for the 1970-71 school year; cross racial assignment of principals; appointment of black professionals to ranking administrative positions; board appointment of a black member to the Board of Education; elimination of the dual bus system; nondiscrimination with respect to teacher salaries, school fees, school lunches, library books, instructional materials,

quality of school buildings, use of federal funds, course offerings and evaluation of students; merger of the black and white PTA Councils; operation of specialized and supplementary programs implemented to increase desegregation; redesigning of freedom of choice so that its only effect would increase desegregation and give racial stability to the schools; gerrymandering of attendance lines to promote maximum racial desegregation and other techniques designed to create and promote racial stability (681a-683a, 1265a-1266a).

The rural areas of the school system do not offer such difficult problems in desegregation as the races are scattered and, therefore, as with most rural systems, these schools present substantial stable desegregation (313a).

Freedom of choice has neither perpetuated nor made substantial inroads on the desegregation problem. The superintendent estimated that approximately 1,200 (565a) white students had left predominately black schools where they would have been mixed in varying degrees with approximately 16,000 blacks.

In 1957 Charlotte led the South in opening its schools to students of both races. However, it is admitted that there were few students who took advantage of this option. Consolidation of the city and county systems, the two largest in the state, occurred in 1961, creating a school system having an east-west span of 22 miles and a north-south span of 36 miles and comprised approximately 550 square miles. The City of Charlotte contains 64 square miles, making it larger than the District of Columbia. The county is nearly twice the size of the City of New York.

In 1965 a plan was devised by the Board embracing freedom of choice, rezoning and non-racial assignment of faculty which entirely abolished the former dual system under the law as then understood. That plan was approved by the district court in 1965 and by the Court of Appeals in 1966. The plan led to the abolition of all dual auxiliary programs and services, such as transportation, athletic leagues, PTA's, etc.

Consistent with racial anonymity, racial identification of students and faculty was completely removed from all school records. Because of this, during the course of this litigation, requests for racial information created a substantial burden on the school system in producing this data.

The plan proposed by the Board eliminates 8 of the 17 predominately black elementary schools, four of the five predominately black junior high schools and establishes ten senior high schools so that no high school will have more than a 36% black ratio. It reduces the number of blacks attending predominately black schools to 7,497. (Compare district court's finding of 16,000 previously). Faculties will be racially balanced.

These exemplary steps have been taken by a school board which petitioners variously label as "recalcitrant," "contemptuous," "lawless" and similar characterizations.

STATEMENT OF THE CASE

The plan for desegregation offered to the district court by the Charlotte-Mecklenburg Board of Education would place 68% of the 24,000 black students in predominately white schools and the remaining 32% would attend schools having a black ratio of 83% to 99%. No other school system of similar size and complexity in this nation has the degree and volume of desegregation offered by this plan.

The exemplary proposal of the Board was summarily rejected by the district court for the reason that this system would not be permitted to have a predominately black school. The district court therefore ordered racial balancing of the schools served by the system.

The present action was instituted in 1965 which resulted in the district court's approval of the plan then offered by the Board. The salient features of the plan related to school closings, school consolidation, freedom of choice (as suggested by *Goss v. Knoxville*, 373 U.S. 683 (1963)), rezoning, nonracial assignment of teachers, and nonracial records of students. Circuit Judge Craven, then district judge, noted:

> As a general proposition, it is undoubtedly true that one could deliberately sit down with the purpose in mind to change lines in order to increase mixing of the races and accomplish the same with some degree of success. I know of no such duty upon either the school board or the district court. The question is not whether zones can be gerrymandered for the assumed good purpose of racial mixing, but whether gerrymandering occurred for the unconstitutional purpose of preventing the mixing of races. I am unable to find from the evidence a sufficient showing of the unconstitutional purpose with respect to any school zone . . . *Swann v. Charlotte-Mecklenburg Board of Education*, 242 F. Supp. 667 (1965).

The holding of the district court was affirmed by the Court of Appeals for the Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education*, 369 F.2d 29 (1966).

Following the Supreme Court decision in *Green v. New Kent County*, 391 U.S. 430 (1968), and companion cases, the petitioners filed a motion for further relief alleging discrimination in teacher salaries, school plants, facilities and numerous other areas, and in addition sought further desegregation. During the course of the hearings conducted in March 1969, the district court noted that it was familiar with the fact that in this system black teachers as a group were paid higher salaries than white teachers for the reason that they had longer tenure and had more graduate education (93a).

In its order of April 23, 1969, the district court found there was no racial discrimination or inequality with reference to the use of federal funds for special aid to the disadvantaged, use of mobile classrooms, the quality of school buildings and equipment, coaching of athletics, parent-teacher association contributions and activities, school fees, school lunches, library books, elective courses, individual evaluation of students and gerrymandering (293a-302a).

The district court further noted that school location in Charlotte had followed residential development including its *de facto* patterns of segregation (305a).

With respect to the motives and judgment of the School Board, the district court found that the schools had been operating pursuant to ". . . the general understanding of 1965 about the law regarding desegregation." The Board had "achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been reviewed in the appellate court decisions." The schools served by this system were "in many respects models for others", and "the rules of the game have changed and the methods and philosophies which in good faith the Board have followed are no longer adequate to complete the job which the courts now say must be done 'now'." (311a-312a).

The court then concluded:

> The school board has an affirmative duty to promote faculty desegregation and desegregation of pupils and to *deal* with the program of the all-black schools (313a). (Emphasis added)

Thereupon, the district court directed the Board to submit a plan for complete desegregation of teachers to be effective for the 1969-70 school year and to submit a plan and time table for the desegregation of pupils to be predominantly effective in the fall of 1969 and completed by the fall of 1970 (314a-315a). The plan submitted pursuant to the order of April 23 was found inadequate by the district court and submission of a new plan by August 4 was directed.

During the interim, this Court decided the case of *United States v. Montgomery*, 395 U.S. 225 (1969), which for the first time indicated limited racial ratios in faculty could be required by the courts.[1] In accordance with *Montgomery*,

[1] *In Montgomery, supra*, page 236, the court noted: ". . . Petitioners on the other hand, do not argue for precisely equal ratios in every school under all circumstances . . . . As the United States, Petitioner in

supra, the Board of Education proposed a plan for desegregation which would produce substantial faculty[2] and student desegregation for the school year 1969-70 and proposed a comprehensive computer-assisted study for the purpose of restructuring attendance lines for the year 1970-71. It was estimated that the study would require approximately six months to complete (487a). On August 15, 1969, the district court entered an order (579a) in which it noted the repudiation by the Fourth Circuit of the *Briggs v. Elliott* dictum on July 11 in *Hawthorne v. Lunenburg*, 413 F.2d 53 (4th Cir. 1969) (581a). The trial judge found that the Board had acknowledged its affirmative duty to desegregate pupils, teachers, principals, and staff members at the earliest possible date (583a) and had dramatically exceeded its goal in desegregating former all black faculties (584a). It approved the reassignment of consenting inner-city black students to outlying white schools for the school year 1969-70.[3] Further,

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No. 798, recognizes in its brief, the district court's order is designed as a *remedy* for past racial assignment . . . . We do not, in other words, argue here that racially balanced faculties are constitutionally or legally required."

[2]The Board reported: "With reference to faculty desegregation, substantial changes have been made as indicated on Exhibit "A" (498a-502a). With few exceptions, schools having black or nearly all black students have white faculties ranging from 40 to 50 percent of the faculty of such schools. By the school term 1970-71, further faculty desegregation will be experienced." (495a).

[3]The Board proposed offering transportation to the reassigned black students and made extensive efforts to secure their acceptance of reassignment. The court stated:

> However, this part of the plan is not compulsory. Students who want to remain in the comfort of their area may elect to attend the Zebulon Vance School (Irwin Avenue) instead; alternatives also are provided for the junior high students. (587a).

In response to objections to reassignment of blacks, the district court stated:

> No legal authority is cited that the Constitution prohibits transportation of *consenting* black children from an inferior educational environment into a better environment for the

the court approved in principle the proposed restructuring of attendance lines and other factors for the 1970-71 school year, but rejected them for lack of specific detail and time table.[4] Results of the desegregation of faculties commended by the district court appears in the record (642a-649a).

In view of the fact that it was impossible to complete the computer restructuring of attendance lines within the time limited, motion was made for additional time in which to present the plan. The district court responded by presenting interrogatories to the Board and issuing its last benign statement on behalf of the Board as follows:

> Nearly six months after the original order, faculty desegregation is well along and there have been a number of substantial improvements in the stated policies of the Board, including the stated assumption of the duty by the Board to desegregate the schools "at the earliest possible date." Limited steps

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purpose of complying with the constitutional requirement of equal protection of laws. (589a). (Emphasis added.)

The Board pointed out that it could not specify the number of students who might object to such assignments (493a).

Nevertheless, later the district court unjustly condemned the Board for not carrying out the plan as "advertised." (658a). "The performance gap is wide." (659a).

At the request of black community leaders, the Board proposed and secured a modification to permit substitution of Irwin Avenue Junior High School for the Zeb Vance school for black students exercising freedom of choice to attend a black elementary school in the inner city. The district court denied the Board the opportunity of upgrading the education for these black students by imposing restrictions on innovative programs for such students unless provided for all blacks who transfer to white schools (593a). The Board was forced to abandon innovative programs for these blacks as such programs require full student participation or segregation of black students in the white schools.

[4]The Board proposed completing the computer restructuring of attendance lines within six months or February 1, 1970 (487a). Furthermore, implementation was directed for the school year beginning 1970-71. (457a and 315a).

> have been taken toward compliance with pupil desegregation provisions of the original order . . . (601a).

Pending application for an extension of time, this Court announced its decision in *Alexander v. Holmes County*, 369 U.S. 19 (1969), and the district court held that as a result of *Alexander*, discretion to grant an extension was prohibited (667a). The district court in its November 7, 1969, order then proceeded to severely criticize the Board for not implementing its 1969-70 desegregation plan. The district court stated "the plan has not been carried out as advertised" (658a) and "the 'performance gap' is wide" (659a). It is difficult to reconcile this criticism in the face of the district court's previous defense of the right of the Board to transport consenting black students to outlying schools and in view of faculty desegregation that resulted in precisely the figures estimated by the Board (589a and 584a). The district court reversed its earlier finding ". . . Location of schools in Charlotte has followed the local pattern of residential development, including its *de facto* patterns of segregation" (305a) and substituted ". . . There is so much state action imbeded in the shaping of these events that the resulting segregation is not innocent or *'de facto'*, and the resulting schools are not 'unitary' or desegregated." The district court further found that freedom of choice had tended to perpetuate segregation by allowing children to leave schools where their race would be a minority (662a).[5] The district court noted that the school system ranked high with reference to desegregation in comparison with the 100 largest school systems, but held this to be immaterial (664a).

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[5]The evidence clearly shows that only 1,200 white students had left predominately black schools (665a) (housing a total of 16,000 blacks). This would therefore appear to fall under the *de minimus* rule. Compare the limited number of students who sought freedom of choice and the infinitesimal effect it had on desegregation for the school year 1969-70 (635a-638a).

For reasons not understood, the attitude of the district court changed with increasing frequency to condemnation or misconstruction of whatever the Board proposed. It assumed that the Board's computer program, designed to promote stability by a 40% limitation on black student assignments, precluded white students from attending predominately black schools. Obviously, if the computer designed a school on a 50/50 ratio, the whites would soon leave the attendance district. The Board has no intention of devising attendance districts which would offer such instability. However, after the best efforts of the computer had been exhausted, those white students residing in the ultimate attendance zones populated predominately by blacks, would nevertheless be assigned to those schools. The district court simply misconstrued one step of the Board plan as constituting the final plan.

In fairness to the district court and the petitioners, the Board on October 19, 1969, gave advance notice that its plan would be unable to eliminate each all-black school (665a).[6] The district court, continuing its castigation of the Board, said the Board had "demonstrated a yawning gap between predictions and performance." (666a). The court thereupon directed the filing of a plan for desegregation ten days later on November 17, notwithstanding the fact that the Board had reaffirmed February 1, 1970, as the earliest date for presentation of a comprehensive plan.

Therefore, faced with this unrealistic time table, the Board was compelled to present an admittedly incomplete plan for desegregation (670a) and report (680a) in which the Board took a strong position for the purpose of attempting to determine the meaning of a "unitary system" and related terms. Attention is directed to the fact that the Board predictions with reference to desegregation of elementary schools was substantially accurate as disclosed by the following:

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[6]At this point, the Board had been admonished to "deal with the problem of the all black schools" (313a).

Percentage Black Students	Projected No. of Schools Nov. 17, 1969	Board Final Plan, No. of Schools Feb. 2, 1970
0-10%	21	20
11-40%	44	43
41-100%	7	9

It would therefore appear that the Board performed as "advertised". There was no wide "performance gap" and there was no "yawning gap between predictions and performances." The court was further advised in August that the Board plan would be complete approximately the first of February 1970, and the Board performed (726a).

On December 1, 1969, the district court again misconstrued the computer instructions as being the results of a finalized plan. Although the Board proposed that each faculty would be predominately white at each school, the court seemed to take offense at the fact that there was no promise of total balance (700a). Compare *Montgomery, supra,* which countenances schools having 83% black faculties.

In response to the inquiries of the Board, the district court outlined some of the parameters of its notions of a desegregated system, which included pro rata distribution of teachers by race and that "all the black and predominately black schools in the system are illegally segregated" (711a and 714a). The district court further held that any plan should seek to reach a 71-29 ratio so that one school would not be racially different from the others though variations may be unavoidable (710a). It is believed that the absolutes of the district court's legal position began to crystalize with the order of November 7, 1969.[7] This has resulted in the

[7] In the order of November 7, 1969, and all subsequent orders, namely, December 1, 1969, February 5, 1970, March 21, 1970 and August 3, 1970, resulted in reversal of facts previously found in favor of the Board and many inferences resolved against the Board together with misconstruction of many of the facts presented to the court. The Board attempted to correct many of the findings by Objections and Exceptions thereto (1239a) and Objections and Exceptions to Findings of Fact dated August 14, 1970.

failure of the court to make any subsequent findings favorable to the Board.

The district court then disapproved the Board's plan for further desegregation and directed desegregation of faculties on a three-to-one ratio effective not later than September 1, 1970, and indicated that a court consultant would be appointed. This was accomplished by order of the court dated December 2, 1969, wherein the court appointed Dr. John Finger as the court's consultant, a witness who had previously testified on two occasions for the plaintiffs and had offered earlier desegregation plans. The order of December 1 did not suggest implementation of pupil desegregation would be advanced to a date earlier than September 1, 1970. The Board was invited to continue working on its plan (714a-716a).

The Board submitted its completed plan on February 2, 1970 (726a). The plan utilized computers to achieve a maximum racial mix of 71% white and 29% black in each school where possible by restructuring attendance lines. One hundred (100) of the 103 schools would have a racial mix, leaving only three all-white schools. Sixty-eight per cent (68%) of the black students would attend schools having less than 40% black population. Thirty-two per cent (32%) of the black students would attend nine elementary and one junior high schools which would have black ratios of 83% to 99% under the Board plan (R. Br. A-4-6, A-10). This plan reduced the number of blacks in predominately black schools from 16,197 to 7,497 and the number of predominately black schools from 22 to 10.

The plan for desegregation submitted by the Board included imposition of faculty ratios of approximately three-to-one, white predominating, in each school and proposed implementation of its plan for the school year 1970-71 in accordance with the various court orders. The Board plan would require the in-district transportation of approximately 5,000 additional students, who would qualify for such transportation under state law.

The court consultant's plan was submitted contemporaneously with that of the Board on February 2, 1970, which effectively adopted in many respects the Board's geographic zoning plan and engrafted upon it the features of pairing of distant elementary schools and creation of satellite districts in predominately black inner-city areas whose students were assigned to distant predominately white outlying secondary schools.

On February 2, 1970, the court conducted a hearing limited solely to the question of time required for implementation. It refused to hear any evidence with reference to the merits of the two plans before the court. On February 4, 1970, the Board made a motion for hearing on its plan and for the opportunity to examine the court consultant, who resides in Rhode Island and beyond the process available to the Board. In response thereto, the court permitted a short hearing severely limited as to time on the following day and declined to direct the consultant to be present for examination. The Board was compelled to submit substantial evidence nunc pro tunc (848a-900a).

On the same day, February 5, 1970, the court entered its order, in which the court found in part as follows:

> The Board plan, prepared by the school staff, relies almost entirely on geographic attendance zones, and is tailored to the Board's limiting specifications. It leaves many schools segregated. The Finger plan incorporates most of those parts of the Board plan which achieve desegregation in particular districts by rezoning; however, the Finger plan goes further and produces desegregation in all the schools in the system.
>
> Taken together, the plans provide adequate supplements to a final desegregation order (819a).

Although the court stated "the order which follows is not based on any requirement of 'racial balance' . . ." (821a), the court then adopted the entire plan of the court consultant and thereby directed racial balancing with reference to the various schools:

A. The Board's pupil assignment plan for senior high schools was approved[8] upon condition that 300 black students residing in four grids suggested by the court consultant would attend Independence High School. Therefore, the court consultant's sole recommendation with reference to high schools was approved, although no school under the Board plan would house more than a 36% black ratio.

B. With respect to junior high schools, the Board plan was approved[9] upon condition that the only junior high school out of 21 which would remain predominately black would be desegregated by giving the Board a "Hobson's choice" of furnishing transportation and increasing blacks in attendance at several outlying schools and in default of rezoning (which had been fully explored), two-way transportation of students (which is cross bussing to which the Board is opposed) or closing the junior high school (whose classrooms are desperately needed to minimize the already serious overcrowding which exists at the junior high level). None of the alternatives were accepted. Therefore, the Board was directed to implement the court consultant's plan, which provided for establishing nine satellite attendance districts (containing 2,760 students) in inner-city black areas for attendance at nine distant predominately white suburban schools.

C. With respect to elementary schools, the court adopted the court consultant's plan which utilized the Board's rezoning[10] and engrafted upon it the features of pairing and grouping nine inner-city black schools with 24 suburban white

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[8]The Board plan for senior high schools eliminated the one all black senior high school, West Charlotte, and established black ratios of 17% to 36% for nine of the ten schools. The remaining school, Independence, would house a 2% black ratio. (748a).

[9]The Board plan for junior high schools eliminated four of the five predominately black schools and the remaining school, Piedmont, would have a 90% black ratio or 758 black students (747a).

[10]The Board plan reduced the number of predominately black elementary schools from 17 to 9 (744a-746a).

schools, thereby necessitating extensive cross-bussing.[11] Approximately 10,300 students would be involved in the elementary cross assignments.

The Board plan contemplated transporting only those students eligible for transportation under state law which would result in furnishing additional transportation to approximately 5,000 students (871a-875a). The order of desegregation imposed substantial additional transportation requirements upon the school system (880a-884a) which were compiled by the transportation office of the school system as follows:

Finger Plan

Additional Students	No. of Buses	First Year Cost
23,000	526	$4,199,439.00

Board Plan

Additional Students	No. of Buses	First Year Cost
4,935	104	$ 864,767.00

Supplementary findings of the court dated March 21, 1970, (1217a-1219a) reflect a finding that transportation as ordered by the court would show the following totals:

Court Estimates

Additional Students	No. of Buses	First Year Cost
13,300	138	$1,011,200.00[12]

[11]The Board transportation office estimated these students would travel fifteen miles each way per day (860a). The district court estimated the school to school distance at seven miles (1261a).

[12]The district court found that the cost of 138 buses would be $743,200.00. The annual operating cost of $532,000.00 was reduced by one-half in its order of April 3, 1970 (1259a), resulting in a total of $1,011,200. The district court amended its February 5 order by order dated March 3, 1970 (921a) to provide that transportation should be offered only to those city students who lived in an area which had been rezoned as a result of the court order. The Board accordingly submitted revised estimates which reduced the requirements for addi-

Extensive objections and exceptions (1239a) were filed by the Board with reference to the findings of the district court dated March 21, 1970, and the Court of Appeals noted that it was difficult to furnish reliable predictions with respect to transportation estimates (1271a).

On appeal, the Court of Appeals approved the provisions of the order of the district court with reference to assignment of faculty and assignment of students to secondary schools and reversed and remanded for further consideration the assignment of pupils attending elementary schools (1262a). In doing so the Court of Appeals noted that the voluntary faculty desegregation of the Board was in compliance with other orders of that court (1263a). The finding of the district court with reference to residential patterns leading to segregation resulting from federal, state and local government action was affirmed on "familiar principles of appellate review."[13]

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tional transportation to 19,285 students and 422 buses at a first year cost of $3,406,687.00. Thereafter, State Board of Education, pursuant to *Sparrow v. Gill*, 304 F. Supp. 86 (MDNC 1969) authorized transportation of all city students residing a mile and a half from their school. Accordingly, this reinstated the original estimates of the local transportation staff.

[13]In view of the importance of other issues in this case, the Board does not deem it appropriate to fully controvert the very shallow and incompetent evidence upon which the district court's findings were made on November 7 reversing its prior findings without benefit of further evidence or hearing. We would point out several areas. With respect to racial restrictive covenants, the only evidence was a 1946 North Carolina Supreme Court case enforcing such restrictions. Other evidence of racial restrictions or the extent thereof is absent from the record. Blacks have for many years purchased homes in predominately white neighborhoods. Plaintiffs' evidence (31a-34a) discloses that relatively small black areas have taken over large white communities. As a result, blacks predominated in 11 former all white schools (591a). Although older black and white neighborhoods were zoned industrial in 1947, no substantial inroads were made in these neighborhoods by industry (254a), industrial zoning in residential areas was substantially curtailed (254a) and existing zoning generally follows existing land use (261a). Urban redevelopment assisted the displaced persons in finding

The reforms the Board undertook to create a unitary school system were applauded by the Court of Appeals (1265a). Noting the district court's holding "that the Board must integrate the student body of every school" (1266a) the Court of Appeals gave a partial answer to the unitary school question in holding:

> . . . first, that not every school in a unitary system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, the school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race . . . (1267a).

The Court of Appeals thereupon adopted ". . . the test of reasonableness–instead of one that calls for absolutes–because it has proved to be a reliable guide in other areas of the law . . ." (1267a).

Although Piedmont Junior High School was a formerly all white facility, and nearly all white in 1965 (25 blacks) (691a), the Court of Appeals noted that this school was now in the heart of the black residential area (1268a), a school which could not be desegregated by rezoning. This school precipitated the creation of nine satellite junior high school districts for the purpose of eliminating this one predominately black junior high school.

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new homes but had no power to direct the location to which they moved (265a). Furthermore, there is no evidence that any citizen was so directed. Many other examples could be cited.

It is noted the findings of the district court, although largely unsupported, closely parallel those of the U.S. Commission on Civil Rights with respect to separation of races in 75 representative cities scattered throughout this nation. *Racial Isolation in the Public Schools–Summary Report by the Commission on Civil Rights (1967).*

rt of Appeals, utilizing the district court's un-
The Court nsportation estimates, found its approval of the
realistic tran portion of the desegregation plan precluded ap-
secondary p he elementary plan. The combined plans would
proval of th 56% increase in pupils transported and the num-
represent a s would be increased by 49%. The Circuit Court
ber of buses ed that the Board ". . . should not be required
acknowledge e such extensive additional busing to discharge
to undertak n to create a unitary school system." (1276a).
its obligatio

rt of Appeals thereupon vacated the judgment of
The Cour court and remanded ". . . the case for reconsidera-
the district c assignment of pupils in the elementary schools,
tion of the ustments, if any, that this may require in plans
and for adj or and senior high schools." (1277a).
for the junic

nd, the district court had before it five elemen-
On remar nior and two senior high school plans. An under-
tary, two ju these plans will be facilitated by reviewing the
standing of p appendix to this brief.
separate ma

Pursuant to the suggestion of the Court of Appeals, the
Board met with representatives of HEW and sought to par-
ticipate in the development of a new desegregation plan.
Although t he Department of Health, Education and Wel-
fare obtaine d from the Board all the information it desired,
it refused t o accept the Board offers to assist it in develop-
ing a plan (Tr. 197, July 15, 1970). Nevertheless, the Board
reconsidered all the techniques of desegregation in an effort
to develop a new plan (Tr. 10-20, July 15, 1970). After
presentation of the HEW plan on June 26, it was reviewed
by the Board and rejected by a unanimous vote. Neverthe-
less, the Board presented the HEW plan to the district court
for its consideration.

A hearing was convened on July 15, 1970, at which time
the district court again reviewed the February 2, 1970 Board
plan and th e February 5, 1970 court approved Finger plan.
The district judge also considered the HEW plan, a plan pre-
pared by m inority of Board members, and an earlier draft
of a plan c nsidered by the court consultant.

The Board and court approved plans have been described earlier herein.

The HEW plan's salient features involved utilization of the Board restructured lines and then clustering a group of school districts contiguous to each other for specialized grade assignment to a particular school, for instance, one school might house grades 1 and 2, a second school grade 3, etc. Many of the districts involved in these clusters were desegregated by the Board's rezoning.[14]

A four-member minority of the Board presented an elementary plan which utilized the 1969-70 school zones, grouped 72 elementary schools within eighteen separate clusters, many of which were far removed from each other. The court's attention is invited to the map (R. Map Appendix), which gives a clear picture of what this plan does to the elementary schools of the Charlotte-Mecklenburg system. It was an obvious successful attempt at racial balancing, as all 72 elementary schools would house black ratios ranging from 27% to 34%. Students chosen for attendance outside their district would be selected on a lottery basis. (R. Ex. 45, July 15, 1970). Dislocations and transportation requirements were essentially equivalent to those of the court ordered Finger plan (Order, August 3, 1970).

Petitioners, calling Dr. Finger as their witness, had him unveil a draft of a preliminary plan previously prepared by him. Basically, the plan was Dr. Finger's attempt to restructure attendance zones. Finding his rezoning attempts left

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[14]Cluster or zone number IV of the HEW plan grouped all white Pinewood, nearly all black Marie Davis with Sedgefield (38% black) and Collinswood (33% black). This plan was roundly condemned for the reason that an elementary student in such a zone would attend four elementary schools in six years and it interfered with the educational programs and organizations of the school system. It also involved substantial transportation and utilized many schools that already had the approximate racial ratio of the entire system. Most of the groupings were near-black or predominately black (R. Ex. 1 and 2, July 15, 1970).

approximately 6,800 black elementary school children in inner-city black schools (Tr. 264, July 15, 1970), he then developed walk-in attendance zones for black students at those schools who would comprise approximately 30% of the capacity of the school. The blacks would attend these schools for six years. Whites residing generally in the inner perimeter of the city limits would be transported to such schools. Blacks who were not assigned to the inner city schools would be transported for six years to suburban white schools. The grade structure of the suburban schools was rearranged on a 3-3 basis with grades 1 - 3 in one school and a school in a contiguous area would have grades 4 - 6. Students in the contiguous zones would attend these two schools along with blacks from the inner city schools. Dr. Finger admitted the plan was incomplete (Tr. 263, July 15, 1970) and contains a complex grade structure (Tr. 258, July 15, 1970). The enormous amount of dislocation and transportation is apparent. As the district court found:

> 26. All plans which desegregate all the schools will require transporting approximately the same number of children. In overall cost, if a zone pupil assignment method is adopted, the minority Board plan may be a little cheaper than the Finger plan. (Order, August 3, 1970).

The district court characterized three of the plans as "reasonable": the court ordered (Finger) plan, the minority board plan and the earlier draft of a Finger plan. The Board was given the "option" of adopting any one of these plans for the elementary schools. The Board met and found the three alternate plans to be unreasonable and the court ordered (Finger) plan was thereupon imposed by order of August 7, 1970.

The Board filed notice of appeal to the Court of Appeals for the Fourth Circuit on August 14, 1970, and has made application to this Court for permission to supplement the record or, in the alternative, that the motion be considered as a writ of certiorari to the Court of Appeals for the Fourth Circuit pursuant to Rule 20 of the Rules of the Supreme Court. No action has been taken thereon at this writing.

SUMMARY OF ARGUMENT

Both the district court and the Fourth Circuit have misapplied the Constitutional imperatives of *Brown I*, *Brown II* and *Green* as they apply to the Charlotte-Mecklenburg schools. In doing so, both of these Courts erred in disapproving the Board plan and imposing upon this System requirements that are unlawful and unwarranted by the facts in this case.

The basic error stems from the misconception of the rights guaranteed black and white children by the Fourteenth Amendment and the goal to be achieved by a dismantling of a dual system and the establishment of a unitary one. Although disclaiming any intent to require racial balancing, the orders imposed upon the Charlotte-Mecklenburg System are based upon the proposition that student assignments at each school must be fashioned in a manner which will achieve or approximate the 70% white - 30% black racial ratio of the system at large. This false premise in turn is founded on the erroneous notion that each black or white child has an individual guaranteed right to attend a school having the prescribed racial mix. Any fair interpretation of the orders of the trial judge point unerringly to the conclusion that he deemed that presumed right to be an absolute one that cannot be diluted or denied by reason of circumstances, costs, disruptions or educational or administrative considerations. Tacitly, the Circuit Court also espoused racial balancing as its goal—but sought unsuccessfully to temper the absolutism of the district court with a test of reasonableness, to which on remand the trial judge gave only thinly veiled lip service. The Board is in general agreement with the employment of a Rule of Reason in appraising desegregation plans. But in this case, the Fourth Circuit misapplied its own Rule of Reason and in effect the district court ignored it. Racial balancing is not required by the Constitution and when imposed by a court violates the prohibitions of the Civil Rights Act of 1964.

Contrary to these erroneous views, the pronouncements of this Court make it clear that the guaranteed right of a child is to attend a school *system* within which discrimination originating from the old state-imposed dualty has been eliminated. If such discrimination has been eradicated and if schools are fairly operated and administered on a nonracial basis, a dual system has been dismantled and a unitary one has been established within which no child is excluded because of his race or color. Nondiscriminatory geographic attendance zones, including those promoting the neighborhood school concept, establish a unitary system—notwithstanding a residue of predominately black schools that remain for reasons totally unrelated to race.

A corollary to the requirement of racial balancing is the burden of massive bussing and dislocation of children to achieve the goal of 70% white–30% black ratio in the schools of the Charlotte-Mecklenburg System. This balancing and the bussing to implement it impinges upon the Constitutional rights of children, both black and white, who may not wish to be assigned and moved out of their neighborhood attendance zones for the sole purpose of promoting the presumed rights of other children.

The February 2, 1970, Board plan is based on geographic attendance zones that were drastically gerrymandered to promote desegregation. This plan severely strains, but maintains the basic benefits of the neighborhood school concept. By this technique, the Board satisfactorily desegregated all but 10 of its 103 schools. *All* but a small handfull of the black children who remain in these 10 schools will have a desegregated school experience for at least one-half of their 12 years of schooling. The Board itself sought to achieve in as many schools as possible a maximum racial mix. By doing so, the Board proposal exceeds Constitutional imperatives. The compulsion of court orders cannot be employed to coerce a school system to do what the Constitution does not require.

The Board plan is reinforced by majority to minority transfers to promote stable desegregation, prevent resegregation and afford blacks that remain in the 10 predominately black schools an opportunity to attend a predominately white school with free transportation to accomplish the move. The teachers at each school are assigned on a ratio of 3 to 1 which is the ratio of white to black teachers in the system. The staff, extra-curricular activities, transportation, facilities, programs and other facets of the system are nondiscriminatory and thoroughly desegregated, and are employed to promote integration throughout the system.

The Board plan effectively establishes a unitary system. Both the district court and the Fourth Circuit erred in disapproving that plan and supplanting it with one or more alternatives designed to racially balance each school, with the consequent bussing and movement of children that the Board considered unnecessary, impractical, costly, disruptive, educationally unsound and not required by the Constitution.

ARGUMENT

I. GENERAL DISCUSSION OF CONSTITUTIONAL PROBLEMS AND CONCEPTS.

A. A CHILD'S CONSTITUTIONAL RIGHT GUARANTEED BY THE FOURTEENTH AMENDMENT IS TO GO TO SCHOOL IN A UNITARY SYSTEM. IF THE SCHOOL IS PART OF SUCH A SYSTEM, HE HAS BEEN ACCORDED THAT RIGHT.

It is unarguable that the negro and white children in the Charlotte-Mecklenburg system must be and will be accorded their Constitutional rights in full measure. However, the district court's misconception of the nature of those rights is succinctly stated in its August 3, 1970, Order (Pets' Br. Al):

> The issue is not the validity of a "system", but the rights of individual people.

Of course, the Constitutional rights of a black or white child under the Fourteenth Amendment are individual and per-

sonal, but the question remains: What is the essence of that right–the right to do what? The trial judge concludes that the right is an absolute one of each child to be in a desegregated school and presumably in a desegregated classroom within the school–regardless of the rights of white children, circumstances, problems peculiar to urban areas, costs, disruptions, educational considerations and other factors which prevent a color blind school system from achieving the ideal racial mix in every one of its schools.

This view does not comport with the previous declarations of this Court. Briefly stated, it is our understanding that this Court has defined the right guaranteed a negro or white child by the Fourteenth Amendment as being the right to attend a school in a *system* where no state-imposed discrimination exists and has prescribed the attendant affirmative duty of a school board to establish such a *system*. This right and duty are summarized in *Green v. New Kent County*, 391 U.S. 430 (1968):

> [I]t was such dual *systems* that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* "to effectuate a transition to a racially nondiscriminatory school *system*" . . . *Id.* at 435. (Emphasis added)
>
> . . . *Brown II* commanded the abolition of such dual *systems* . . . *Id.* at 437. (Emphasis added)
>
> School boards such as the respondent then operating State-compelled dual systems were nevertheless clearly charged with the affirmative duty . . . to convert to a *unitary system* in which racial discrimination would be eliminated root and branch . . . The constitutional rights of Negro school children articulated in *Brown I* permit no less than this . . . *Id.* at 437-38 (Emphasis added)

The thrust of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Board of Education*, 349 U.S. 294 (1955) and all that this Court has said since those landmark decisions point unerringly to the validity of this proposition:

State-imposed dual *systems* must be abolished and must be replaced with unitary *systems*. The Constitution does not guarantee to a child the right to attend a school having any particular racial complexion. The Fourteenth Amendment secures for him only the privilege to attend a school that is part of a unitary *system* which is comprised of "just schools" (*Green, supra,* at 442)–schools that are operated and administered without any vestige of discrimination. Once a conversion or transformation to a unitary nondiscriminatory *system* has been accomplished, every child in that *system* has been accorded his rights. Those who contend for a particular racial mix or balance in each school propose a perversion of the commands of *Brown I* and *II* and *Green*.

It is by these standards that the plan of the School Board in this case must be judged. An analysis of that plan clearly demonstrates that it realistically will achieve the nondiscriminatory unitary system the Constitution requires. The oppressive plan of the district court does not conform with these standards. In spite of disclaimers, its objective is the racial balancing of each one of the schools of the Charlotte-Mecklenburg system.

B. A UNITARY SYSTEM IS ONE WITHIN WHICH NO CHILD IS EXCLUDED FROM ANY SCHOOL BECAUSE OF RACE. IF A DESEGREGATION PLAN PROMISES REALISTICALLY TO ACCOMPLISH THIS, IT IS CONSTITUTIONALLY ACCEPTABLE NOTWITHSTANDING A RESIDUE OF PREDOMINATELY BLACK OR WHITE SCHOOLS THAT REMAIN FOR REASONS UNRELATED TO RACE.

The now familiar definition of a unitary system is one "within which no person is to be effectively excluded from any school because of race or color." *Alexander v. Holmes,* 396 U.S. 19 (1969); *Northcross v. Board of Education* (Burger, Chief Justice, concurring opinion) 397 U.S. 232 (1970). Unhappily for school boards charged with the responsibility of fashioning a unitary system, this definition only begins,

not ends, inquiry regarding the necessary ingredients and characteristics of a unitary system.

This Court is well aware of the diversity and change of opinion both among and within courts that have been wrestling with the scope and meaning of this definition. This ought not to be. We hope this Court will find an opportunity in this case to put some meat on the bare bones of this definition which will give instruction and guidance to school boards and will help dispel the disparity that presently characterizes the findings of fact, conclusions and opinions of the lower courts.

Brown I and *II*, the *Green* triad and *Alexander v. Holmes* are of some help—but not much for practical application "in the field." From these cases, we understand a unitary system to have at least these attributes: It is "nonracial." It is "racially nondiscriminatory." It is what is left after a "well-entrenched dual system" has been "dismantled." It is one in which "racial discrimination" is "eliminated root and branch." It is one within which no child is "effectively excluded because of race or color." Running through all of these criteria is one common theme: If a system is established that does not discriminate against the race of a child and thereafter operates on a color blind basis, a former dual system has been transformed, converted and, we presume, purged.

It is worth noting that the 2-school rural residentially mixed New Kent County involved in *Green* typifies the systems stricken down by *Brown I* and *II*, a fact which is specially commented upon at page 435:

> The pattern of separate "white" and "Negro" schools in the New Kent County school system established under the compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two

schools but to every facet of school operations–faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "negro."

It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S. at 301, 75 S.Ct. at 756.

The *Green* triology formed the primary vehicle for the last detailed pronouncements of this Court concerning some of the characteristics of a dual and non-dual system. The factual context within which the teachings of *Green* were made presents considerable difficulties when these guides are applied to a complex urban system like Charlotte-Mecklenburg–particularly when that system has long since abandoned the discriminatory practices that were so flagrantly involved in New Kent County.

In identifying a unitary system, the *Alexander v. Holmes* definition embodies two basic aspects: (1) effective exclusion and (2) the reason for exclusion–i.e. because of race.

The word "exclude" means to shut out. It implies keeping out hwat is already outside. That a person remains outside does not necessarily mean that he is excluded. The idea of shutting out suggests affirmative action on the part of someone to accomplish the exclusion. If a person outside is afforded an opportunity to come inside, he is not barred or excluded. This opportunity must be a reasonable one. If the opportunity accorded a person is unreasonable, he may be said to be effectively excluded.

The *Holmes* definition does not prohibit all exclusion–only invidious ones based on race or color. There are any number of reasons why a child can fairly be required to attend one school instead of another: capacity, distance,

cost, disruptions, location of residence, age, travel, safety, administrative problems, educational considerations and a host of other factors that have absolutely nothing to do with his race or color.

If, in the operation of a school system, these factors are honestly, realistically and reasonably applied without the slightest degree of racial discrimination, the system is nonetheless unitary even though by reason of these factors some black children remain in predominately black schools.

The Fourth Circuit correctly comes to this conclusion in the Charlotte-Mecklenburg case (1267a):

> . . . [W]e hold: First, not every school in a unitary system need be integrated . . .
>
> . . . [I]f a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary system. *Ellis v. Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970).

This view agrees with the trend of lower court decisions which may be summarized as follows: The maintenance of some all-black or all-white schools in a given school system will not automatically invalidate a desegregation plan nor will it automatically indicate a shirking of responsibility by school board officials so long as the segregation is the result of housing patterns and means are made available whereby black children in the all-black areas may transfer to predominately white schools. The operation and maintenance of a particular school building, attended only by negro or white children, is not *per se* unconstitutional. *United States v. Greenwood Municipal Separate School District*, 406 F.2d 1085, 1093 (5th Cir. 1969), *Ellis v. Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970), *Goss v. Board of Education, City of Knoxville, Tennessee*, 406 F.2d 1183 (6th Cir. 1969), *Deal v. Cincinnati Board of Education*, 419 F.2d, 1387 (6th Cir. 1969).

The trial judge who heard the Charlotte-Mecklenburg case is out of step with this trend and obviously disagreed with the opinion of the Court of Appeals for the Fourth Circuit. On February 5, 1970, the trial judge ordered (822a); "That no school be operated with an all-black or predominantly black student body." The district court did not retreat from this position in its August 3, 1970, Order (Pets.' Br. A1) issued after the conclusion of hearings held pursuant to the Circuit Court directives. This misconception of what the Constitution requires lies at the heart of the unlawful orders of the district court and the unwarranted findings of fact which the trial judge used to support his erroneous conclusions.

C. A "RULE OF REASON" RATHER THAN A "RULE OF ABSOLUTES" SHOULD BE THE STANDARD BY WHICH TO JUDGE THE SUFFICIENCY OF A DESEGREGATION PLAN.

We approve the test of reasonableness adopted by the Court of Appeals–instead of one that calls for absolutes (1267a-1268a):

> We adopted the test of reasonableness–instead of one that calls for absolutes–because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides a test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettos so large that integration of every school is an improbable, if not an unattainable, goal. Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary school system. *Ellis v. Board of Public Instruc. of Orange County,* No. 29124, Feb. 17, 1970___ F.2d. ___ (5th Cir.)

Such a test is consistent with the equitable principles elucidated in *Brown II* which made it clear that desegregation plans and the means of implementing them should take into account a variety of local problems and conditions—including by implication those specifically itemized by the Court of Appeals (age of pupils, board resources, costs, effect of bussing on traffic and the distance and time for transportation).

In the name of common sense, what standards other than "reasonable" ones should be applied to test the efficacy of desegregation plans? In fashioning and effectuating decrees, *Brown II* directed that trial courts be guided by equitable principles. The very concept of equity presupposes the application of fairness, practicability and reason. Equity is employed where absolutes are inappropriate.

As stated in *Green, supra:*

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in the light of the circumstances present and the options available in each instance.[15] *Id.* at 439.

The August 3, 1970, Order of the district court (including its findings of fact) clearly shows that the trial judge gave only lip service to the test of reasonableness directed by the Court of Appeals. The recital of a few evidences of this lip service will suffice at this point: "The circuit court's reasonableness order is vague" (Pets.' Br. A7); "reservations" about the pertinence of a rule of reason are expressly acknowledged (Pets.' Br. A31); the size of a system is immaterial (Pets.' Br. A10); " 'Busing' is still an irrelevant issue" (Pets.' Br. A10); current long distance bussing of kindergarten children is cited as justification for bussing thousands

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[15]With tongue-in-cheek solemnity, the district judge in *Ross v. Eckels, Houston Independent School District*, F. Supp. (S.D. Texas 1970), in commenting on the practical problem occasioned by Buffalo Bayou, proclaimed: "A child is not required to swim or fly to school."

of elementary youngsters (Pets.' Br. A16, A18); "There is no way to decide what remnant shall be determined intractable" (Pets.' Br. A18); "cost and inconvenience" are not pertinent considerations (Pets.' Br. A31).

In view of the reservations entertained by the district court about the pertinence of a Rule of Reason, it is not surprising that upon remand the trial judge concluded that his own prior orders were "reasonable"—notwithstanding the determination of the Fourth Circuit that the trial judge's earlier mandate regarding the elementary plan was unreasonable. This reaffirmation by the district court of its own prior conclusions evidences a subjectivity that does not square with either the directions of the Court of Appeals or with the equitable principles decreed by this Court.

It is incomprehensible that two dissenting members of the Court of Appeals (Judges Sobeloff and Winter) should find a "test of reason" so frightening. They find it undefined, subjective, ambiguous and pernicious (1288a, 1289a, 1290a, 1302a, 1303a). They say it threatens dire consequences of delay and exploitation. (1290a).

In his dissent Judge Sobeloff rejects what he calls (1291a) the "slippery test" of reasonableness because it implies that desegregation is not "worth the price" (1288a). This misconception is echoed by the plaintiffs' assertion (Br. 58) that the Circuit Court's reasonableness rule demonstrates a departure from the educational goal of desegregation laid down in *Brown I* and *II* and reinforced by *Green*.

This unwarranted conclusion misconstrues the goal sought to be achieved. *Green, supra,* succinctly defined that goal:

> [S]chool boards operating such school systems (i.e. dual systems) were *required* by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system" . . . The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . *Id.* at 435-36 (Emphasis by Court).

And at

37-38, school boards were charged with:

> T]he affirmative duty to take whatever steps might e necessary to convert to a unitary system in which acial discrimination would be eliminated root and ranch.

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lless of the prior dualty of a school system prev- perated under the authority of *Plessy v. Ferguson*, 537 (1896) or otherwise, from these teachings it that if a current desegregation plan of a school aligns its schools and its assignment policies in a hat effects a conversion to a nonracial, nondiscrimi- ystem, the commands of this Court have been "Discrimination" is defined as "the act, practice, tance of discriminating categ ically rather than in- ." *Webster's Seventh New Collegiate Dictionary* Within the context of desegregation, if the opera- administration of a school system does not counte- ch acts and practices on account of race, discrimina- been eliminated.

or the courts to appraise the plans proffered by a bard to determine whether the results achieved are founded on considerations that are completely dis- from any degree of racial discrimination. When the peculiarities of local problems, conditions and nces, the plan of the Charlotte-Mecklenburg School ght not to be supplanted by a court plan that com-

h the subjective views of a trial judge that absolutes ed.

dissent in *United States v. Jefferson County Board tion*, 380 F.2d 385 (5th Cir. 1967), Judge Gewin curring) responded to the champions of absolutism:

> . . No consideration is given to any distinction in ny of the numerous school systems involved. Urban hools, rural ones, small schools, large ones, areas here racial imbalance is large or small, the relative umber of Negro and white children in any particu- r area, or any of the other myriad problems which e known to every school administrator, are taken

into account. All things must yield to speed, uniformity percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since Brown II. As the Court there stated:

> Because these cases arose under *different local conditions* and their disposition will involve a variety of *local problems*, we required further argument on the question of relief. (349 U.S. p. 298, 75 S.Ct. p. 755). *Id.* at 403.

In appraising the efficacy of desegregation plans, even courts espousing the Rule of Reason have been prone to place undue emphasis upon tangible factors such as numbers of buses and numbers of dollars–with very little direct consideration of the effect of such plans upon the educational processes of a particular system. After all, education is what *Brown I* and *II* professed to be all about.

We believe that judicial restraint should be employed in assessing the impact of a particular desegregation plan upon the educational program of a local system lest the excesses of plans devised by absolutists tear to shreds the fabric of the educational process that the decisions of this Court were designed to improve and promote for all children–black and white.

This is not meant to imply that courts should refrain from looking behind the judgments of school boards and administrators to ascertain whether or not they are in fact being employed as a guise to circumvent the commands of *Brown I* and *II* and *Green*. We suggest, however, that the judiciary should beware lest court-devised plans throw the education baby out with the bath water.

The Fourth Circuit (1267a) explained its reasons for adopting a Rule of Reason:

> We adopt the test of reasonableness–instead of one that calls for absolutes–*because it has proved to be a reliable guide in other areas of the law.* (Emphasis added)

The soundness of the explanation assigned by the Court of Appeals for its adoption of this test should require no documentation, except for those encumbered by a predisposition for absolutes.

The "other areas of the law" referred to by the Court of Appeals include the construction and application by this Court of a variety of fundamental individual rights guaranteed by the Constitution. By way of example we call attention to only a few.

Some of the limitations on Freedom of Religion are summarized in *Mohammad v. Sommers*, 238 F. Supp. 806 (E.D. Mich. 1964):

> [I]n the interest of the public weal, there are many limitations which bound religious freedom. Generally, it can be said that these limitations begin to operate whenever activities in the name of religion affect or collide with the liberties of others or of the public, or violate public policy. Witness this but partial lists of instances of such conflicts which have all been resolved against the claims of religion: Sunday closing, spiritualistic readings, selective service, parading in the streets, practice and advocacy of polygamy, vending periodicals in the streets, fluoridation of water, compulsory school attendance, child labor regulations, compulsory vaccination, blood transfusion, surgery and medical attention. *Id.* at 808.

Numerous limitations have been imposed upon the Right of Free Speech. For example, see *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gitlow v. People of the State of New York*, 268 U.S. 652 (1925); *Times Film Corporation v. City of Chicago*, 365 U.S. 43 (1961)–"It has never been held that liberty of speech is absolute"; *Schenck v. United States*, 249 U.S. 47 (1919); *Gilbert v. Minnesota*, 254 U.S. 325 (1920)–"it is not absolute–it is subject to restriction and limitation;" *Dennis v. United States*, 341 U.S. 494 (1951).

The same is true of the Right to Trial by Jury. Of interest is what this Court said in *Duncan v. Louisiana*, 391 U.S. 145

(1968), holding that a jury trial for petty offenses was not required by the Sixth and Fourteenth Amendments:

> . . . [T]he *possible consequences to defendants* from convictions for petty offenses had been thought *insufficient to outweigh* the *benefits* to efficient law enforcement and simplify judicial administration resulting from the availability of speedy and *inexpensive nonjury adjudications.* These same considerations compel the same result under the Fourteenth Amendment. *Id.* at 1453. (Emphasis added)

And in *Baldwin v. State of New York,* ___ U.S. ___, 90 S.Ct. 1886 (1970)

> One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences which face him, and the consequences which face appellant here. Indeed, the prospect of imprisonment for however short of time will seldom be viewed by the accused as trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. *Where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they be, may be outweighed by the benefits which result from speedy and inexpensive nonjury adjudications.* *Id.* at , 90 S. Ct. at 1890. (Emphasis added)

With reference to the Right to Counsel as expounded by this Court in *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Court in *Brinson v. State of Florida, County of Dade,* 273 F. Supp. 840 (S.D. Fla. 1967), at 845-47 had this to say:

> . . . The right to counsel should not be treated as an abstract theorem, but rather as a means of achieving the most perfect justice possible in a given situation. The essence of the right is to protect those charged with crimes from wrongful conviction. However, *that right is qualified by practical exigencies . . .*
>
> *The right to counsel guaranteed by the Sixth and Fourteenth Amendments is not an absolute right,*

> *nor are any of the rights guaranteed by the Constitution "absolute."* See *Creighton v. State of North Carolina*, 257 F. Supp. 806 (E.D.N.C. 1966). *As stated in that case, the Constitution was not written to provide an exercise in abstract idealism but as a practical guide for the management of the affairs of the country and the protection of the rights of its citizens. In today's complex society there can be no truly "absolute" rights.* Thus, the right to free exercise of the religion of one's choice is on its face absolute, but in application is limited since a religion requiring illegal activities would not be constitutionally protected. One cannot refuse to pay taxes because of religious scruples, nor can one engage in polygamy or any other practice directly harmful to the safety, morals, health or general welfare . . . The "absolute" right to free speech has been qualified and curtailed by libel and slander laws. Such right, on occasion, must be subordinated to other values and considerations. *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1950). It does not confer the right to persuade others to violate the law. *Bullock v. United States*, 265 F.2d 683 (6th Cir. 1958) . . . Neither does such right preclude Congress from excluding obscene matter from the mails or from punishing person advocating overthrow of the government by force. *United States v. Bryan*, 167 F.2d 241. *Likewise, the "absolute" right to counsel in all criminal prosecutions must be qualified by practical exigencies and, unless this is done, the necessities of sound judicial administration would be disregarded* and the administration of justice thrown into senseless chaos. (Emphasis added)

Without belaboring the point further, these examples are cited to demonstrate the futility of a Rule of Absolutes and the necessity for a Rule of Reason. As the dissenting opinion of Judges Sobeloff and Winter and the orders of the district court suggest, if a test of reasonableness is slippery and inapplicable to an evaluation of a school board's efforts to convert to a unitary system, a consideration of costs, disrup-

tions, buses, administrative problems, and impact on educational programs become totally unnecessary and irrelevant. If such be true, there would be no need for complex desegregation plans and much of the elapsed time since *Brown I* and *II* has been wasted.

To the contrary, we subscribe to what this Court said in *Dennis v. United States, supra:*

> Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. *Id.* at 866.

Green gave birth to a major portion of the nomenclature applied to measure school systems and desegregation plans. We find little evidence of any disposition on the part of the absolutists to heed the admonition suggested by *Dennis* that there are differences, which should reasonably be taken into account, between the 2 rural schools (1300 pupils) of New Kent County and the 105 primarily urban schools (84,500 pupils) of Charlotte-Mecklenburg.[16] The absolutists springboard from the nomenclature of *Green* to rationalize their own views, without taking into account the limitations of the ruling of this Court in that case:

> *[A]ll we decide today* is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. *Id.* at 440. (Emphasis added)

If the review of the Charlotte-Mecklenburg case does nothing else, we hope standards and guidelines for desegregation

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[16]The trial judge glibly dismisses the differences in his August 3 Order (Pets.' Br. A10): "The principal difference between New Kent County, Virginia, and Mecklenburg County, North Carolina, is that in New Kent County the number of children being denied access to equal education was only 740, whereas in Mecklenburg that number exceeds 16,000." Even this reference to 16,000 leaves an erroneous impression. Under the Board plan only 7,497 black youngsters will attend predominately black schools. See statistical data relating to the Charlotte-Mecklenburg schools and the Board plan attached hereto at A-3.

plans will be evolved that are sufficiently clear and definite to curtail the temptation of some lower courts to rely on their personal educational and social philosophies in judging plans and the system for which they are formulated.

D. THE DISTINCTION BETWEEN DE FACTO AND DE JURE IS NOT A VALID STANDARD BY WHICH TO DETERMINE WHETHER A SCHOOL SYSTEM IS UNITARY.

A major thrust of the district court's sweeping orders is based upon its findings that such segregation as remained in the Charlotte-Mecklenburg schools was the result of *de jure*, not innocent *de facto*, action of federal, state and local authorities. These findings are summarized in the opinion of the Court of Appeals (1264a):

> The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property until *Shelley v. Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage. The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accommodate the

> needs of immediate neighborhoods. Predominately black schools were the inevitable result. The interplay of these policies on both residential and educational segregation previously has been recognized by this and other courts.

These findings were employed as a justification by both the trial judge and the Court of Appeals for the disapproval of the Board's plan that would desegregate all but 10 of the system's 103 schools and place 100% of the black and white children in schools with thoroughly integrated teaching staffs and 68% of the blacks in 93 predominately white schools–with almost all of the remaining black children being scheduled to attend such schools for at least one-half of their 12 years of schooling. These *de jure* findings are in marked contrast to earlier findings of the district court in its April 23, 1969, Order (311a-312a):

> A word about the School Board.–The observations in this opinion are not intended to reflect upon the motives or the judgment of the School Board members. They have operated for four years under a court order which reflected the general understanding of 1965 about the law regarding desegregation. *They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions.* The Charlotte-Mecklenburg schools in many respects are *models for others.* They are attractive to outside teachers and offer good education. The problem before this court is only one part (albeit a major part) of the educational problem. The purpose of this court is not to criticize the School Board, but to lay down some legal standards by which the Board can deal further with a most complex and difficult problem. The difference between 1965 and 1969 is simply the difference between *Brown* of 1965 and *Green v. New Kent County* of 1968. *The rules of the game have changed, and the methods and philosophies which in good faith the Board has followed* are no longer adequate to complete the job

> which the courts now say must be done "now". (Emphasis added)

Of particular interest is the district court's April 23, 1970, finding:

> . . . Location of schools in Charlotte has followed the local pattern of residential development, including its *de facto patterns of segregation.* (305a) (Emphasis added)

Six months later, in its November 7, 1969, Memorandum Opinion (661a-662a) the district court gratuitously and without the benefit of further evidentiary hearings reversed its previous findings that segregation in Charlotte was *de facto.* The trial judge attributed to the School Board every real or fancied ill that beset the Charlotte-Mecklenburg community and stemmed from federal, state, local and private action, including, among others, public accommodations and housing, racial restrictions in deeds, zoning ordinances, urban renewal, low rent housing and placement of neighborhood schools.

The unfairness and artificiality of these attributions is underscored by a comparison of the district court's findings in this case with those of the Sixth Circuit in *Deal v. Cincinnati Board of Education, supra,* wherein the Court considered the same factors, and arrived at a diametrically opposite result and concluded:

> In our opinion, the burden of righting wrongs alleged to have been committed by public or private agencies ought not to be foisted upon Boards of Education, which have enough problems of their own to solve in providing proper education for the young. *Id.* at 1392.

In *Deal, supra,* the Court observed that in Cincinnati due to residential patterns there was a large concentration of negroes in one portion of the city and schools had been located to serve the neighborhoods where the children live. The Court in *Deal* referred to an Ohio statute that *required* the selection of school sites in areas of the heaviest concentration of children and declared that:

> Even in the absence of such a statute, it would seem prudent to locate the schools where they will be easily accessible and convenient to most of the children and without the necessity of bussing the children or their crossing dangerous thoroughfares. The Board should consider locations in areas that are being developed where large population increases are anticipated, and locations in areas where the Board already owns property.

We, of course, are mindful of the holding of this Court in *Cooper v. Aaron*, 358 U.S. 1 (1958) which is frequently cited for the proposition that as agents of the state a local school board is responsible for conditions created by state officials. This holding was made within the context of the violent, disruptive and overt action generated by Governor Faubus and other state officials to thwart the rezoning efforts of the local school board. In the case of Charlotte-Mecklenburg it is manifestly unsound, unfair and unrealistic that the actions of others should be arbitrarily attributed to its School Board as justification for the excessive order approving the disruptive and costly plan of the district court and disapproving the plan proposed by the Board.

It is common knowledge that prior to 1954 Charlotte-Mecklenburg maintained a dual system, sanctioned by the laws of the State of North Carolina promulgated under the authority of the "separate but equal" doctrine of *Plessy v. Ferguson, supra*, stricken down by *Brown I* and *II*,

Following the mandates of *Brown I* and *II*, in order to achieve further racial mixing Charlotte-Mecklenburg adopted a plan of redistricting that in 1966 was found by the Court of Appeals for the Fourth Circuit to comply with the Constitution as then understood. *Swann v. Charlotte-Mecklenburg Board of Education*, 369 F.2d 29 (1966). Thereafter, in furtherance of additional desegregation, the Board initiated a number of actions which were applauded by the district court in its April 23, 1969, Order (298a-301a, 311a-312a). Following *Green* and in response to the orders of the district court the School Board submitted its plan that on

February 5, 1970, was disapproved by the district court in favor of its own--reciting in support of its action that the local system was tainted by the *de jure* factors referred to above.[17]

The history of this case, the 1966 Circuit Court approval of geographic zones, the Board's initiative to promote desegregation and the results which will be achieved by the February 2, 1970, plan of the Board compels an answer to this question: When, if ever, can a school system born under the ill-fated star of *Plessy v. Ferguson* purge itself of the *de jure* stigma reserved for systems that once-upon-a-time had the dualty that *Plessy* condoned?

We suggest that the distinction between *de jure* and *de facto* is invalid and artificially contrived. In doing so, it is not our purpose to whitewash the Charlotte-Mecklenburg system by pointing a finger at other systems in other parts of the nation that have escaped the lash of oppressive court orders because they operate behind the mask of *de facto* segregation. We do suggest, however, that the *de jure - de facto* standard is not an appropriate test by which to judge a school board's compliance with the commands of *Brown I, Brown II* and *Green*. Schools everywhere should be measured by the same yardstick.

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[17]In Charlotte-Mecklenburg, 68% of the blacks during the school year 1969-70 attended predominately black schools. Under the Board plan this percentage is dramatically reduced to 32% (see A-3 Appendix attached to this brief). Comparable information derived from HEW figures reflects the following percentages of black students at predominately black schools: New York City, 86%; Los Angeles, 96%; Detroit, 91%; Philadelphia, 90%; Milwaukee, 88%; San Francisco, 54%; Boston, 77%; and Cincinnati, 78%.

The percentages of black students attending schools housing 95% to 100% black students in other cities is as follows: Baltimore, 76%; Cleveland, 80%; Washington, 89%; St. Louis, 86%; Newark, 75%; Buffalo, 61%; Gary, Indiana, 80%. In Chicago, 76% of the blacks attended schools less than 2% white. Source: United Press International *Release*, May 17, 1970.

The flaw in the *de jure - de facto* dichotomy is that from the moment *Brown I* was announced all federal, state and local laws requiring or permitting segregation were void and of no effect. On and after May 31, 1955, there plainly could be no *de jure* racial discrimination in any school system in the United States. What was left, North and South, was segregation in the schools in fact.

The *de jure* concept was never of any importance except as a handle upon which to hang state action and an affirmative duty to dismantle. If one accepts an affirmative conception of the Constitution, the *de jure* idea becomes worthless and the North and South distinctions intolerable.[18]

If separation by race in the public schools renders educational opportunities inherently unequal and if accomplishment of a social purpose is really the true goal, it ought to be purely of historical interest and wholly irrelevant how the practice originated, whether by law, custom or ghetto economics.

It is abundantly clear that social reform is the goal that the trial judge sought to achieve in Charlotte-Mecklenburg: Segregation *per se* is unlawful; educational opportunities and performances are not controlling–"Segregation would not become lawful, however, if all children scored equally on the [achievement] tests" (Pets.' Br. A15); "no school [shall] be operated with an all-black or predominately black student body" (822a); the "pupils of all grades [shall] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students" (822a); the School Board shall "maintain a continuing control over the race of children in each school . . . to prevent any school from becoming racially identifiable" (823a); the School Board shall "implement a continuing program, computerized or otherwise, of assigning pupils and teachers during the school

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[18]Senator Abraham Ribicoff, of Connecticut, has described this double standard as "monumental hypocricy."

year as well as at the start of each year for the conscious purpose of maintaining each school and each faculty in a condition of desegregation" (824a).[19] One embarked upon a crusade for social reform finds both opportunity and justification in the *de jure* precept. By way of illustration, it seems rather strained that private racial deed restrictions negated by *Shelley v. Kraemer*, 334 U.S. 1 in 1948 should be relied upon in support of nefarious state action now. The same is true of the purported effects of federal financing and other governmental action over which the school board has no control.

It is inescapable that an all-black school in Washington or Baltimore is just as unequal as an all-black school in Charlotte or Atlanta. People are pretty much the same everywhere and race prejudice now and in the past has not been confined to the southern part of the United States.[20]

If social reform were to be candidly admitted as the objective, we could more profitably concern ourselves with what is reasonably practicable for a school board to do to correct

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[19]Even if *arguendo* the *de jure - de facto* distinction were to be accepted, such a requirement of continued maintenance and control over the race of children in each school would seem to exceed the authority of a district judge, once he concludes that a desegregation plan has dismantled a dual system and has established a unitary one. After this has been accomplished, any future segregation would be *de facto*–not *de jure*.

[20]*Racial Isolation in the Public Schools, Summary Report by the Commission on Civil Rights* (1967), at 3:

> Although school segregation was sanctioned by law and official policy in Southern cities until 1954, there is a legacy of governmentally sanctioned school segregation in the North as well. State statutes authorizing racially separate public schools were on the books in New York until 1938, in Indiana until 1949, and in New Mexico and Wyoming until 1954. Although not sanctioned by law in other States, separate schools were maintained for Negroes in some communities in New Jersey, Illinois, and Ohio, as late as the 1940s and 1950s. In some cities such as New Rochelle, N.Y. and Hillsboro, Ohio, the courts found that school district lines have been gerrymandered for the purpose of racial segregation.

social inequities–North and South–rather than having our attention diverted to how a particular school system may have gotten that way. Further, it would obviate the necessity for artifically contrived rationales to support a trial court desegregation order, which in this case the Court of Appeals accepted "under familiar principles of appellate review."

E. THE CONSTITUTION DOES NOT REQUIRE RACIAL BALANCING IN SCHOOLS OR BUSSING OF CHILDREN OUTSIDE GEOGRAPHIC ATTENDANCE ZONES TO EFFECT SUCH BALANCING. BALANCING AND COMPULSORY BUSSING INFRINGE ON THE PERSONAL RIGHTS AND LIBERTIES OF THE CHILDREN INVOLVED.

The test of reasonableness adopted by the Court of Appeals–instead of one that calls for absolutes–can be the only sensible standard. Transportation may be employed on a "reasonable" basis as a legitimate tool to effectively desegregate an otherwise dual system. However, this still leaves open to question the circumstances under which and the purposes for which bussing may be or should be imposed upon a school system.

The mandate of the Constitution does not require racial balancing or compulsory bussing outside of normal attendance zones to achieve such balancing if the attendance areas are fairly drawn.

1. Racial Balancing and the Bussing to Achieve It Were the Bases for the Decisions of the Trial Court and Court of Appeals.

The net effect of the trial court orders of February 5, 1970, and August 3, 1970, was to require racial balancing at all three instructional levels and the bussing necessary to implement it–regardless of cost or disruptions. The net effect of the Court of Appeals decision was to impose racial balancing at the junior and senior high levels and to authorize

it at elementary level—tempered only by its test of reasonableness with reference to the amount of bussing involved.

In its August 3, 1970, Order the district court asserts that " 'Racial balance' is not required by this court, merely racial diversity." (Pets.' Br. A10). This was merely a reaffirmation of its previous denials that its prior denials that its prior orders were not based upon a requirement of "racial balance" (710a, 821a). A careful consideration of the various orders of the district court clearly shows that contrary to the trial judge's disclaimers his rulings were in fact premised upon the proposition that a racial balancing of the Charlotte-Mecklenburg schools is required by the Law of the Land.

In its April 23, 1969, Order (310a) the trial court entertained doubts about its power to order a racial ratio in the various schools of the Charlotte-Mecklenburg system:

> Counsel for the Plaintiffs says that since the ratio of white to black students is about 70/30 the School Board should assign children on a basis of 70% white and 30% black and bus them to all schools. This Court does not feel that it has the power to make such a specific order.

In its December 1, 1969, Order (710a) the trial judge acknowledged that his previously expressed doubts had been dispelled:

> . . .[T]he court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71/29 ratio in the various schools so that there would be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

In his February 5, 1970, Order (822a) the trial judge abandoned temporarily any pretense concerning racial balancing as a requirement when he directed:

> That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at

various grade levels have about the same proportion of black and white students.

The Court of Appeals likewise disavowed any purpose to require racial balancing of the Charlotte-Mecklenburg schools. In his dissent, Circuit Judge Bryan cut through the sematics employed by both the district court and his colleagues on the Court of Appeals (1293a-1294a):

> The Court commands the Charlotte-Mecklenburg Board of Education to provide busing of pupils to its public schools for "achieving *integration*". (Accent added) "[A]chieving integration" is the phraseology used, but actually, achieving racial *balance* is the objective. Busing to prevent racial imbalance is not as yet a Constitutional obligation. Therefore, no matter the prior or present utilization of busing for this or other reasons, and regardless of the cost consideration or duplication of the bus routes, I think the injunction cannot stand.
>
> Without Constitutional origin, no power exists in the Federal courts to order the Board to do or not to do anything. I read no authority in the Constitution, or in the implications of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its derivatives, requiring the authorities to endeavor to apportion the school bodies in the racial ratio of the whole school system.
>
> The majority opinion presupposes this racial balance, and also busing to achieve it, as Constitutional imperatives, but the Chief Justice of the United States has recently suggested inquiry on whether "any particular racial balance must be achieved in the school; . . . (and) to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." . . .
>
> I would not, as the majority does, lay upon Charlotte-Mecklenburg this so doubtfully Constitutional ukase. (Emphasis by Judge Bryan.)

In expressing his approval of the district court's plan at all three instructional levels, Circuit Judge Winter in his dissenting opinion candidly acknowledges that racial balancing *per se* should be required and cites as his justification the teacher ratios discussed in *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969). Judge Winter concludes: "if in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason why the same should not be true to achieve pupil integration . . ." (1301a-1302a).

Having had substantial integration of its faculties in the past, with the opening of its schools this fall Charlotte-Mecklenburg has in each of its 103 schools a white-black teacher ratio of about 3 to 1, which is the racial ratio of faculty members throughout the system. The School Board believes these assignments to be beneficial for both black and white children. However, we do not agree with the district court or Circuit Judge Winter that racial balancing of teachers can be cited as support for the proposition that children can or should be racially balanced as a Constitutional requirement. Teachers are under no compulsion to teach in a particular system. Teacher assignments occasion little, if any, inconvenience for the teacher and no costs or disruptions are imposed upon the school system. By contract they are employed by a system to apply their teaching talents wherever needed. If dissatisfied, they are free to quit and move to a system where employment contracts and conditions are more to their personal likings. Children must attend the school to which they are assigned and have no option to escape the unpalatable effects of their forced participation in a program of racial balancing designed to accommodate others.

In *United States v. Montgomery County Board of Education, supra*, at 236, this Court observed that the petitioners in that case did not argue "for precisely equal ratios in every single school under all circumstances" and that the United States did not argue that "racially balanced faculties are constitutionally required." As noted above, in apparent

agreement with the principle of racial balancing of school children, Circuit Judge Winter sought to temper the import of the district court order with the mollifying comment that "deviations from the overall ratio" had been permitted to "accommodate circumstances" with respect to particular schools. To one wedded to the proposition that racial balancing and ratios is the desired objective, circumstances and practical problems will seldom be asserted to prevent the achievement of this goal.

2. Racial Balancing and Compulsory Bussing Required by the District and Circuit Courts Violate the Constitutional Rights of the Children Involved.

In its February 2, 1970, Plan the School Board concluded with a statement of its conviction that its duty is to protect the rights of all children (741a):

> . . . The Board understandably is prone to *exercise caution lest, in protecting the rights of some of its citizens, it tramples on the rights of others* in the absence of a clear mandate of the Supreme Court. (Emphasis added.)

This concern of the Board was well-founded. The compulsory cross and satellite bussing requirements of the district court and the Court of Appeals will violate the individual rights guaranteed by the Fourteenth Amendment of those blacks and whites caught up in the forced mass movement of children away from their neighborhoods and out of their normal attendance zones for the sole purpose of achieving the racial balancing prescribed by those orders. It is ironic that the counterpart of the compulsion outlawed by *Brown I* and *II* is now employed in the name of the Constitution. Is it trite to suggest that two wrongs do not make a right?

It is obvious that a school board must necessarily have wide latitude in the establishment of attendance zones for orderly administration of the various schools in its system

and that, if these zones are fairly conceived on a nondiscriminatory basis, the children may be compelled to attend the school to which they are assigned under the applicable compulsory attendance laws. (See N.C.G.S. Sec. 115-116 et seq.) Absent an unlimited freedom of choice arrangement (which the Charlotte-Mecklenburg Board has not proposed), the right of a child to go to a particular school is, of course, not absolute, but circumscribed by the inherent power of a school board to make reasonable attendance assignments to conform to the needs of the school system and the community it serves.

Whether or not the Board as an elective body could lawfully have required cross and satellite bussing to effect the compulsory mass movement of children may be open to question. Suffice it to say, the Board did not choose to go to this extreme. The point now at issue is whether the judiciary under the mandates of the district court and the Court of Appeals infringed upon the individual constitutional rights of the children and their parents–black and white–who do not want to be bussed or balanced. In requiring this compulsory bussing those orders exceeded any Constitutional requirement, by *excluding* children from attending nearby schools *solely* on account of their race.

Deal v. Cincinnati Board of Education, supra, at 1391-92 (6th Cir. 1969) addressed itself to this matter:

> It is the contention of appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty. *Appellants are not the only children who have constitutional rights.* There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neigh-

> borhoods in order to mix the races. (Emphasis added.)

The district judge in *Ross v. Eckels, Houston Independent School District, supra*, asked an interesting question:

> Our hypothetical student well might say to the Superintendent of Instruction, "You are excluding me from School A, two blocks from my home, because I am black, and for no other reason. How can you do this when the Supreme Court of the United States in its latest pronouncement on the subject imposes on you the duty 'to operate as [a] unitary school system *within which no person is to be effectively excluded from any school because of race or color*?" I would be interested to know how this question would be answered. (Emphasis added.)

From time immemorial, the public school has been a focal point of community and family life. The location of a particular school is a major consideration for parental decisions regarding the location of their homes and the neighborhood in which they choose to live. Obviously, affluent whites and blacks are normally better able to make this choice than poor whites and blacks. Nevertheless, some poor people prefer that their children attend the school serving the areas of their residence. To afford disadvantaged parents the flexibility of greater options for the education of their children than their existing economic or social status may permit and to bring these available options made in line with those enjoyed by the more affluent citizens are worthwhile objects of any desegregation plan. But it is quite a different matter for a judicial decree to compel bussing to a distant school outside the normal attendance zones–whether the parents like it or not. A court mandate that requires this coercion to achieve what it conceives to be a worthy social purpose (i.e. racial balance) is judicial paternalism.

The dissenting opinion of Judge Bell (concurred in by Judge Gewin) in *United States v. Jefferson County Board of Education, supra*, involving the desegregation of numerous deep south schools, speaks to the matter at hand (at 411):

> Then there is the matter of personal liberty. *Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty.* History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty . . . They (the majority opinion) *cast a long shadow over personal liberty as it embraces freedom of association and a free society.* They do little for the cause of education. (Emphasis added.)

In *Jefferson County, supra*, Judge Gewin in his own dissent (concurred in by Judge Bell) expressed similar views

> . . . There must be a mixing of the races according to majority philosophy *even if such mixing can only be achieved under the lash of compulsion* . . . Accordingly, *while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike.* There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law . . . *When our concepts as to proportions and percentages are imposed on school systems,* notwithstanding free choices actually made, *we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly . . . embrace.* (Emphasis added.)

The majority in *Jefferson, supra*, and other courts have sought to justify infringement upon the rights of students in the majority where segregation is said to rest upon *de jure* action.

The distinction between *de facto* and *de jure* is not a valid test by which to measure the liberties of either black children or white children. It is fair to assume that both black and white school children are blissfully unaware of any such distinction or of the circumstances that are relied

upon by some to justify unequal treatment. The personal rights and liberties of one child should not be sacrificed to promote those of another.

3. A Neighborhood Plan Fairly Administered Without Racial Bias Satisfies the Constitutional Requirements of a Unitary System.

The neighborhood school concept[21] is one that the Board considers to be beneficial to the children and enhances the support that comes when children and parents identify themselves with a particular school and its programs. Fragmentation of this type of association is not in the best interest of our schools.

In its April 23, 1969, Order the district court volunteered its own educational philosophy in opposition to the neighborhood school (306a):

> Today people drive as much as forty or fifty miles to work; five or ten miles to church; several hours to football games; all over the country for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood . . . If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships . . .

To the contrary, all too many of our present day relationships have become institutionalized and depersonalized. We believe this trend to be unwholesome. Close relationships among teachers, parents and children should to the maximum extent be encouraged and undergirded. The neighborhood school plays an important part in fostering such relationships–particularly at the elementary level where the

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[21]Geographical zoning is the common method of determining school attendance and the neighborhood school is the predominant attendance unit. *Racial Isolation in the Public Schools–Summary of a Report by the Commission on Civil Rights*, page 3, (March 1967).

ties between home, school and after-class acitvities are an important part of the educational process of children in their early formative years. In a metropolitan system such as ours the ideal may not always be achieved. This should not be a reason for dismantling and abandoning the neighborhood school.[22]

From the beginning there has been this marked contrast between the views of the trial court and those of the Board regarding the pertinence of the neighborhood school. The School Board responded to the pressure of the trial court when it submitted its February 2, 1970, plan—a plan which retained, but severely strained, the principle of the neighborhood school. *Deal v. Cincinnati Board of Education*, 324 F.2d 209 (6th Cir. 1966) succinctly stated the case for the neighborhood school:

> Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominately or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and

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[22]It is interesting to note that in the brief filed by petitioners with this Court in *Green, supra*, October Term, 1967, No. 695, substantially the same view of the importance of the neighborhood school was expressed at page 14 of that brief: "Prior to the relatively recent controversy concerning segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need for transportation, encourage the use of schools as community centers and generally facilitate planning for expanding school populations."

> administration through the use of neutral, easily determined standards, and better home-school communication.

This appraisal was reaffirmed in *Deal v. Cincinnati Board of Education* (1969) *supra*, wherein the Court observed that the neighborhood school concept was not only sanctioned, but required, by statute in the State of Ohio.

In his policy statement of March 24, 1970, entitled *SCHOOL DESEGREGATION: A Free and Open Society* (116 Cong. Rec. S4351, Daily Ed., March 24, 1970), the President of the United States addressed himself at length and in depth to the important role that the neighborhood school plays in the education of our public school children. He said in part:

> The neighborhood school will be deemed the most appropriate base for such a [unitary] system.
>
> Transportation of pupils beyond normal geographical school zones for the purpose of achieving racial balance will not be required.

An earlier statement[23] by Robert Finch, then Secretary of Health, Education and Welfare, with particular reference to the Charlotte case, underscored some of the ill-effects of a dismantling of the neighborhood schools:

> We have a very confused set of decisions—that go to both ends of the spectrum with regard to the question of bussing, for example. We have a decision out of the Fifth Circuit involving Orange County, Florida, which says in effect the neighborhood school is the important concept, and that must be preserved at all costs, and that's where the dollars ought to be allocated.
>
> Then you have decisions like Charlotte, in the Carolinas, in Los Angeles, which I think are totally unrealistic, because they say that you shall take the

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[23] *PROFILE*, a production of Metromedia Radio News, Feb. 27, 1970, Transcript at 7-8.

> percentages in the district as a whole and apply those and force those on each district—or, each school within that district.
>
> And in the case of Charlotte, they have to buy 400 new buses; in the case of Los Angeles, they have to buy, I guess, better than 500 new buses, with all that goes with that, and when you have that kind of a situation, that's not the best use of your resources, because you're trying desperately to keep the doors open, to pay faculty, to pay janitors. But beyond that, it's not the best educational experience, because to haul young children, for an hour or more, across long distances, as you have particularly in the Los Angeles situation, means they can't get any tutoring after school, the parents can't—have great difficulty in getting to the teacher to talk about their child; they can't take part in athletic events, or dramatic events or extracurricular events, and it's not good educational policy.
>
> So that I feel very strongly that those decisions are moving in the wrong direction.

In the Charlotte-Mecklenburg case, the trial court quite obviously considered the neighborhood school to be unimportant and irrelevant. The Court of Appeals, though not addressing itself *per se* to the neighborhood school concept, nevertheless disapproved the geographic zones at all three instructional levels which the Board in its considered judgment had proposed to achieve a unitary system while retaining the basic benefits of the neighborhood school.[24]

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[24] In commenting upon the complexities of ineffective freedom of choice plans, the petitioners in *Green, supra*, at page 15 of their brief, recommended the simplicity of disestablishing dual zones by conversion to compact attendance areas close to home: "The easiest method, administratively, was to convert the dual attendance zones into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience. With rare exception, however, southern school boards, when finally forced to begin desegregation, rejected this relatively simple method . . . ."

The School Board plan clearly demonstrates a good faith, conscious and effective effort to keep its neighborhood school attendance areas–drastically gerrymandered to promote maximum desegregation. This plan satisfies the Constitutional requirement that a unitary system be established within which no child is excluded because of race or color.

4. The Compulsory Bussing Approved by the Court of Appeals Is Violative of the Provisions of Section 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. 2000c(b) and 2000c-6(a)(2)] Which Expressly Prohibits a United States Court To Order Transportation To Achieve Racial Balance in Schools.

The Court of Appeals has read into the Civil Rights Act of 1964 interpretations which are not fairly warranted by the plain and intelligible language of the Act or supported by its legislative history. In so doing, it has joined the error committed by the Court of Appeals for the Fifth Circuit in *Jefferson, supra*, which reached its conclusion by a strained illogical analysis of this Act and the legislative history.

The clear language of the Act makes no distinction between *de facto* and *de jure* segregation and the legislative history expressly disclaims any sectional or tenuous distinctions adopted by the Court of Appeals and the cases on which it relies. If it were otherwise, Congress would have expressly so stated and the proponents of the bill would have made it so known.

The Courts have been unwilling to give any definitive statement with respect to the term "desegregation" and, therefore, it became incumbent upon Congress to supply an answer in this void. 42 U.S.C. 2000c(b) provides as follows:

> "Desegregation" means the assignment of students to public schools and within such schools without

> regard to their race, color, religion or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

It is therefore apparent that Congress in expressing a definition of "desegregation" in a positive manner stated that no student would be *excluded* from his school on account of race, color, religion or national origin. This is the language of *Alexander v. Holmes, supra*. Congress also negatively stated "desegregation" does not mean assignment to overcome racial imbalance.

In order to give further meaning to its definition, Congress by 42 U.S.C. 2000c(a) provides in part as follows:

> . . .[P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with Constitutional standards. . . .

The term "desegregation" has taken on such national concern and importance that a Congressional definition may properly be regarded as a statement of public policy. Although the courts may take action with reference to establishing public policy, it primarily rests with the lawmakers to determine public policy. In *Building Service Employees International Union v. Gazzam*, 339 U.S. 991 (1950), the Supreme Court held:

> The public policy of any state is to be found in its Constitution, acts of the legislature, and the decisions of its courts. *Primarily, it is for the lawmakers to determine the public policy of the state.* (p. 787) *Twin City Pipeline Company v. Harding Glass Co.*, 283 U.S. 353, 357, 51 S. Ct. 476, 478, 75 L. Ed. 1112, 83 A.L.R. 1168.

Having primary responsibility, and acting to fill a void left by the courts, the public policy as expressed by the Congress of the United States is binding upon the judiciary.

Shortly after the Civil Rights Act of 1964 became the law of the land, the Circuit Court for the Fifth Circuit by a three-judge panel in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (1966) commonly referred to as *Jefferson I*, and *en banc* in *United States v. Jefferson County School Board*, 380 F.2d 385 (1967), commonly referred to as *Jefferson II*, undertook to dissect that Congressional enactment. In *Jefferson I* the Court acknowledged the supremacy of the legislature in the establishment of national policy in the constitutional scheme of things and the restraints that should be employed by the judiciary in running counter to such a declaration policy:

> More clearly and effectively than either of the other two coordinated branches of government Congress speaks as the voice of the nation. (at page 850) . . . When Congress declares national policy, the duty the other two coordinated branches owe to the nation requires that, within the law, the judicial and executive respect and carry out that policy. (at 856) . . . We shall not permit the Courts to be used to destroy or dilute the effectiveness of the Congressional policy. (at 856) . . .

Having made these pronouncements, the panel in *Jefferson I* abandoned these professed restraints and adopted a rationale by which it came to unwarranted conclusions that clearly thwarted the legislative policy as expressed in the Civil Rights Act of 1964[25] expressly forbidding racial balancing

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[25]The remarks of Hubert Humphrey, then Majority Whip, made during the course of Senate deliberations are a clear down-to-earth expression of the legislative intent:

> . . .[T]he Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The

and the use of transportation to achieve it. This error was perpetuated by the majority in *Jefferson II* and other courts relying upon the ill-considered reasoning of these cases.

Judge Bryan in his dissent in the Charlotte-Mecklenburg case clearly recognizes congressional hostility to the principle of "racial balance":

> Even construed as only incidental to the 1964 Civil Rights Act, this legislation in 42 United States Code §2000c-6 is necessarily revealing of Congress' hostile attitude toward the concept of achieving racial balance by bussing. It unequivocally decried in this enactment "any order [of a Federal Court] seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . to achieve racial balance . . .

The opinions and orders of the Court of Appeals and of the district court are based on the premise that balancing of the races in each of the Charlotte-Mecklenburg schools is the optimal objective. Those opinions and orders contravene the prohibition of the Civil Rights Act of 1964.

F. RACIAL BALANCE–THE HARBINGER OF MASSIVE COURT INVOLVEMENT IN SOCIAL THEORIES.

The Supreme Court is now being asked by petitioners to direct this School Board to engage in another experiment in efforts to seek some educational or social goal which has eluded them and will continue to do so for years to come. It is well known that social balance, social equivalence,

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bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. 110 Cong. Rec. p. 12717, June 4, 1964.

educational equivalence and related concepts will not be accomplished by the blacks over night. All the sociologists and educators agree on this point.

The theory advanced by the petitioners in the original *Brown* case, *supra*, was not that every child would be entitled to go to a non-segregated school, but rather that the children would be distributed to the schools by drawing attendance lines on a natural basis. 21 U.S.L.W. 3164 (Dec. 16, 1952). This position was pursued in *Cooper v. Aaron*, 358 U.S. 1 (1958) where petitioners sought enforcement of a plan which proposed to "develop school attendance areas consistent with the location of white and colored pupils with respect to the present and future physical facilities of the Little Rock school district." *Norwood v. Tucker*, 287 F.2d 798 (8th Cir. 1961).

The theory of freedom of choice was successfully urged upon this Court in *Goss v. Knoxville*, 373 U.S. 683 (1963) and was openly embraced by the Department of Health, Education and Welfare under the Civil Rights Act of 1964 and by the Fifth Circuit in *United States v. Jefferson*, 380 F.2d 385 (1967).

Petitioners' attorneys in *Green, supra*, (Oct. term, 1967, #695), on page 15 of their brief, argued:

> After Brown, southern school boards were faced with the problem of "effectuating a transition to a racially non-discriminatory system" (Brown II at 301). *The easiest method*, administratively, was *to convert* the dual attendance zones *into single attendance zones*, without regard to race, so that assignment of all students would depend only on *proximity* and *convenience*.[16]
>
> [16]Indeed, it was this method that this Court alluded in Brown II when it stated "[t]o that end, the courts may consider problems related to administration, arising from . . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis" (349 U.S. at 300-301). (Emphasis added.)

Similar expressions appear throughout petitioners' brief in *Green*.

Notwithstanding petitioners' arguments in *Green*, and notwithstanding appellate approval of the existing attendance lines of the Charlotte-Mecklenburg system, the Board gerrymandered so as to produce a maximum racial mix in schools and proposed to totally desegregate faculties. It has gone far beyond the requirements of *Brown, Green* and the position of the NAACP throughout all Supreme Court proceedings. Now the NAACP seeks total racial balance. Why?

For years, the courts and school systems have been advised that dramatic improvement in the performance of black students could be expected upon the attainment of desegregation. The Coleman Report teaches there is a tendency for blacks to improve in desegregated schools. The achievement tests of this system (R. Ex. 64, July 15, 1970) disclose that the improvement brought about by desegregation is indeed slight. Perhaps the reason is that this system has been offering educational equivalence in its facilities and programs for some years (298a-302a).

The disappointing results of school desegregation brings to the forefront the environmentalists who have consistently maintained that the environment and attitudes of a child are the largest determinants in achieving equivalence. How will the courts meet this problem? Will it require massive economic assistance to families in the lower economic strata? Perhaps the court will be persuaded that the attitudes and environment of the blacks may be enhanced by enlarging the school board's responsibility with respect to food, clothing and shelter, all of which may best be resolved by placing these children in state maintained boarding educational centers. If the court has at that time accepted the racial balance theory, then in view of the substantial transportation times which children encounter in traveling to and from these centers, it is a simple step of mental gymnastics to require full attendance of whites in these educational centers so as to further satisfy the peer

group advocates. If this Court embraces the principle of racial balancing, it will have adopted the proposition that the constitutional rights of one child may be submerged to promote the presumed rights of another.

Even this will not produce total social mixing sought by petitioners and additional areas of court intervention will be requested which the court must be prepared to face. For instance, the district court conjectured that public housing has been concentrated by action of federal officials. Obviously, the concentration of blacks in large public housing projects would perpetuate segregation not only in the schools but in neighborhoods. Will the court limit the size of public housing projects and the distance between such projects so as to assure dispersal of blacks?

Related questions arise in the area of private residential housing which the district court said perpetuated segregation. Will this Court ultimately require a private owner of a subdivision to include a prescribed quota of homes for blacks only in each block of a residential development? Will transportation be required in remote suburban areas for those blacks who customarily use public transportation?

Numerous other questions relate to what extent this Court will require local public authorities to inaugurate plans for the racial residential balancing of entire communities. If community balancing is required, will judicial control over power possessed by local building licensing officials be used to establish and maintain such balancing? Will local governments be required to submit for court approval plans for desegregation of entire cities? Will such plans be subject to continued judicial review and supervision?

Another area which petitioners may pursue through the courts relates to school grading, IQ and achievement tests administered by the school system. Obviously, those students who perform poorly in school on such tests are less likely to get the desired employment positions. The remedy which may be urged upon the courts is that such grading is unfair to minority groups with different cultural back-

grounds. Therefore, all students should be automatically promoted as having received the same education and given the same certificate on graduation. In the eyes of the prospective employer, all students would possess the same educational qualifications. Is this Court prepared to foist this theory upon the nation?

Recently, this Court had occasion to pass upon the unconstitutionality of disproportionate district representation which resulted in the "one man one vote rule." *Reynolds v. Sims*, 377 U.S. 533 (1964). School boards are now being faced with demands by black students that student organizations, cheerleaders, school officers, class officers and other positions ordinarily determined by popular vote be accorded blacks pro rata and without regard to the vote of the majority. If this Court should direct pro rata representation in the schools, then this Court must be prepared to answer similar demands of these black students when they move into the adult world which does not permit racial ratios in elective offices. Will this Court direct that minority groups be permitted to select a pro rata number of seats in Congress, state legislatures and other positions of government?

It is quite obvious that this Court would be unwilling to order the adults of this society to such extremes in an attempt to attain social racial balances. Are children any less citizens by reason of their youth? Certainly not, as they are accorded the full spectrum of constitutional rights and obligations conferred on adults, other than the right to vote. This being true, this Court cannot justify taking from the children involved their personal preferences, their time, their right to free association and the host of other rights they possess as citizens which would be sacrificed in being involuntarily transported to a school beyond the area in which they reside—solely for the purpose of satisfying a racial balance numbers game. The rights of one child and the child's parents to be free of standardization by the state is clearly enunciated in *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925):

> . . . The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to *standardize its children* by forcing them to accept public instruction from public teachers only. *The child is not the mere creature of the state*. Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (Emphasis added.)

In describing the word "liberty", this court held in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as follows:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of the happiness of men . . . The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect . . .

If this Court directs racial balance in the child's world, then there is no constitutional prohibition which would prevent the court ordering racial balance in the adult world. The Constitution as written and as developed contains no premise upon which to undergird such reckless appropriation of the constitutional rights of its citizens, be they children or adults. Mr. Justice Reynolds in *Meyer v. Nebraska, supra*, describing the totalitarian ancient state of Sparta, stated:

> . . . In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of the state without doing violence to both the letter and spirit of the Constitution.

Will the courts tread where it has forbidden the legislature to walk?

II. DISCUSSION OF CONSTITUTIONAL PRINCIPLES TO DESEGREGATION PLANS.

A. GENERAL STATEMENT REGARDING DESEGREGATION PLANS INVOLVED IN THIS CASE.

When the Fourth Circuit heard this case, there were two plans before it, both of which related to all three instructional levels: The February 2, 1970, plan of the Board and the February 5, 1970, plan of the district court, which the trial judge later reapproved and reinstated in his orders of August 3 and August 7, 1970. After remand by the Court of Appeals, during the course of the hearings held pursuant to the Circuit Court directives, three other desegregation plans were presented for the elementary level: the HEW plan, a plan prepared by a minority of the Board and an earlier draft of a plan prepared by the court consultant Dr. John A. Finger. In his August 3, 1970, Order, the trial judge disapproved the HEW plan and found the other two to be reasonable alternatives. Having appealed to the Fourth Circuit from the August 3 and August 7 Orders, the School Board on September 3, 1970, filed with this Court a motion for leave to supplement the record, or in the alternative for a Writ of Certiorari to the Court of Appeals, so that this

Court would have before it the complete record of the proceedings that culminated in the August 3 and August 7 Orders–including the three additional plans referred to above. As this brief is being prepared no action has been taken by this Court upon the Board's motion of September 3. On the assumption that the motion will be granted, this brief addresses itself to all five plans.

In an effort to be of the greatest possible assistance to this Court, as a separate appendix to this brief the School Board has filed a total of 9 maps (color coded where appropriate) to show graphically the attendance areas, pairings, clusters and other information concerning all of the plans–with the exception of the earlier Finger draft that was too indefinite for adaption to a graphic portrayal. Careful consideration of these maps is earnestly invited with the hope that this Court will find them to be a convenient means of getting a quick accurate picture and comparison of the various desegregation proposals.

B. THE BOARD PLAN CONVERTS THE CHARLOTTE-MECKLENBURG SCHOOLS TO A UNITARY SYSTEM. THE FOURTH CIRCUIT JOINED IN THE ERROR OF THE TRIAL COURT BY DISAPPROVING THAT PLAN.

1. The Board Plan Squares with the Conversion Checklist Prescribed by Green.

In *Green, supra*, this Court (commenting upon the typical pattern of state-imposed dualty found in New Kent County and outlawed by *Brown I* and *II*) observed at 435:

> . . . Racial identification of the system's schools was complete, extending not just to the *composition of student bodies* at the two schools but to every facet of school operations–*faculty, staff, transportation, extracurricular activities and facilities* . . . (Emphasis added.)

This itemization has been used by courts as a checklist by which to measure the effectiveness of desegregation efforts.

The administrative staff and school faculties of the Charlotte-Mecklenburg system are now thoroughly integrated. In its April 23, 1970, Order the district judge made specific findings that there was no discrimination with respect to the "other facets" referred to in *Green*, as well as a number of others (298a-301a). The Fourth Circuit also took note of these (1265a-1266a). In addition the Board has inaugurated many other innovative programs.

Most of these policies and practices were undertaken by the Board on its own initiative, a circumstance that prompted the district court to state that nothing in its April 23, 1969 Order shall be construed as any reflection on the good faith motives or judgment of the School Board which had "achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts and have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions. The Charlotte-Mecklenburg schools in many respects are models for others." (311a-312a).

Since the petitioners do not controvert the findings of the trial judge in giving Charlotte-Mecklenburg a clean bill of health with respect to these "other facets," the only one at issue in this case involves the question of whether the Board plan effectively eliminates discrimination in the schools and student bodies of this system.

2. The Board Plan Based on Geographic Attendance Zones Gerrymandered to Achieve Maximum Racial Mix Fully Complies with Constitutional Requirements for Desegregation of the Charlotte-Mecklenburg Schools and Their Student Bodies.

The pivotal issue in this case is whether the School Board's desegregation plan based on comprehensively restructured geographic attendance zones satisfies the Constitutional requirement of a unitary system in a situation where these zones are established to promote the maximum amount of desegregation possible by the employment of this tech-

nique.[26] This issue involves a consideration of the extent to which a school board may employ this technique as a means of preserving some semblance of the neighborhood school concept which it, together with most school systems and educators, believe to be beneficial.[27]

Of the maps previously referred to, the Court's attention is invited to Map Nos. 1, 6 and 8 showing the elementary, junior high and senior high restructured zones of the Board

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[26]The Board plan is supplemented by a majority to minority transfer program designed to promote desegregation and to prevent resegregation. It allows any black child in a school having more than 30% of his race to attend one that is less than 30% black, but permits a white child to transfer only if his present school is more than 70% white and the one to which he seeks assignment is less than 70% white. To encourage blacks to take advantage of this option, transportation is provided for those chosing to move from their neighborhoods.

[27]Compare article appearing in NATION'S SCHOOLS, June, 1970, page 100, entitled "*Forced Busing Vetoed by 90% of Schoolmen*":

> Although nearly 40 per cent of the nation's school superintendents think the Nixon Administration is vacillating on its enforcement of school desegregation, 90 per cent agree with the President's recently stated reservations about compulsory busing . . .
>
> Despite the various shadings of opinion on enforcement policy, most schoolmen reported unequivocal opposition to busing as a means for achieving desegregated schools. Judging form their comments, for a sizeable majority of superintendents the neighborhood school represents, as one New Yorker expressed it, "a fundamental principle in American public education." Objections to busing fell mainly into the following categories:
>
> Busing is an infringement on the rights of parents and students.
>
> Busing is a poor solution to the problem of desegregating the schools since the long-term answer depends on the alteration of residential housing patterns.
>
> Busing is too expensive a solution, when money could be better spent to upgrade educational programs in poverty area schools . . .
>
> How administrators voted: . . .

plan and Map No. 2 showing the new elementary zones superimposed upon the previous attendance areas.[28]

Under the Board plan, 100 of the 103 schools in the Charlotte-Mecklenburg System would have some degree of racial mix, leaving only three all-white schools. 68% (16,709) of the black students would attend 93 schools with less than 40% black student bodies[29]—leaving the remaining 32% of the black pupils in the 10 schools having white ratios of 17% to 1%.[30] These 10 predominately black schools remained in spite of the Board's best efforts to achieve a more satisfactory racial mix in them by means of the drastically gerrymandered attendance lines. Of these 10 schools, 9 are elementary[31] and 1 is a junior high school.[32]

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2. Do you think busing of students should be implemented to achieve desegregation, even if it means a weakening of the neighborhood school concept?

10% Yes 90% No . . .

The opinion poll survey, conducted monthly by the editorial staff of NATION's SCHOOLS, is based on a five per cent proportional sampling of 14,000 school administrators in 50 states. This month's poll brought a 40 per cent response.

[28]Some of these maps reflect slight adjustments occasioned by "rounding off" the square corners of the computer lines to conform them to identificable landmarks.

[29]This represents a 100% increase over 1969-70, when 8,858 blacks attended 73 predominately white schools. In March of 1965 only 343 blacks attended 22 white schools. Several predominately white schools slightly exceed 40% black.

[30]See Appendix attached to this brief for statistical data pertaining to the Board plan.

[31]Under the Board plan, these 9 elementary schools have the following black-white ratios: Bruns Ave. (90-10); Marie Davis (88-12); Double Oaks (99-1); Druid Hills (96-4); First Ward (99-1); Lincoln Heights (99-1); Oaklawn (99-1); University Park (85-15); and Villa Heights (83-17). (*A Plan for Student Desegregation*–Systems Associates, Inc., page 31.)

[32]Under the Board plan, Piedmont Junior High has a black-white ratio of 90% (B)-10% (W). (*A Plan for Student Desegregation*–Systems Associates, Inc., page 31.)

The remaining predominately black schools are located in the inner-city core which is populated for the most part by blacks, many of whom due to shifting housing patterns had moved into previously white areas. In its March 21, 1970, Supplemental Findings of Fact (1208a), the trial court acknowledged:

> Both Dr. Finger and the school board staff appear to have agreed, and the *court finds as a fact*, that for the present at least, there is *no way to desegregate* the all-black schools in Northwest Charlotte *without providing* (or continuing to provide) *bus or other transportation* for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion. (Emphasis added.)

In formulating its plan, the Board to a very significant degree has elected to exceed Constitutional requirements. It materially altered the compactness of neighborhood school areas.[33] It introduced into each school a precise black-white teacher ratio. It sought to achieve a 70/30

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[33] *Brown II* recognized that an acceptable desegregation plan may employ geographical rezoning if done fairly and in good faith to effect "a revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis." A pertinent historical note is made by Alexander M. Bickell in his recent book, *The Supreme Court and the Idea of Progress:*

> At the first argument of *Brown v. Board of Education* in 1952, Justice Frankfurter asked the future Justice Thurgood Marshall, then counsel for the Negro children, whether a decision in his favor would "entitle every mother to have her child go to a non-segregated school?" Mr. Marshall replied in the negative. "What will it do?" Justice Frankfurter pursued. Mr. Marshall replied: "The School Board, I assume would find some other method of distributing the children by drawing district lines." The only requirement would be, Mr. Marshall added, that the lines be drawn "on a natural basis," and not be gerrymandered so as to enclose or exclude Negro neighborhoods. Bickell, *The Supreme Court and the Idea of Progress*, p. 117 (1970). See also 21 U.S.L.W. 3164 (1952).

racial mix in as many of the 103 schools as possible–a goal which the Board maintains cannot be required by judicial fiat. Because of neighborhood patterns, only an intractable remnant of black children will be assigned to the 10 inner-city black schools. Any of these who wish to leave their neighborhoods are encouraged to do so by the majority to minority transfer policy and are provided the transportation with which to accomplish the move. Of those who remain, almost all are assured of a desegregated school experience for one-half of their 12 years.[34]

By any reasonable standard the Board plan dismantles whatever remained of the old dual system that years ago was maintained under the permissiveness of *Plessy v. Ferguson* and the compulson of State law. Any vestige of racial discrimination or identification has been obliterated. All facets of the Charlotte-Mecklenburg schools–including student bodies, faculty, staff, transportation, extracurricular activities and facilities–are desegregated. No child is excluded from any of the 103 schools because of race or color. As stated by the Court of Appeals (1268a), an intractable remnant of segregation "should not void an otherwise exemplary plan for the creation of a unitary system."

A consideration of the pro-desegregation gerrymandered zones of the Board excludes any inference that they were formulated for any purpose other than a color conscious one to promote maximum desegregation of the Charlotte-Mecklenburg Schools. The Board has acquitted its affirmative duty to convert to a unitary system.

Both the trial judge and the Court of Appeals erred when

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[34]Of the 32% black children who will remain in predominately black schools 6,739 are assigned to 9 (out of a total of 72) elementary schools and 758 will attend 1 (out of a total of 21) junior high school. All 10 of the high schools are desegregated. Under the Board plan all of the 758 junior high students will advance to the predominately white high schools and all but a small handful of the elementary youngsters will advance to the 20 desegregated junior high schools.

they disapproved the Board plan—errors premised upon the faulty notion that more racial balancing should be superimposed upon that which the Board itself elected to undertake. By so doing, the Circuit Court exceeded the bounds of its own test of reasonableness.

C. THE COURT APPROVED FINGER PLAN EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING RACIAL BALANCING AND THE BUSSING TO IMPLEMENT IT. THE FOURTH CIRCUIT JOINED IN THE TRIAL COURT'S ERRORS BY DISAPPROVING THE BOARD PLAN AND MISAPPLYING ITS OWN RULE OF REASON.

This controversy revolves around the trial court's February 5, 1970, Order requiring long distance bussing to racially balance the elementary, junior high and senior high schools of the Charlotte-Mecklenburg system. The plan adopted by the trial court and ordered into effect was prepared by Dr. John A. Finger, Jr., a Professor of Education at Rhode Island College, who had previously appeared as a witness for the plaintiffs.[35] The objectionable features of the Finger plan were basically occasioned by his adding to the Board plan the paired and clustered schools and satellite areas that he considered necessary to comply with trial court instructions to eliminate the 10 schools that remained predominately black under the Board plan and to create a racial balance in one senior high school (981a). Upon appeal, the Fourth Circuit approved the secondary plans of the district court, but disapproved its elementary plan as being unreasonably onerous. Upon remand (August 3, 1970, Order) contrary to the Circuit Court ruling the trial judge concluded

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[35]The Fourth Circuit in commenting on the use of Dr. Finger as court consultant cautioned against the use of a partisan witness, but concluded that his dual role did not cause him to be faithless to the trust imposed on him and therefore, "the error, if any, in his selection, was harmless." (1279a).

that his own elementary plan was reasonable and reaffirmed his February 5 Order at all three instructional levels.

1. An Analysis of the Court Approved Finger Plan Shows the Racial Balancing Imposed Upon the Charlotte-Mecklenburg Schools.

The following is a brief summary of the consequences of balancing requirements at all three instructional levels which were prescribed by the February 5 and August 3 Orders of the district judge—those at the secondary level having been approved by the Circuit Court and those at the elementary level having been held by the Circuit Court to be unreasonable because too extensive and onerous.

(a) *Elementary Schools*

The most burdensome part of the trial court's order is the long distance cross-bussing of about 10,300 elementary children to eliminate 9 predominately black inner-city schools by pairing them with 24 predominately white suburban schools—requiring the bussing of 5,150 black first, second, third and fourth graders to the white schools and 5,150 white fifth and sixth graders to the black schools.

It is ironic that, under court compulsion it is proposed to reinstate the dual bus system Charlotte-Mecklenburg abandoned years ago. Once again, buses for whites only and buses for blacks only will be passing each other on the streets of Charlotte.

This Court's attention is invited to Map 3 which shows more clearly than can any written description the practical effect of the racial balancing edicted by the court plan at the elementary level. The long streamers on that map are designed to assist this Court in identifying the 9 inner-city predominately black schools that are paired with the 24 white suburban schools for the sole purpose of achieving the optimal 70/30 racial mix the trial judge adopted as his goal.

These are the 9 elementary schools in which the School Board was unable to attain a more satisfactory mix[36] because the concentration in black neighborhoods is so great that pulling in whites from adjoining areas would cancel out the desegregation achieved under the Board plan in the nearby schools.

In disapproving the trial judge's elementary plan, the Fourth Circuit did not quarrel with the racial balancing goal sought to be realized. Under its test of reasonableness, the Court of Appeals merely concluded that, based on the trial court's estimates, the resulting increase of 39% in the number of elementary students bussed and 32% in the present bus fleet was too extensive and too onerous (1276a). The dissenters, Judges Sobeloff and Winter, were delighted with the results and the means of attaining them.

(b) *Junior High Schools*

The Board plan proposed to restructure the attendance lines of the 21 junior high schools so that all but one of them would not have more than 38% black students. In spite of the Board's best efforts, the one remaining school (Piedmont Junior High) housing about 840 pupils was left 90% black and 10% white. As was the case with the 9 elementary schools, the Board was unable to achieve further mixing of Piedmont Junior High because of the adverse domino effect upon the nearby junior highs where satisfactory racial ratios had been accomplished.

In order to reduce the percentage of blacks in this one school from 90% (758 pupils) to 32% (243 pupils), the court consultant reshuffled the Board's proposed attendance zones for the junior high schools and provided for satellite bussing

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[36]The results of the School Board plan regarding these 9 schools are summarized in footnote No. 31 at page 72 of this brief. Even under the Board plan in 4 of these 9 schools the student bodies would be comprised of 10%-17% whites, a mix considered completely acceptable by many courts.

of inner-city black youngsters to nine predominately white suburban junior high schools. This proposal of Dr. Finger was approved by the trial court and the Court of Appeals.

Map No. 7 shows the junior high zones restructured by district court and the streamers on that map identify the various inner-city schools from which black youngsters will be bussed to outlying schools. As indicated, all of these changes were occasioned by the insistence of both the district court and the Court of Appeals that the 90% black-10% white ratio at Piedmont is not good enough. The extensive court imposed surgery was undertaken notwithstanding the fact that the Board had already produced satisfactory ratios in all of the schools involved in the reshuffle, with the single exception of Piedmont, a school nearly all white 5 years ago (691a).

According to Board estimates these changes prescribed by Dr. Finger require the bussing of 4,741 additional children–6,129 under the Finger plan v. 1,388 under the Board plan (881a, 872a). All of this is directed to effect a reduction of black students at 1 of the 21 schools (Piedmont) by only 515 students. These dislocations and the cost of the bussing required to accomplish this racial balancing cannot stand up under the test of reason or the requirements of the Constitution.

(c) *Senior High Schools*

In some respects, the court action at the senior high school level evidences the most glaring, if not the most extensive, example of racial balancing. Under the Board plan all 10 high schools were desegregated–9 of them 17%-36% black and 1 (Independence High) with 2% black. This plan was adopted by the trial court and approved by the Circuit Court with one exception: 300 black students residing in the inner core of the City must be bussed from the area of their residence through center city traffic a distance of about 12 or 13 miles to Independence High School located in white suburbia.

Reference is made to Map No. 9 for a graphic illustration of the practical result of Dr. Finger's modification requiring the bussing of the 300 blacks from the inner city satellite area to Independence High.

The Court of Appeals referred to the bus mileage for the black youngsters as being about the same as the average of other bus routes serving Independence High (1273a)–but neglected to observe that the existing bus routes were primarily in rural and suburban areas, rather than in the congested inner city areas which would be traversed by the 300 black students.

Under the Board plan these 300 children would have attended a thoroughly desegregated high school having a racial composition of 36% black and 64% white. The only purpose served by the court-directed shifting of these 300 was to make a white school less white. Is the time and safety of these black children irrelevant? They were assured of a desegregated education.

2. The Court-Approved Finger Plan Is Unreasonable and Proper Consideration Was Not Given to the Burdens Which that Plan Imposes on the Charlotte-Mecklenburg System.

The reservations of the district court regarding the pertinence of the Fourth Circuit's Rule of Reason and its preference for a Rule of Absolutes impaired a proper and full consideration of the Board's evidence and the practical and educational problems confronting the Charlotte-Mecklenburg System within the context of a complex urban setting.

In his August 3 Order (Pets.' Br. Al *et seq*) after eight days of testimony at the hearing that the Circuit Court required, the district judge did not make a single finding of fact favorable to the School Board. The same is true with reference to the March 21, 1970 Supplemental Findings of Fact (1198a) made after hearings that were also held

pursuant to Circuit Court directions.[37] These findings indicate appalling disdain of the Board's evidence.

The School Board filed objections and exceptions to the findings of fact set forth in both of those Orders. The district court took no material action with respect to the Board's motions that these findings of fact be modified to conform to the evidence. The objections and exceptions to the March 21 findings appear at Appendix 1241a-1254a. Those submitted in response to the August 3 findings will be printed and filed with this Court as part of an additional appendix. A careful consideration of those objections and exceptions will assist this Court in appraising the conclusions of the district court.[38]

Due to limitation of space it is practical to discuss only a few of the areas wherein the findings of the trial judge failed to conform to the evidence.

There was a marked disparity between the estimates of the trial court and those of the experienced transportation staff of the schools regarding the additional number of children to be transported under the Finger plan and the number of busses required–13,300 (138 busses) according to the judge and 23,384 (526 busses) according to the staff. As the Court of Appeals observed (1271a), anyone's estimates rest on many variables. This is, of course true, but the judge's drastic discount factors (1215a) were unwarranted. The trial court's computations ignore the fact that

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[37]At the February 5, 1970 hearing the trial judge repeatedly stated that the evidence regarding transportation costs and other such data was irrelevant and indicated his impatience with the whole subject. (For example, see Tr. 111-14, 128-30, 133-134, 150-151, 153.) On March 5, 1970, the Fourth Circuit granted a stay of the February 5, 1970 Order with directions that the district court make supplemental findings of fact regarding transportation, the stay being left undisturbed by this Court.

[38]Among other portions of the record that this Court may find particularly helpful are the affidavit of J. D. Morgan and its attachments (853a-890a), the affidavit of William C. Self (850a-852a) and affidavits of Herman J. Hoose (894a-897a, 1038a-1040a).

the long routes through the city traffic will hamper the use of multiple bus trips and will occasion the need for hard-to-get adult drivers unless class schedules of student drivers are severely staggered to accommodate transportation. The court presumes that a bus can make 1.8 trips per day which was the 1969-70 experience of the system with its rural routes. This conclusion disregards the evidence showing that the 1.8 average includes empty bus trips by the driver, that (excluding empty bus trips) last year's average on primarily rural trips were 1.49 overall and 1.06 at the elementary level, that the length of trips includes not only school to school but the meanderings of routes to pick up children, that some busses must operate with under-capacity loads when necessary to pick up pockets of children in out-of-the-way areas and that busses in inner-city traffic should not be overloaded. In computing the additional children to be transplanted, the trial judge ignores the evidence that a space must be provided for each child assigned to a bus whether or not he is absent on a particular day, that due to familiarity with specific schools and community areas the school staff reduced where appropriate the eligible children who would not utilize the busses and that almost all of the children in the low economic areas would be dependent upon school bus transportation.

The district court's justification of the great expansion of the existing fleet resulting from its order by reference to the pre-existing transportation (280 busses; 23,000 children) is unwarranted and ignores the problems occasioned by the mass movement of children and busses over the streets and arteries of the inner-city and its perimeter already saturated and glutted to the breaking point–particularly during rush hour traffic. School busses having a 35 mile speed limit will be thrown into the stream of arteries moving 40-50 miles per hour. The city traffic engineer acknowledged that at present some school busses are being operated in congested areas–but equated the practice to a tolerable amount of "smallpox" that should not be consciously turned into an "epidemic." Overloaded busses on

rural routes cannot sensibly be cited to support the wisdom of overloading busses operating cross-town in the congestion of inner-city rush hour traffic—particularly with immature drivers.

The trial judge's findings imply the availability of unlimited funds from State and local sources with which to defray the extensive cost of the additional bussing imposed upon the Charlotte-Mecklenburg System—citing in support the size of the budgets for the State of North Carolina, the County of Mecklenburg and the local school system and implying that, if the local community gets financial assistance from the State, it is therefore "free." The evidence shows that the School Board has no control over the State budget, that the funds it gets from Federal and State sources are nondiscretionary and earmarked primarily for teacher salaries, instructional services and special programs, that the current local school budget permits the educational programs (severely beset by inflation and growing pains) to just about stay even and that diversion of funds to finance a greatly expanded transportation system will curtail the availability of funds for educational pursuits. To the extent the judge implies money from the State is "free" he overlooks the fact that the State gets its money from the taxpaying public and the source thereof is immaterial in applying a Rule of Reason. In seeking to minimize the cost of busses to implement the Finger plan for the 1970-71 school year, the district court takes refuge in the willingness of the State to lend the Charlotte-Mecklenburg System obsolete busses (14 to 16 years old) on a one-year basis as a supplement to the existing fleet.[39] This overlooks the obvious fact that

[39]Paragraph 14 of the order dated August 3, 1970, carries with it an implication of the Board's prior concealment of ownership of additional busses totaling 107. Common sense dictates that a bus fleet of 280 would require approximately 20 spare busses which could not be used for regular runs as they are required for use as substitutes while other busses are out of service. The 29 activity busses, although titled in the Board, are owned by the individual schools and for limited use, 500 to 600 miles annually (Tr. 1043, July 15, 1970). Delivery of

the capital outlay burden of acquiring busses is merely postponed to another day. The judge minimizes the cost and problems of reconditioning these obsolete busses and ignores the lack of wisdom of using them in congested traffic.

The district judge completely discounts other increased costs occasioned by an extensive expansion of the System's bus fleet (1218a). For example, the costs of additional supervisory, mechanical and clerical personnel; of additional drivers (the expense being greatly increased to the extent adults are used); of additional service and gasoline trucks and other equipment; of improving and constructing bus parking areas for loading and unloading children where insufficient or non-existent; of new and improved rights of way for safe and efficient circulation to, from and within school grounds (R. Ex. 47, 49-53, 65-68; 853a; P. Ex. 15).

In finding No. 3 of the August 3, 1970 order, the district court implies that desegregation will close the gap in the academic performance of the blacks. The test results of this System disclose that the improvement is slight.

Popular attitudes, which are apparently shared by the district court, are that desegregation eliminates or nearly eliminates the disparity of educational achievement between black and white children. Results of desegregation are material on the question of reasonableness but the district court's comparisons are meaningless in this regard. The Coleman Report makes a general finding that desegregation *tends* to hold that blacks advance without retarding the whites. Achievement statistics compiled by the Board relating to the performance of black students attending schools which have been desegregated since 1965 reflect that the improvement of the black students is indeed slight. For example, elementary schools which have been so des

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busses subsequent to the last hearings created the 30 used bus category busses which are 14 to 15 years old. The 28 new busses were clearly scheduled for future delivery. This example is cited as an indication of the district court's predisposition to downgrade Board actions and representations.

gregated (Cornelius, Huntersville and Davidson) found that their black third-grade students performed on an average school level of second grade, first month, whereas predominantely black schools (First Ward, Irwin Avenue and Amay James) found that their third-grade black students performed at an average school level of first grade, ninth month, or a grade differential of one school month. Black students attending those schools at the sixth grade level performed at an average school level of fourth grade, third month at the desegregated schools; and third grade, ninth month at the predominantely black schools, or a difference of three school months improvement experienced by the blacks attending desegregated schools for a period of six years. In making these comparisons, the Board acknowledges that the sampling is small and that the performance of individual black students in some cases substantially exceeds the performance of the group, and conversely, other black students do not perform as well as the group. The primary purpose of the Board in reporting this information was to disclose to the district court that educators and courts must rely on other means to bring about educational equivalence. In determining priorities to bring about this equivalence, the courts are ill-fitted to adjudge the various techniques, including the very expensive and disruptive technique of long distance bussing. Determination of such priorities should be left with the educators, who after having made extensive efforts at desegregation, should be permitted judgments based on sound educational consideration. (R. Ex. 64, July 15, 1970).

In an attempt to justify findings that bussing is a desirable and safe practice, the court (Findings Nos. 2, 4, 6, 13 and 32 of August 3 Order) refers to the present transportation of elementary youngsters and of kindergarten children. This observation is irrelevant to the question of how much of such bussing should reasonably be required or permitted under the circumstances existing in the Charlotte-Mecklenburg School System. The implication of the trial judge's findings are at odds with the conclusions of the educators:

Bussing of elementary children away from their neighborhoods is educationally unsound and should be minimized, not increased; the school day of young children should be shortened and not lengthened to accommodate bus schedules; unattended immature children at bus pickup points is neither desirable nor safe; staggered schedules and multiple pickups should be minimized; bus transportation interferes with after-school activities which are an important part of the educational process; bussing of young children away from their neighboring schools dilutes the interchange between home and school which is most important at the elementary level. Transportation should be built around education, rather than make education serve transportation. Dr. Self stated the matter succinctly (Tr. 138, July 15, 1970):

> [O]ur computations have assumed that we would begin with the concept that the transportation system serves the educational program. And instead of operating our schools in such a way as to accommodate a bus fleet, we'd like to try to have the bus fleet serve the schools.

In submitting its estimates, the School Board readily acknowledged that if savings could be realized through educationally sound staggering of school schedules, the use of busses for multiple trips, a reasonable and safe degree of overloading and other economies it would do so.

The foregoing are recited as typical examples of the treatment that was accorded by the trial judge to the evidence of the School Board regarding the practicability and desirability of the massive bussing occasioned by the court approved Finger plan. The district court's findings clearly show its unreasonable view of the Rule of Reason.

D. THE HEW ELEMENTARY PLAN IS EDUCATIONALLY UNSOUND, REQUIRES RACIAL BALANCING, FOSTERS RESEGREGATION AND IS UNREASONABLE.

The HEW elementary plan was built upon the restructured lines of the Board plan which were used to form seven different clusters within each of which 3 or 4 elementary schools were grouped together. Each school within a cluster serves one, two or three grades. The clusters proposed by HEW are shown on Map No. 4. The HEW plan had the dubious distinction of being shot down in flames by the district court, Dr. Finger, the school staff, the Board majority and the Board minority—by everyone except the HEW representatives.

The trial court's August 3 Order (Pets.' Br. A28) outlines its objections to the plan. In rejecting the plan we agree that the trial judge was right—but for the wrong reasons. The district court's complaints are primarily based on the failure of the HEW plan to do a complete job of racial balancing.

The Board's rejection of the HEW plan was prompted by a variety of practical and educational reasons. The plan requires the bussing of about as many children as do the Finger and Minority plans (R. Ex. 47, Tr. 136). In terms of what is accomplished by the plan, the transportation costs are prohibitive (R. Ex. 47, 50, 52 and 61a).

The proposed grade structure which in 4 of the 7 proposed clusters would require children to attend 4 different schools during the course of their elementary education, was severely criticized as being educationally unsound (Tr. 24, 112, 265), imposing a rigidity that would effectively preclude experimentation with programs of ungraded classes (Tr. 24-27, 99) and would necessitate a complete change in teacher assignments (Tr. 110). The head of the HEW team admitted that aside from desegregation he would not recommend this organization of the elementary schools (P. Ex. 4, p. 68). The proposed grade structure unnecessarily increases transportation requirements (Finger, Tr. 228, 233).

Four of the 7 HEW clusters result in a 50-57% black enrollment, a condition that promises resegregation (Tr. 30, 100, 112, 229). The cluster arrangement brings together a predominately black school and several other schools which were already desegregated (Tr. 31-34, 111, 230, 267). It overpopulates some schools and underpopulates others, compounding the system's housing problem (Tr. 30).

As stated by Dr. Finger (Tr. 267), the HEW plan has little to recommend it. We agree.

E. THE ELEMENTARY PLAN OF THE BOARD MINORITY IS INCOMPLETE AND UNLAWFULLY EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING COMPLETE RACIAL BALANCING OF EVERY ELEMENTARY SCHOOL AND THE BUSSING TO IMPLEMENT IT. THE DISTRICT COURT ERRED IN APPROVING THAT PLAN AS A REASONABLE ALTERNATIVE.

The elementary plan was developed by a 4-member minority of the School Board. In his August 3 Order, the trial judge approved the Minority plan as a reasonable alternative available for implementation by the Board. This plan was rejected by the Board.

The plan groups all of the 72 elementary schools within 18 separate clusters, many of which are far removed from each other and all of which occasion massive dislocation of elementary children. This Court's attention is invited to Map No. 5 which gives a clear picture of what this plan does to the elementary schools of the Charlotte-Mecklenburg System.

The authors of the plan acknowledge that its purpose is to racially balance the 72 elementary schools of the system. The plan is educationally unsound (Tr. 68, 174). In its various clusters the Minority plan includes schools that are already desegregated (Tr. 180-181, 297).

A random selection for the assignment of children is required within the clusters by the use of a complicated lottery system (Tr. 69, 118). The plan would occasion great administrative difficulties and would involve the problem of selecting children from year to year and could require elementary children of the same family to attend different schools (Tr. 120).

The plan will require the bussing of about the same number of children as would be transported under the Finger and HEW plans (August 3 Order). The burden of this amount of transportation had been declared by the Fourth Circuit, which accepted the district court's discounted estimates, to be too onerous and hence unreasonable with reference to the Finger plan. The transportation system required to implement the plan would be complex and cumbersome and would involve the mass movement of children within the congested areas of the city (Tr. 225, 239). Both Dr. Finger and the Superintendent observed that the Minority plan involved very long-distance bussing for a large number of children (Tr. 265) and could not be implemented without a heavy network of transportation (Tr. 119). Both Dr. Finger and the Superintendent agreed that education should be controlled by the educators rather than by a transportation system (Tr. 138, 303).[40]

The plan would require the closing of Double Oaks School in spite of the fact that the schools of the system are presently overcrowded with a 12% overcapacity.

The Board's objections to the Minority plan include all of the exceptions which it has to the court-approved Finger plan discussed elsewhere in this brief—as well as those peculiar to the Minority proposal. The racial balancing that this plan envisions is 100%. Every one of the 72 elementary schools are involved in this complete reshuffling to achieve the 70/30 racial mix of each student body. In spite of the

[40]This is a rather remarkable concession on the part of Dr. Finger, whose own plan occasions massive cross and satellite bussing of children through the most congested parts of the City.

weaknesses, defects, costs and disruptions of this plan that were pointed out by both the School staff and the court's consultant, Dr. Finger, the trial judge found it to be reasonable. This conclusion is unwarranted and underscores once again that racial balancing is the basic, but erroneous, precept which undergirds this and every other order of the district court.

F. THE EARLIER DRAFT OF THE FINGER ELEMENTARY PLAN IS INCOMPLETE AND UNLAWFULLY EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING RACIAL BALANCING. THE DISTRICT COURT ERRED IN APPROVING THAT PLAN AS A REASONABLE ALTERNATIVE.

This draft of Dr. Finger is illustrated by Plaintiff's Exhibit 10. At the hearings preceding the August 3 Order, only a minimal amount of attention was accorded this proposal which was prepared by Dr. Finger in the early days of his appointment as court consultant. It had been abandoned in favor of the one which the consultant evolved by the use of the restructured lines of the Board plan and which was adopted by the judge's February 5 Order.

Dr. Finger himself did not recommend this early draft (Tr. 263). He described it as an incomplete plan that he prepared only "to illustrate what some of the elements are that enter into the problem of determining how a desegregation plan should be prepared" (Tr. 263). Dr. Finger pointed out that the plan has a "complex grade structure" (Tr. 258). It will require transporting about the same number of elementary children as the court-approved February 5 and Board Minority plans (August 3, Order).

The purpose of this draft of Dr. Finger was to achieve racial balancing of elementary schools, which the court consultant admitted (981a). It is not a reasonable alternative.

G. IN ASSESSING THE EFFECTIVENESS OF A DESEGREGATION PLAN, A RULE OF REASON REQUIRES THAT DUE CONSIDERATION SHOULD BE ACCORDED SCHOOL BOARDS AND ADMINISTRATORS IN CONTROLLING THE DESTINY OF PUBLIC EDUCATION.

President Nixon defined the role of a school board:

> In devising local compliance plans, primary weight should be given to the considered judgment of local school boards—provided they act in good faith, and within Constitutional limits. President Nixon's March 24, 1970, policy statement entitled *SCHOOL DESEGREGATION: A Free and Open Society, supra.*

If it were otherwise, the admonition of Judge Coleman in *Bivins v. Bibb County Board of Education,* 419 F.2d. 1211 (5th Cir. 1970), is pertinent:

> Some of these days, the Courts are going to have . . . to free themselves of their tragic failures in the role of school administrators and get back to their primary functions.

The Charlotte-Mecklenburg School Board is an elective body and, as such, is charged with the responsibility of exercising its own judgment regarding the needs of the system and the best interest of its children.

It is the School Board's duty to determine whether the dollars allocated to it by other elective officials (the Board of County Commissioners for Mecklenburg County) for the education of our children shall be spent for *books or buses.* It is for the Board to determine whether the existing transportation system shall be expanded or contracted, whether it is educationally good or bad to stagger the opening and closing of schools at any particular grade level, whether after school activities will suffer, whether inconveniences and disruption to children and parents are justifiable, whether overloaded buses are acceptable or safe, whether the time of children in transit is justifiable and how the host of other value judgments and policies shall be made to administer

effectively a large complex metropolitan school system charged with awesome responsibility of providing 84,500 school children in 103 schools with a quality education.

Books, bricks and buses (and all that they imply) are part of the tools to be used in the educational process. How and when these tools are used must be left to the good faith decision of local school boards or the boards should be disestablished and the administration of school systems should be turned over the courts.

In his findings of fact, the trial court justified his rulings requiring extensive and disruptive transportation by calling attention to the extent that the system already was involved in burdensome bussing. This rationale is unsound. The reasonableness of a desegregation plan should not be measured by the worst aspects of a school program.

The fact that last year the Charlotte-Mecklenburg school system transported 23,000 children with 280 buses, the opening and closing of some of its schools were staggered, in some schools after-school activities were impaired, some school buses travelled over congested traffic arteries, some elementary children waited for the school bus by the side of the road at 6:30 in the morning and others got home at 5:00 in the afternoon, some buses were overloaded and some children had to stand up, some buses were unsound and should have been replaced—is no answer to the administrative and educational problem of how much of this is desirable, tolerable or necessary in a system as large and complex as Charlotte-Mecklenburg. A court mandate that edicts racial balancing and forced bussing supplants the value judgments of the elected school board and the educators on its administrative staff. An overdose of judicial paternalism and control will ultimately sign the death warrant for public education.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that:

1. The judgment of the Fourth Circuit be affirmed only in so far as it vacated the judgment of the district court.

2. The judgment of the district court, including its Orders of August 3 and August 7, 1970, be reversed; and

3. This matter be remanded to the district court with instructions to approve the implementation of the February 2, 1970, plan of the School Board as one complying with the Constitutional requirements for a unitary school system.

Respectfully submitted,

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SUMMARY OF RESULTS FROM RESTRUCTURED SCHOOL ATTENDANCE LINES

	% Black	1969-1970 No. of Students	1969-1970 No. of Schools	1970-1971 No. of Students	1970-1971 No. of Schools
Elementary Schools	All White	6,607	9	6,437	8
	1- 5	9,519	17	2,477	4
	6-10	7,349	11	5,603	8
	11-15	3,595	6	5,311	10
	16-41	6,516	12	17,626	33
	42-100	11,312	17	7,242	9
	Error			202	
	Totals	44,898	73	44,898	72
Junior High Schools	All White	-0-	-0-	557	1
	1- 5	4,539	3	1,875	2
	6-10	6,372	5	524	1
	11-15	876	1	1,282	1
	16-41	5,049	5	16,227	15
	42-100	4,563	5	842	1
	Error			92	
	Totals	21,399	19	21,399	21
High Schools	All White	-0-	-0-	-0-	-0-
	1- 5	2,133	1	1,264	1
	6-10	1,592	1	-0-	-0-
	11-15	5,398	3	-0-	-0-
	16-41	4,287	2	15,895	9
	42-100	3,902	3	-0-	-0-
	Error			153	
	Totals	17,312	10	17,312	10
Total All Schools	All White	6,607	9	6,994	9
	1- 5	16,191	21	5,616	7
	6-10	15,313	17	6,127	9
	11-15	9,869	10	6,593	11
	16-41	15,852	19	49,748	57
	42-100	19,777	26	8,084	11
	Error			447	
	Totals	83,609	102	83,609	104

*Figures presume present inner-city bussing remains in effect.

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POPULATION CHARACTERISTICS OF THE SYSTEM

	Number of Students			
	Black	White	Total	% Black
Elementary	13,162	31,534	44,696	30
Junior High	5,931	15,376	21,307	28
High School	4,139	13,020	17,159	26
(Error)			447	0.5
	23,232	59,930	83,609	28

BLACK STUDENT POPULATION DISTRIBUTION

Black Students in Predominantly Black Schools

Elementary Schools	6,739
Junior High Schools	758
Senior High Schools	-0-
	7,497
% of Black Students in Black Schools	32%

BLACK STUDENT DISTRIBUTION BASED ON RESTRUCTURED ATTENDANCE LINES

% of Black Students	Number of Black Students	% Black Students by Integration %
0- 5%	121	.5
6- 10%	436	2.0
11- 15%	855	3.8
16- 41%	14,246	61.4
42-100%	7,497	32.3
	23,155	100.0

ELEMENTARY SCHOOLS

Results of Attendance Line Restructing Projected for 1970-71*

School	1969-70 Enrollment	69-70 % Black	Black Students	White Students	Total Students	Rated Capacity	Over (Under) Capacity	% Black
Albemarle Road	514	1	4	469	473	432	41	1
Allenbrook	513	12	59	496	555	540	15	11
Ashley Park	601	4	155	421	576	621	(45)	27
Bain	768	4	25	706	731	702	29	3
Barringer	875	98	203	320	523	486	37	39
Berryhill	789	14	247	574	821	836	(15)	30
Beverly Woods	752	9	8	648	656	540	124	1
Billingsville	610	100	113	325	438	594	(156)	26
Briarwood	686	1	2	663	665	540	225	0
Bruns Avenue	784	99	624	73	697	675	22	90
Chantilly	492	1	142	303	445	432	13	32
Clear Creek	295	17	43	266	309	297	12	14
Collinswood	554	20	224	448	672	621	51	33
Cornelius	432	45	182	265	447	459	(12)	41
Cotswold	560	4	128	449	577	540	37	24
Davidson	290	36	102	174	276	324	(48)	32
Marie Davis	691	100	666	82	748	756	(8)	88
Derita	851	19	152	595	747	783	(36)	20
Devonshire	903	0	0	925	925	648	277	0
Dilworth	449	25	241	376	617	567	50	39
Double Oaks	836	100	825	3	828	675	153	99
Druid Hills	475	99	465	20	485	486	(1)	96
Eastover	601	7	157	478	635	648	(13)	25

School	1969-70 Enrollment	69-70 % Black	Black Students	White Students	Total Students	Rated Capacity	Over (Under) Capacity	% Black
Elizabeth	517	71	112	294	406	405	1	28
Enderly Park	374	1	119	238	357	297	60	33
First Ward	820	100	770	7	777	702	75	99
Hickory Grove	603	12	74	556	630	459	171	12
Hidden Valley	1,100	0	1	1,077	1,078	648	438	0
Highland	374	18	76	237	313	297	16	24
Hoskins	241	5	124	219	343	297	46	36
Huntersville	689	22	130	554	684	675	9	19
Huntingtowne Farms	610	1	3	614	617	594	23	1
Idlewild	653	9	59	549	608	594	14	10
Irwin Avenue	315	100	277	7	284	837	(553)	98
Amy James	476	99	90	169	259	243	16	35
Lakeview	364	78	119	285	404	378	26	29
Lansdowne	877	9	79	719	798	756	42	10
Lincoln Heights	711	100	903	6	909	648	261	99
Long Creek	735	36	259	523	782	837	55	33
Matthews	888	10	81	837	918	945	(27)	9
Merry Oaks	442	0	0	557	557	486	71	0
Midwood	488	2	116	401	517	459	58	23
Montclaire	718	0	1	781	782	675	107	0
Myers Park	478	5	150	314	464	432	32	32
Nations Ford	728	6	177	548	725	621	104	24
Newell	512	14	64	436	500	594	(94)	13
Oakdale	586	12	202	460	662	540	122	31
Oakhurst	621	1	92	504	596	594	2	15
Oaklawn	613	100	597	3	600	594	6	99
Olde Providence	592	14	83	461	544	486	58	15

School	1969 70 Enrollment	69-70 % Black	Black Students	White Students	Total Students	Rated Capacity	Over (Under) Capacity	% Black
Park Road	592	7	41	570	611	540	71	7
Paw Creek	636	4	83	602	685	774	(89)	12
Paw Creek Annex	301	10						
Pineville	521	28	123	379	502	486	16	25
Pinewood	674	0	0	900	900	648	242	0
Plaza Road	450	20	181	350	531	459	72	34
Rama Road	816	0	3	744	747	648	99	0
Sedgefield	551	1	223	364	587	540	47	38
Selwyn	648	5	32	459	491	486	5	7
Shamrock Gardens	515	0	84	496	580	486	94	15
Sharon	453	20	91	421	512	459	53	18
Starmount	737	3	67	838	905	648	257	7
Statesville Road	855	39	160	553	713	549	164	23
Steele Creek	514	1	195	475	670	378	292	29
Thomasboro	690	0	135	777	912	729	183	15
Tryon Hills	488	66	200	342	542	513	29	37
Tuckaseegee	636	9	57	510	567	540	27	10
University Park	825	100	735	132	867	648	219	85
Villa Heights	1,017	91	877	170	1,047	810	237	83
Westerly Hills	585	8	144	332	476	405	71	30
Wilmore	463	49	153	250	403	378	25	38
Windsor Park	749	0	1	782	783	648	135	0
Winterfield	736	7	52	653	705	648	57	7
TOTALS	44,898		13,162	31,534	44,696			

*These projections are based on 1969-70 enrollment by map location code on "grid". This population data contains an error of approximately 0.5% and therefore, projected enrollment does not exactly equal actual enrollment

POPULATIONS OF PREDOMINANTLY BLACK ELEMENTARY SCHOOLS

School	Projected Number of Students				% Black
	Capacity	White	Black	Total	
Bruns Avenue	675	73	624	697	90
Marie Davis	756	82	666	748	90
Double Oaks	675	3	825	828	99
Druid Hills	486	20	465	485	96
First Ward	702	7	770	777	99
Irwin Avenue	837	7	277	284	97
Lincoln Heights	648	6	903	909	99
Oaklawn	594	3	597	600	99
University Park	648	132	735	867	85
Villa Heights	810	170	877	1,047	84
Totals	6,831	503	6,739	7,242	

ELEMENTARY SCHOOLS

With Predominately Black Student Populations

	1969-1970	Projected for 1970-1971*
1. Barringer	98%	
2. Billingsville	100%	
3. Bruns Avenue	99%	Bruns Avenue 90%
4. Marie Davis	100%	Marie Davis 90%
5. Double Oaks	100%	Double Oaks 99%
6. Druid Hills	99%	Druid Hills 96%
7. Elizabeth	71%	
8. First Ward	100%	First Ward 99%
9. Irwin Avenue	100%	Irwin Avenue 97%
10. Amy James	99%	
11. Lakeview	78%	
12. Lincoln Heights	100%	Lincoln Heights 99%
13. Oaklawn	100%	Oaklawn 99%
14. Tryon Hills	66%	
15. University Park	100%	University Park 85%
16. Villa Heights	91%	Villa Heights 84%

NOTE: Irwin Avenue closed.

ELEMENTARY SCHOOLS

With 99 or 100% White Populations*

School	% Black
Albemarle Road	1
Beverly Woods	
Briarwood	1
Chantilly	1
Devonshire	0
Enderly Park	1
Hidden Valley	0
Huntingtowne Farms	1
Merry Oaks	0
Montclaire	0
Oakhurst	1
Pinewood	0
Rama Road	0
Sedgefield	1
Shamrock Gardens	0
Steele Creek	1
Thomasboro	0
Windsor Park	0

School	% Black
Albemarle Road	1
Beverly Woods	1
Briarwood	0
Devonshire	0
Hidden Valley	0
Huntingtowne Farms	1
Merry Oaks	0
Montclaire	0
Pinewood	0
Rama Road	0
Windsor Park	0

*If present inner-city bussing is discontinued, Lansdowne, Park Road, and Sharon Schools will be 100% white as they would also have been in 1969-70.

JUNIOR HIGH SCHOOLS
Results of Restructured Attendance Lines

School	69/70 Enrollment	69/70 % Black	Number of Students Black	White	Total*	Rated Capacity	Over (Under) Capacity	% Black
Albemarle Road	1,058	6	19	783	802	948	(146)	2
Alexander	1,140	32	309	699	1,008	874	127	30
Cochrane	1,631	5	571	1,150	1,721	1,190	531	33
Coulwood	876	12	313	551	864	704	160	36
Eastway	1,417	4	375	971	1,346	1,093	253	28
Alexander Graham	1,141	10	261	888	1,149	996	153	23
Hawthorne	1,068	56	276	704	980	850	130	28
Kennedy	863	94	325	540	865	801	64	38
McClintock	1,381	7	25	1,048	1,073	923	150	2
Northwest	1,053	100	296	685	981	1,068	(87)	30
Piedmont	498	89	758	84	842	631	211	90
Quail Hollow	1,576	10	138	1,144	1,282	1,238	44	11
Randolph	999	29	327	703	1,030	672	58	31
Ranson	808	32	295	558	853	851	2	35
Sedgefield	976	17	234	612	846	777	69	28
Smith	1,491	4	330	957	1,287	1,093	194	26
Spaugh	1,126	25	346	752	1,098	826	272	32
Williams	1,081	100	336	722	1,058	801	257	32
Wilson	1,216	6	346	795	1,141	1,044	97	30
Carmel	—	—	2	555	557	558	(1)	0
J. H. Gunn	—	—	49	475	524	558	(34)	9
	21,399		5,931	15,376	21,307	18,796	2,389	

*These projections are based on 1969-70 enrollment by map location code or "grid". This population data contains an error of approximately 0.5% and therefore, projected enrollment does not exactly equal actual enrollment.

SENIOR HIGH SCHOOLS

Results of Restructured Attendance Lines

School	69/70 Enrollment	69/70 % Black	Number of Students Black	White	Total*	Expt. Growth	Rated Capacity	Over (Under) Incl. Growth	Max. Capacity	Over (Under) Max. Capacity	% Black
West	1,592	9	494	998	1,492	75	1,374	193	1,660	(93)	33
Olympic	888	42	201	687	888	50	807	131	1,100	(162)	23
Harding	1,356	47	395	692	1,087	25	1,202	(90)	1,300	(188)	36
West Charlotte	1,658	100	597	1,045	1,642	50	1,593	99	1,800	(108)	36
South	2,133	5	482	1,846	2,328	150	1,523	955	2,200	278	21
Myers Park	2,000	12	426	1,883	2,309	-50	1,679	580	2,200	59	18
Garinger	2,640	19	721	1,914	2,635	50	1,874	811	2,450	235	27
East	2,152	11	360	1,716	2,076	150	1,700	526	2,200	26	17
Independence	1,246	11	23	1,241	1,264	100	1,047	317	1,400	(36)	2
North	1,647	28	440	998	1,438	0	1,158	280	1,650	(212)	31
	17,312		4,139	13,020	17,159	600	13,957	3,802	17,960	(201)	

*These projections are based on 1969-70 enrollment by map location code or "grid". This population data contains an error of approximately 0.5% and therefore, projected enrollment does not exactly equal actual enrollment.

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IN THE

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OCTOBER TERM, 1970

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PETITIONERS,

-V-

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, ET AL.,
RESPONDENTS.

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA

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AUTHORITY FOR FILING

This amicus curiae brief for the State of Florida ex rel. Earl Faircloth, Attorney General of Florida, and Floyd Christian, Commissioner of Education, is filed pursuant to Rule 42 (4) of the Rules of this Court.

QUESTION PRESENTED

WHETHER THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION REQUIRES OR PERMITS SCHOOL SYSTEMS TO ASSIGN PUPILS TO PARTICULAR SCHOOLS BECAUSE OF THEIR RACE.

STATUTE INVOLVED

42 U.S.C. § 2000c (b) (1964), provides:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

STATEMENT

Florida respectfully relies upon the factual representations contained in the briefs filed by the parties to this cause.

SUMMARY OF ARGUMENT

In deciding this case the Court should keep two principles foremost in its consideration. The first principle is that this case turns upon what the Constitution mandates and not what seems "better" or "more desirable". The second principle is that we are concerned with a national constitution which should be uniformly applied without reference to "labels of convenience".

In our nation, any classification based upon a person's race is obviously irrelevant and invidious. Simply stated, our Constitution is "color blind".

From this premise it follows that a "non-gerrymandered" neighborhood school system meets constitutional mandates, even though, in many cities, it would result in schools lacking in racial balance. Likewise, a uniformly applied and "color blind" freedom of choice assignment plan meets constitutional mandates. The fact that students, under such a plan, might elect to remain in schools where their own race predominates, is constitutionally irrelevant.

Forced racial balancing by federal court order is obviously unconstitutional, since it is a deprivation of liberty in violation of the Fifth Amendment for an arm of the federal government to assign a student to a particular school because of his race. Furthermore, such orders

are in violation of the Civil Rights Act of 1964 which was enacted pursuant to the authority of Congress to enforce the Fourteenth Amendment. This Congressional authority extends to defining what activity does or does not violate the Equal Protection Clause.

ARGUMENT

I. Introduction.

In Brown v. Board of Education, 347 U. S. 483 (1954) (Brown I), this Court unanimously decreed that the equal protection clause prohibited school systems from maintaining schools where pupil assignment was dictated by the color of the particular pupil's skin. Brown is now, and rightfully should continue to be, the supreme law of the land.

However, Brown and its progeny, particularly in the lower federal courts, have spawned a variety of conflicting views as to what is required of a school system in order for it to comply with the mandate of the Constitution. Some persons plead for "freedom of choice", others cry for "neighborhood schools", and yet others argue for "racial balance".

Florida would urge this Court to initially keep foremost the fact that it is the Constitution which is here being interpreted. In this regard, just as the Constitution does not "enact Mr. Herbert

Spencer's Social Statics", Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), neither does it also enact Ross Barnett's or Eldridge Cleaver's views on race relations. In short, the question as to whether it is "better" or "more desirable" to have a racial balance in each school or to have complete separation of the races, is constitutionally irrelevant. These political questions of policy have, under our system of government, "been committed by the Constitution to another branch of government". Baker v. Carr, 369 U.S. 186, 211 (1962). We are here only concerned with constitutional requirements.

Florida would also urge this Court to remember that "[i]t is, after all, a national constitution" Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (Brennan and Goldberg, JJ), which this Court is being called upon to interpret. Particularly when dealing with the issue of racial balance, many lower courts have come to completely opposite conclusions because the past "segregation" in the school system was "de facto" as opposed to "de jure". This distinction is of little consolation to the pupil currently in school and thus this Court should emphatically reject it. "To hold otherwise would be to disregard substance because of the feeble enticement of the [de facto] label-of-convenience which has been attached", In Re Gault, 387 U.S. 1, 50 (1967), to the absence of racial balance in Northern schools. Thus, the constitutional requirement vel non of racial

balancing in school systems must be applied "in an even handed manner" throughout our nation.

II. A person's race is constitutionally irrelevant.

This Court has long adhered to the position that classifying a person on the basis of his race is, under our Constitution, an "obviously irrelevant and invidious" - Steele v. Louisville & N.R. Co., 323 U.S. 192, 203 (1944), practice. To simply state it, "[o]ur Constitution is color blind". Plessy v. Ferguson, 163 U.S. 537, 599 (1896) (Harlan, J., dissenting).

The singling out of a person because of his race "in any form and in any degree has no justifiable part whatever in our democratic way of life". Korematsu v. United States, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting). Admittedly, there were times in the history of our nation when, for example, a pupil was singled out for assignment to a particular school because of his race. Brown I allegedly sounded the constitutional death knell for this practice. This Court must now decide whether the practice will be constitutionally resurrected.

III. A neighborhood school pupil assignment plan is constitutional.

Florida submits that a neighborhood school pupil assignment plan, where all students must attend the school closest

to their home, clearly meets constitutional mandates, since it provides a "color blind" method of assignment.

Florida notes that this Court clearly indicated its approval of the neighborhood school concept in the original Brown decision. In Brown, once this Court issued its original opinion, it called for supplemental briefs and argument re the practical implementation of the opinion. In its supplemental opinion this Court stated school boards were entitled to a certain time to achieve compliance because of the administrative problems arising (in part) from the necessary "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis". Brown v. Board of Education, 349 U.S. 294, 300-1 (1955) (Brown II). This Court has thus already directed the nation's school systems to alter their school systems to conform to the neighborhood concept, i.e., "attendance areas [in] compact units".

To be sure, these attendance areas constitutionally cannot be "gerry-mandered" so as to systematically exclude students of one race who should otherwise have attended a particular school. See Sailors v. Board of Education, 387 U.S. 105, 108 (1967); Gomillion v. Lightfoot, 364 U.S. 339 (1960). However, if the areas are drawn on a "color blind" geographical basis, it constitutionally matters not that the respective schools might have

disproportionate numbers of one race or another. As has been noted with reference to voting districts and their constitutionality:

> "Neighborhoods in our larger cities often contain members of only one race; and those who draw the lines of Congressional Districts cannot be expected to disregard neighborhoods in an effort to make each district a multiracial one." Wright v. Rockefeller, 376 U.S. 52, 59 (1964) (Douglas and Goldberg, JJ).

Thus, a neighborhood school system, so long as its attendance zones are drawn on a "true" geographical basis, meets constitutional mandates. Brown II, supra.

IV. A freedom of choice pupil assignment plan is constitutional.

Florida next notes that a "color blind" pupil assignment plan, based upon "freedom of choice" meets constitutional mandates and has clearly been approved by this Court.

In Goss v. Board of Education, 373 U. S. 683 (1963), this Court passed upon the validity of a student transfer plan which hinged the ability of the student to transfer upon the student's race and the racial composition of the school he was to attend. The Court rightfully condemned

the plan because race was the criterion employed for the transfer. This Court went on to emphasize, however, that:

> "In so doing, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another."
> Id. at 687.

Thus it clearly appears that a "color blind" freedom of choice pupil assignment system (either singly or in conjunction with a neighborhood system) meets constitutional mandates. It should be noted that the freedom of choice system has, perhaps, one desirable feature which surpasses even the neighborhood system, i.e., in the freedom of choice system, the student's ability to attend a racially balanced school (if he so desires) in no way depends upon the racial composition of his neighborhood. Neighborhood racial patterns have no effect upon a freedom of choice system.

It should be noted here that some lower federal courts have rejected freedom of choice plans on the ground that they do not "work", i.e., most blacks tend to remain in predominantly black schools and likewise with the whites. This "indictment of workability", however, has no constitutional substance. If a freedom of choice plan is administered in "an even handed manner", what is the constitutional objection if black students elect to remain in predominantly black schools (for reasons of "black pride", "black control" or whatever) and likewise for the white students? This "workability objection" has constitutional substance only if the Constitution is construed as affirmatively requiring Americans of different races, ethnic backgrounds, etc., to associate with each other. Florida is not aware of any recognized legal interpretation of the Constitution which would support such a premise.

It is thus clear that a "freedom of choice" school system (where the "choice" is uniformly applied) meets the constitutional mandate of a "color blind" system which admits students "regardless of their race". Goss v. Board of Education, supra.

V. Forced racial balancing is unconstitutional.

Florida submits that it is almost too axiomatic to require citation of authority that under a "color blind" Constitution, which views its citizens on a "nonracial" basis, the assignment of pupils to a

particular school because of their race (as opposed to because it is "the closest school" or "the school of their choice") is unlawful. It thus follows that federal court orders which order "forced bussing", "forced walking", or even "forced subwaying" of pupils to a particular school, because of their race, are patently unconstitutional on their face. Parenthetically, Florida would here emphasize that "bussing", "walking" or "subwaying" are not fundamentally the issues in this case. Each, or all, of the above have a legitimate basis in our educational system. Florida simply maintains that none of the above have any place in our democracy where any of them are occasioned simply to affirmatively achieve a set ratio of students based upon their race (or ethnic origin, nationality, etc.).

It is clear that when a federal court orders a student to attend a school, other than the one he would normally attend (under any "color blind" assignment plan), because of the color of his skin, then that court has deprived that student of his valuable and fundamental right to due process of law. This Court has already emphatically and unanimously held that the assignment of pupils to a particular school, by an arm of the federal government, because of the color of their skin "constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause [of the Fifth Amendment]". Bolling v. Sharpe, 347 U.S. 497, 500 (1954). This Court, some years later, reemphasized that "[t]he recognition of race

as an absolute criterion for transfers . . . is no less unconstitutional than its use for original admission or subsequent assignment to public schools". Goss v. Board of Education, 373 U.S. 683 688 (1963). It is thus patently obvious that federal court orders which force st dents to attend particular schools becau of their race are totally impermissible under our "color blind" Constitution.

Florida would also emphasize that suc court orders also violate the provisions of the Civil Rights Act of 1964 which states that desegregation "shall not mea the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. § 2000c (b) (1964). To dismiss this mandate as merely relati to a "government aid program", as some lower courts have done, is to totally ig nore the Constitutional authority of Congress "to enforce, by appropriate leg islation, the provisions of [the Fourtee th Amendment]" Amend. XIV, § 5, U.S. Const. This Congressional authority ex tends to "responsibility for exercising judgment as to when the Fourteenth Amend ment is violated". United States v. County Board of Elections, 248 F.Supp. 316, 322 (W.D. N.Y. 1966), appeal dismi ed, 383 U.S. 575 (1966).

It cannot be denied that Congress wa exercising (in part) its section 5 authority when it enacted this statute. Heart of Atlanta Motel v. United States 379 U.S. 241, 279-292 (1964) (Douglas a Goldberg JJ concurring). Thus, it is

clear that this Congressional prohibition on pupil assignment to achieve racial balance is given "constitutional life" by section 5 of the Fourteenth Amendment and it cannot be ignored by the judiciary.

CONCLUSION

Florida submits that this Court should now give full meaning to the late Justice Harlan's admonition that "our Constitution is color blind". For too many years in this nation the color of a boy's or girl's skin determined the school he or she had to attend in order to receive an education. To be sure, our Constitution should remain "color conscious" to the extent of voiding classifications based solely upon the color of a citizen's skin.

Let us not, however, in a zeal to eliminate the sins of the past, resort to the same racial criterion even though the end result might be thought "best". Let us not also "visit the sins of the father upon the son".

Florida simply urges this Court, when it decides to adopt its criteria, no matter what they may be, to establish criteria for public school assignment which do not contain the terms "white", "black", "Indian", or any other racial prefix to qualify the noun "American".

Respectfully submitted,

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Respondents.

Certiorari to the United States Court of Appeals for the Fourth Circuit

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AMICUS CURIAE BRIEF OF THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA

NATURE OF INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the School Board of the County of Hillsborough, a political subdivision of the State of Florida, and is sponsored by the attorney for the School Board of Hillsborough County, Florida, the authorized law officer thereof, under Rule 42(4) of the Rules of the Supreme Court of the United States.

The School Board of Hillsborough County's interest arises because, in *Mannings v. Board of Public Instruction of Hillsborough County, Florida,* 5 Cir. 1970, _____ F.2d _____ [No. 28,643, May 11, 1970], the Fifth Circuit, and in subsequent orders thereto entered by the District Judge of the United States District Court for

the Middle District of Florida, certain elementary schools were directed to be paired. Such orders entirely ignored the provisions of Title 42, Sections 2000c.(b) and 2000c.—6(a)(2), which provide that "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance, and prohibit any official or court of the United States from issuing any order seeking to achieve a racial balance in any school by requiring the transportation of pupils from one school to another in order to achieve such racial balance. Such orders also necessarily required the busing of students from parts of the school areas as paired, to the school building where the classes were to be held, a condition which did not previously exist prior to the entry of such orders. Florida law provides that no state funds shall be paid for the transportation of pupils whose homes are within two miles from the nearest appropriate school. Section 234.01, Florida Statutes. In a number of instances, the pairing of elementary schools directed as aforesaid results in requiring busing students from portions of the school areas directed to be paired, in excess of two miles to the school building where appropriate classes are held, thus requiring the busing of students not contemplated by the School Board.

QUESTIONS PRESENTED

1. Does the Constitution require or permit the courts to order the busing of pupils solely to achieve racial balance?

2. Did the courts below improperly disregard the explicit direction of Congress in Section 407(a)(2) of the Civil Rights Act of 1964, that "nothing herein shall impower any * * * court of the United States to issue

ny order seeking to achieve racial balance in any school y requiring the transportation of pupils or students rom one school to another in order to achieve such acial balance."?

ARGUMENT

No decision of this Court has required racial balanc-ng. Every decision from *Brown v. Board of Education,* , 347 U.S. 483, through *Alexander v. Board of Education,* 96 U.S. 19, has reiterated the Constitution's mandate or wholly non-racial public school systems.

A concise statement of the law appears in *Deal v. Cincinnati Board of Education,* U.S.C.A., 6 Cir. (1966) 69 F.2d 55 (Deal I), cert. denied 389 U.S. 847, 88 S.Ct. 39, 19 L.Ed. 114, where it was said:

> "We hold that there is no constitutional duty on the part of the Board to *bus* Negro or white children out of their neighborhoods or to transfer classes *for the sole purpose of alleviating racial imbalance* that it did not cause, nor is there a like duty to select new school sites solely in futherance of such a purpose." (emphasis supplied)

A three-judge court in *Briggs v. Elliott,* 132 F.Supp. 776, firmly declared:

> "The Constitution, in other words, does not require integration. It merely forbids discrimination."

At least seven Circuit Courts of Appeal support this doctrine. Only the Fifth Circuit has discarded its earlier approval of the case and now adheres to the racially oriented policy of racial balancing, *U.S. v. Jefferson County Board of Education,* 372 F.2d 836, adhered to on rehearing, 380 F.2d 385.

The concept of racial balancing as a form of desegregation was explicitly and emphatically disapproved by Congress when it enacted the Civil Rights Act of 1964. When the bill was considered on the floor of the House on February 6, 1964, Mr. Cramer of Florida offered an amendment which provided that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." Chairman Celler of the Judiciary Committee accepted that amendment, and, as thus amended, Section 401(b) was not further changed in the course of the passage through Congress; it was carried on to the statute book as amended by Mr. Cramer.

Notwithstanding the provisos in Section 401(b) and 407(a) of the Civil Rights Act of 1964, they have been either consistently misread, or simply disregarded by the courts that have had these statutory directions called to their attention. *U.S. v. Jefferson County Board of Education, supra, Caddo Parish School Board v. U.S.*, 389 U.S. 840. This disregard of congressional action constitutes another reason for review by this Court. Nothing in the Constitution of the United States permits, much less requires, the busing of school children to achieve racial balancing. The direction (*Alexander v. Board of Education,* 396 U.S.19) "to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color" forbids the result obtained below, which in fact excludes several hundred white children from the walk-in schools nearest their homes simply because admitting them there fails to achieve racial balancing within the entire system. Past discrimination in one direction does not justify present discrimination in another.

CONCLUSION

These issues which have caused wide-spread confusion must be resolved. The time is now. Amicus urgently requests the Court to announce that the busing of pupils solely to achieve racial balance should not be required; that the concept of the neighborhood school should be preserved, and that involuntary pairing of schools is educationally and economically unsound, threatening to encroach upon and destroy the historical concept of the American school system.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court, U.S.
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No. 281

JAMES E. SWANN, et al., *Petitioners,*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.,

No. 349

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., *Petitioners,*

v.

JAMES E. SWANN, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE CLASSROOM TEACHERS ASSOCIATION OF THE CHARLOTTE-MECKLENBURG SCHOOL SYSTEM, INCORPORATED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, et al., *Petitioners*,

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AMICUS CURIAE BRIEF FOR THE CLASSROOM TEACHERS ASSOCIATION OF THE CHARLOTTE-MECKLENBURG SCHOOL SYSTEM, INCORPORATED

INTEREST OF THE AMICUS CURIAE

The Classroom Teachers Association of the Charlotte-ecklenburg School System, Incorporated, is a non-profit embership organization in corporate form, which includes its membership a substantial part of the 3,553 classroom achers in the Charlotte-Mecklenburg School System and ich devotes itself to the advancement of public educa-n. The specific objectives of the organization and its mbers are to promote the interests of classroom teachers the Charlotte-Mecklenburg School System, and to secure

to the students attending the schools of the System opportunities to achieve by quality education their highest potentialities.

The Classroom Teachers Association of the Charlotte-Mecklenburg School System and its members believe that the execution of the order of the United States District Court for the Western District of North Carolina and the judgment of the United States Circuit Court for the Fourth Circuit affirming such order in part seriously impair the educational opportunities offered by the Charlotte-Mecklenburg School System to the students in its schools, and for this reason the organization files this amicus curiae brief in support of the position of the Charlotte-Mecklenburg Board of Education, which harmonizes with this view.

The parties to the proceedings in Nos. 281 and 349 have consented in writing to the filing of this brief, and the writings evidencing such consent have been filed with the Clerk.

The members of the Supreme Court bar who submit this brief in behalf of the organization do so without compensation in the hope that they may aid the Supreme Court to reach a decision which will restore tranquility to much troubled areas of our land and enable the public schools operating in them to function economically and efficiently as educational institutions.

OPINIONS BELOW

The opinion of the Court below consists of the opinion and judgment of the United States Court of Appeals filed May 26, 1970, which are not yet reported and which appear in the Appendix (Volume 3, pages 1262a to 1304a).

In its opinion and judgment, the Court of Appeals reviewed and approved in part and remanded in part for further consideration the rulings and findings made by the

United States District Court in the following orders and documents:

1. Order dated February 5, 1970 (819a-839a), as amended, corrected, and clarified on March 3, 1970 (921a).

2. Supplementary Findings of Fact dated March 21, 1970 (1198a-1220a).

3. Supplemental Memorandum dated March 21, 1970 (1221a-1238a).

JURISDICTION

The Supreme Court has jurisdiction to review this case by writ of certiorari under 28 U.S.C. 1254(1), and has accepted it for such purpose by granting writs to the petitioners in No. 281 and the petitioners in No. 349.

QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions for review:

1. Does a public school board comply with the Equal Protection Clause of the Fourteenth Amendment when it creates non-discriminatory attendance districts or zones and assigns all children, black and white, to neighborhood schools in the district or zone in which they reside without regard to their race?

2. Does the Equal Protection Clause of the Fourteenth Amendment empower a federal court to order a public school board to assign children to the schools it operates to balance the student bodies in such schools racially or to bus children outside of non-discriminatory attendance districts or zones to effect such purpose?

3. Does Title IV of the Civil Rights Act of 1964, which prohibits the assignment of students to public schools to balance the student bodies in such schools racially and to bus them from some schools to other schools or from some school districts to other school districts to effect such purpose, constitute appropriate legislation to enforce the Equal Protection Clause within the purview of the Fifth Section of the Fourteenth Amendment?

4. Does the order entered by the District Court and affirmed in part by the Circuit Court usurp and exercise the authority of the Charlotte-Mecklenburg Board of Education to devise and implement a non-discriminatory assignment plan conforming to the Equal Protection Clause, and require the Charlotte-Mecklenburg Board of Education to violate the Equal Protection Clause by treating in a different manner students similarly situated and by denying students admission to their neighborhood schools because of their race?

The amicus curiae insists that the first, third, and fourth questions must be answered in the affirmative and that the second question must be answered in the negative.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the first and second sections of the Fourteenth Amendment; the first and second sections of Article III of the Constitution; and Title IV of the Civil Rights Act of 1964. These constitutional and statutory provisions are printed in the Appendix.

STATEMENT OF THE CASE

A. The Charlotte-Mecklenburg Public School System

The writ in No. 281 and the writ in No. 349 present to the Supreme Court for review the judgment entered by the United States Court of Appeals for the Fourth Circuit on May 26, 1970, in the civil action entitled James E. Swann and others, Plaintiffs, v. Charlotte-Mecklenburg Board of Education and others, Defendants. For ease of narration and understanding, James E. Swann and his associates in this litigation are hereafter called the plaintiffs, and the Charlotte-Mecklenburg Board of Education is hereafter designated as the School Board.

The School Board operates the Charlotte-Mecklenburg Public School System in Charlotte and Mecklenburg County, North Carolina, political subdivisions of North Carolina.

Charlotte, which is the county seat of Mecklenburg County, is inhabited by 239,056 persons who are concentrated within the 64 square miles embraced by its city limits, an area larger than the District of Columbia. Mecklenburg County embraces 550 square miles, has an east-west span of 26 miles, a north-south span of 36 miles, and has a population of 352,006, exclusive of those residing within the area embraced by Charlotte.

In the discharge of its state-assigned duties, the School Board operates 10 high schools, 21 junior high schools, and 72 elementary schools to house and instruct the 84,500 school children residing in Charlotte and Mecklenburg County. Of these school children, 24,000, or 29 percent, are black, and 60,500, or 71 percent, are white. Approximately 95 percent of all the black children who reside within the limits of the City of Charlotte live in predominately black residential sections in northwest Charlotte, and a substantial portion of the other black children in Mecklenburg County reside in predominately black residential areas adjacent to it. (293a-298a).

Prior to *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the School Board operated the public schools of Charlotte and Mecklenburg County as racially segregated schools in conformity with the interpretation then placed upon the Equal Protection Clause of the Fourteenth Amendment. Subsequent to the *Brown Case* and prior to 1965, the School Board established an effective system of determining admission to its public schools on a non-racial basis. It did this, and thus converted its formerly dual system into a unitary system by establishing non-discriminatory attendance districts or zones, and assigning the school children subject to its jurisdiction to their neighborhood schools irrespective of race.

Inasmuch as some of the attendance districts or zones in rural Mecklenburg County and some of its suburban residential districts or zones in or adjacent to Charlotte are extremely large, the School Board voluntarily established a transportation system for the sole purpose of carrying

children residing in these geographically large districts or zones to the nearest available schools. As a consequence, it now uses 280 buses to bus some 23,000 school children to rural and suburban schools. (864a)

In 1965 the plaintiffs brought the instant action against the School Board in the United States District Court for the Western District of North Carolina seeking to obtain a compulsory desegregation decree. After hearing the evidence in the case, the District Court found that the School Board had complied with the requirement of the Equal Protection Clause and denied the decree sought by them. *Swann v. Charlotte-Mecklenburg Board of Education*, 243 F.Supp. 667 (1965). This ruling was affirmed by the Circuit Court. *Swann v. Charlotte-Mecklenburg Board of Education*, 369 F.2d 29 (1966).

B. The Plan Submitted by the Charlotte-Mecklenburg Board of Education

Subsequent to the decision in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), the plaintiffs filed a motion in the cause seeking further desegregation. (2a)

Although it found as a fact that the "location of schools in Charlotte has followed the local pattern of residential development, including its de facto patterns of segregation" (305a), and that the School Board members "have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts and have exceeded the performance of any school boards whose actions have been reviewed in the appellate court decisions" (311a-312a), the District Court resumed hearings in the case on the ground that the *Green Case* had changed "the rules of the game." (312a)

It is to be noted that subsequently the District Court on its own motion reversed its previous findings that any racial imbalance in the Charlotte-Mecklenburg public schools was the result of de facto segregation by asserting that "there is

so much State action imbedded in and shaping these events that the resulting segregation is not innocent or 'de facto' and the resulting schools are not 'unitary' or 'desegregated'." (662a) The amicus curiae submits with all due deference that there is no testimony in the record to sustain this particular finding.

Pursuant to the orders entered by the District Court on April 23, 1969 (285a), June 20, 1969 (448a), August 15, 1969 (579a), and December 1, 1969 (698a), the School Board filed desegregation plans (330a, 480a, 670a) which were rejected by the District Court.

Meanwhile on December 2, 1969, the Court appointed Dr. John Finger, a resident of Rhode Island, as a special consultant to devise a desegregation plan for the guidance of the Court. (819a) Dr. Finger had originally entered the case as a partisan witness for the plaintiffs, and for this reason a good case can be made for the proposition that he lacked the impartiality which is desirable in one selected for the task of assisting a judge in keeping the scales of justice evenly balanced between adverse litigants. (1279a)

While the District Court orders and the School Board plans mentioned above shed light on the School Board's devotion to the neighborhood school concept, and its reluctance as an elected public body to engage in excessive and expensive busing of school children, the subsequent School Board plan of February 5, 1970, and the subsequent District Court order of February 5, 1970, relating to it really illuminate the issues which now confront the Supreme Court. (726a-748a, 819a-839a)

By this plan, the School Board proposed that attendance districts or zones should be drastically gerrymandered in such a manner as to include as many blacks as possible in each district or zone, and that all school children subject to its jurisdiction should be required to attend the school appropriate to their educational standings in the district or zone of their residence. The plan would have accomplished a racial mixture of school children in all of the 103 schools

in the system, except three elementary white schools located in neighborhoods inhabited exclusively by members of the white race. (726a-748a)

The School Board plan contemplated that from 17 percent to 36 percent of the student body in nine of the ten senior high schools in the system would be black; that not more than 38 percent of the student body in 20 of the 21 junior high schools in the system would be black; and that not more than 40 percent of the student body in 60 of the 72 elementary schools in the system would be black.

Under the School Board plan, the remaining high school, Independence High, would be 2 percent black and 98 percent white; the remaining junior high school, Piedmont Junior High, would be 90 percent black and 10 percent white; and all of the 12 remaining elementary schools, except the three white elementary schools, would be 83 percent to 1 percent black. (726a-748a)

The School Board judged it to be impossible to desegregate the three white elementary schools, and to further desegregate the nine predominately black elementary schools by geographic districting or zoning because of the de facto segregation prevailing in the residential areas in which the children assigned to these 12 elementary schools lived. (730a-732a) The District Court made a specific finding in its Supplemental Findings of Fact of March 21, 1970, which establishes the validity of the School Board's conclusion concerning Independence High, Piedmont Junior High, and the 9 predominately black elementary schools, all of which are located in northwest Charlotte or its environs.

The District Court expressly found that "both Dr. Finger and the School Board staff appear to have agreed, and the Court finds as a fact that for the present at least there is no way to desegregate the all-black schools in northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variation of plans considered for this purpose lead in one fashion or another to that conclusion." (1208a)

The amicus curiae submits that it beggars imagination to conjecture how any plan could have obtained a greater degree of racial integration by gerrymandering attendance districts or zones in a political subdivision where white children outnumber black children 71 to 29, and where most of the black children are concentrated residentially in an area inhabited exclusively by members of their race.

The School Board plan did not stop with proposing such a high degree of racial integration among the student bodies in the schools subject to its jurisdiction. It made these three additional proposals:

1. That the faculty of each school should be assigned in such a manner that the ratio of black teachers to white teachers in each school would be approximately 1 to 3 in accordance with the ratios in the entire faculty of the system (737a);

2. That the School Board should furnish 4,935 additional students in-district or in-zone transportation to the schools in the proposed gerrymandered attendance districts or zones in accordance with the North Carolina law which forbids such transportation within one and one-half mile distances (736a); and

3. That any black child in any school having more than 30 percent of his race in its student body should be allowed to transfer to any school having less than 30 percent of his race; whereas a white child should be permitted to transfer to another school only if the school he is attending has more than 70 percent of his race and the school to which he seeks transfer is less than 70 percent white. (734a-735a)

At the same time, Dr. Finger submitted to the District Court his plan of desegregation which contemplated that the School Board should be required by the Court to deny approximately 23,000 additional children admission to the neighborhood schools in the districts or zones of their residence, and to transport them by bus or otherwise substantial distances in order to produce a greater racial mixture

in student bodies. (819a, 825a-827a, 829a-839a, 1198a, 1208a-1214a, 1231a-1234a, 1268a-1269a)

C. The Order of the District Court

On February 5, 1970, the District Court entered an order approving the School Board plan, subject to certain drastic conditions and revisions recommended by Dr. Finger. (819a-839a) By adopting these conditions and revisions, the District Court commanded the School Board to do these things:

1. To deny hundreds of black high school students admission to a nearby high school which would have had a racial composition of 36 percent black and 64 percent white under the School Board plan, and to bus them from their residences in northwest Charlotte through center-city traffic a distance of some 12 or 13 miles to Independence High School, which is located in a white suburban residential area;

2. To deny several thousands of black junior high school students admission to their neighborhood junior high schools in the inner city, and to bus them substantial distances to nine predominately white suburban schools located in other attendance districts or zones; and

3. To deny thousands of black and thousands of white elementary school children admission to 31 elementary schools located within their respective attendance districts or zones, and to bus them distances approximating 15 miles to elementary schools situated in other attendance districts or zones.

The sole purpose of the District Court in ordering the School Board to dislocate and bus the hundreds of black high school students to Independence High School was to make Independence High less white, and the sole purpose of the District Court in ordering the School Board to dislocate and bus several thousands of junior high school students was to reduce the percentage of blacks in Piedmont Junior High from 90 percent to 32 percent. (825a-826a)

The sole purpose of the order of the Court commanding the School Board to dislocate and bus thousands of elementary school children was to alter the racial composition of the student body in 9 predominately black inner-city schools and in 24 predominately white suburban schools. To accomplish this purpose, the District Court commanded the School Board to dislocate and bus thousands of black first, second, third, and fourth grade students from 9 predominately black inner-city schools to 24 predominately white suburban schools, and to dislocate and bus thousands of white fifth and sixth grade students from the 24 predominately white suburban schools to the 9 predominately black inner-city schools. (826a)

The order of the District Court did not stop with these things. It further ordered the School Board to establish and implement a continuing program of assigning students throughout the school year "for the conscious purpose of maintaining each school * * * in a condition of desegregation." (824a)

The record clearly discloses the reasoning which prompted the District Court to seek to achieve the purposes of its order.

Prior to its order of February 5, 1970, namely, on April 24, 1969, the District Court manifested its disapproval of the School Board's adherence to the neighborhood school concept by this statement: "Today people drive as much as 40 or 50 miles to work; 5 to 10 miles to church; several hours to football games; all over the country for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood * * * If this Court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships." (306a)

When it entered its order of February 5, 1970, the District Court justified adding the conditions and revisions recommended by Dr. Finger on the ground that the School

Board plan "relies almost entirely on geographical attendance zones," while "the Finger plan goes further and produces desegregation of all the schools in the system." (819a)

What has been said makes it manifest that the District Court entertained the opinion that the Equal Protection Clause of the Fourteenth Amendment makes it obligatory for a school board to mix student bodies racially in every school subject to its jurisdiction if children are available for mixing, and that a school board must deny a sufficient number of school children admission to their neighborhood schools and bus them to schools elsewhere either to overcome racial imbalances in their neighborhood schools or in the schools elsewhere, regardless of whether such racial imbalances are produced by arbitrary or invidious discrimination on the part of the school board or simply result from adventitious de facto residential segregation or other cause.

The amicus curiae has not undertaken to state with exactitude the number of additional school children which the District Court ordered the School Board to deny admission to their neighborhood schools and to bus from one school to another or from one school district to another, or the additional cost which the carrying out of the District Court's order in this respect will impose upon the School Board.

This action of the amicus curiae has been deliberate because these matters are in serious dispute between the School Board and the District Court.

When the District Court entered its order of February 5, 1970, and thereby adopted the Finger plan in virtually its entirety, the School Board estimated that the order required it to bus 23,384 additional students an average round trip of 30 miles each school day, and that to do this the School Board would have to acquire 526 additional buses and additional parking spaces at an original capital outlay of $3,284,448.94; and thereafter expend each year an addi

tional $1,065,391.98 in employing additional personnel and defraying other operating costs. (853a, 866a)

On March 3, 1970, the District Court modified its order of February 5, 1970. (921a) The School Board then calculated that the order as modified will require it to transport 19,285 additional students and to purchase for such purpose 422 additional buses and additional parking spaces at an original capital outlay of $2,369,100.00; and thereafter to expend each year for additional personnel and operating expenses of such buses $284,800.00. (1269a-1270a)

The Court estimated that the execution of its order as modified would require the School Board to bus 13,300 additional students and to purchase for such use 138 additional buses at an original capital outlay of $745,200.00; and to expend thereafter annually $266,000.00 for operating costs of such additional buses, exclusive of what it will have to expend to compensate any additional personnel necessary for their operation. (1259a-1261a, 1269a)

The Court arrived at its figures by suggesting that the School Board could reduce its estimate of the expenses incident to busing the thousands of children affected by its order by drastically staggering school openings and closings. The School Board replied to this suggestion by asserting that the suggested staggering of school openings and closings would require some children to leave home as early as 6:30 a.m. and prevent some of them from returning home before 5:00 p.m. (864a-865a)

D. The Judgment of the United States Court of Appeals for the Fourth Circuit

At the instance of the School Board, the United States Court of Appeals for the Fourth Circuit reviewed the orders of the District Court. On May 26, 1970, the Circuit Court rendered its judgment affirming the orders of the District Court insofar as they related to the assignment and busing of senior high school and junior high school students, and

remanding to the District Court for further consideration the provisions of the order of the District Court relating to the assignment and busing of elementary school students. (1262a-1304a)

In making this remand, the Circuit Court adjudged that "not every school in a unitary system need be integrated," and adopted a "test of reasonableness—instead of one that calls for absolutes." (1267a)

The writ of certiorari granted to the School Board presents for review the validity of the Circuit Court ruling approving the orders of the District Court relating to the assignment and busing of senior high school and junior high school students and the writ of certiorari granted to the original plaintiffs presents for review the question of the validity of the ruling of the Circuit Court vacating the order of the District Court relating to the assignment and busing of elementary school students.

Subsequent to these events, namely, on August 3, 1970, the District Court reinstated and reaffirmed its order of February 5, 1970, in respect to the assignment and busing of the elementary school students. (1320a) While the validity of this particular order may not be before the Supreme Court, the question which it raises is involved in the matter to be reviewed under the writ granted to James E. Swann and those associated with him in this litigation.

The amicus curiae understands that the School Board has filed an yet unprinted motion with the Supreme Court for a stay of the order entered by the District Court on August 3, 1970, after the hearing of the case in the Circuit Court.

SUMMARY OF ARGUMENT

In the final analysis, the questions presented for review in this case do not arise out of any real controversy in respect to the testimony. They arise out of a fundamental disagreement between the School Board, on the one hand, and the District Court and some of the Circuit Court

Judges, on the other, with respect to how the Equal Protection Clause applies to the assignment of students to public schools.

The view of the School Board may be epitomized in this fashion:

The Equal Protection Clause applies only to State action which is arbitrary or invidious, and, hence, it leaves a public school board, acting as a State agency, entirely free to assign students to its schools by any method satisfactory to itself if such method is not arbitrary or invidious. A public school board acts arbitrarily or invidiously if it assigns students to its schools for racial reasons, but a public school board does not act arbitrarily or invidiously if it assigns students to its schools for non-racial reasons, such as the promotion of the efficiency of school administration, the economy of school administration, or the convenience of the students or their parents. This being true, the Equal Protection Clause does not impair in any way the power of a public school board to create fairly drawn geographic attendance districts or zones, and to assign all students without regard to their race to neighborhood schools in the respective districts or zones in which they reside even though such action may result in some racial imbalances in the schools serving areas predominately inhabited by members of one race.

The view of the District Court and some of the Circuit Court Judges may be summarized in this way:

It is highly desirable from an educational viewpoint to mix students in public schools racially in the highest possible degree. Hence, the Equal Protection Clause imposes upon a public school board the positive duty to balance racially all the schools it operates if black and white children are available for this purpose; and to deny school children admission to their neighborhood schools and bus them to other schools in other areas, no matter how distant, in sufficient numbers to effect such racial balancing.

The School Board refutes this proposition by saying that the Equal Protection Clause does not require action which may be desirable; it merely prohibits action which is arbitrary or invidious.

When it is stripped of irrelevancies and surmises, the record discloses a surprisingly simple state of facts which are relatively free of conflict insofar as they relate to the crucial issues.

After the first *Brown Case*, 347 U.S. 483 (1954), the School Board converted its previously dual system of schools into a unitary system of schools within which no child was excluded because of the child's race. The School Board did this by a geographic assignment plan applicable in like manner to all children without regard to their race. Its action in this regard was adjudged to be in compliance with the Equal Protection Clause by both the District Court and the Court of Appeals.

Subsequent to the *Green Case*, 391 U.S. 430 (1968), the District Court ordered the School Board to submit another plan for the desegregation of its schools. Pursuant to this order, the School Board proposed a plan which was reasonably designed to secure the maximum amount of racial mixture obtainable in the student bodies in its schools without abandonment of the neighborhood school concept by restructuring its geographic attendance districts or zones, and assigning all of the children subject to its jurisdiction without regard to their race to their respective neighborhood schools in the districts or zones in which they reside.

The Court rejected the School Board plan simply because it did not racially balance one senior high school out of the system's ten senior high schools, one junior high school out of the system's 21 junior high schools, and nine predominately black and three predominately white elementary schools out of the system's 72 elementary schools.

Instead of approving the reasonable plan submitted by the School Board, the District Court, in essence, adopted the Finger Plan which requires the School Board to deny

thousands of children admission to their neighborhood schools, and to bus them to other schools in other areas merely to eliminate the racial imbalances in these particular schools. The School Board insists that the action of the District Court was not only inconsistent with the Equal Protection Clause, but violates Title IV of the Civil Rights Act of 1964, and that the Circuit Court erred insofar as it approved the action of the District Court.

ARGUMENT

I.

The Charlotte-Mecklenburg Board of Education has complied with the Equal Protection Clause of the Fourteenth Amendment and the Supreme Court decisions interpreting it by establishing and operating a unitary public school system, which receives and teaches students without discrimination on the basis of their race or color. Any racial imbalance remaining in any of the schools under the jurisdiction of the Board represents de facto segregation, which results from the purely adventitious circumstance that the inhabitants of particular areas in and adjacent to the city of Charlotte are predominantly of one race.

The Equal Protection Clause of the Fourteenth Amendment, which was certified to be a part of the Constitution on July 28, 1868, forbids a state to "deny to any person within its jurisdiction the equal protection of the laws."

By these words, the Equal Protection Clause requires a state to treat in like manner all persons similarly situated. *State Board of Tax Commissioners of Indiana v. Jackson,* 283 U.S. 527 (1931); *Maxwell v. Bugbee,* 250 U.S. 525 (1919). The clause does not require identity of treatment. *Walters v. St. Louis,* 347 U.S. 231 (1934). It permits a state to make distinctions between persons subject to its jurisdiction if the distinctions are based on some reasonable classi-

fication, and all persons embraced within the classification are treated alike. It merely outlaws arbitrary or invidious discrimination. *Avery v. Midland County*, 390 U.S. 474 (1968); *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205 (1888).

From July 28, 1868, until May 17, 1954, the Equal Protection Clause of the Fourteenth Amendment was interpreted to sanction the "separate but equal doctrine," which permitted a state to segregate school children in its public schools on the basis of race when it furnished equal facilities for the education of the children of each race. *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

On May 17, 1954, the Supreme Court handed down its historic decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), adjudging "that in the field of public education the doctrine of 'separate but equal' has no place" and holding that a state violates the Equal Protection Clause if it denies any child admission to any of its public schools on account of the child's race.

On the same day the Supreme Court handed down *Bolling v. Sharpe*, 347 U.S. 497 (1954), ruling that the Due Process Clause of the Fifth Amendment imposes the same inhibition on the public schools of the District of Columbia that the Equal Protection Clause does on the public schools of a state, and one year later the Supreme Court announced its implementing decision in second *Brown*, which is reported as *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

Since these decisions the Supreme Court has applied the Equal Protection Clause to varying factual situations arising in various Southern public school districts in the following cases: *Cooper v. Aaron*, 358 U.S. 1, 20 (1958); *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101 (1958); *Bush v. Orleans Parish School Board*, 364 U.S. 500 (1960); *Watson v. City of Memphis*, 373 U.S. 526 (1963);

Goss v. Board of Education of Knoxville, 373 U.S. 683 (1963); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Bradley v. School Board of City of Richmond*, 382 U.S. 103 (1965); *Rogers v. Paul*, 382 U.S. 198 (1965); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Raney v. Board of Education of the Gould School District*, 391 U.S. 443 (1968); *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Dowell v. Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969); *Carter v. West Felicana Parish School Board*, 396 U.S. 226 (1969); *Carter v. West Felicana Parish School Board*, 396 U.S. 290 (1970); and *Northcross v. Board of Education of the Memphis City Schools*, 397 U.S. 232 (1970).

Besides, individual Supreme Court Justices, acting as Circuit Justices, have expressed opinions on the subject in these cases: *Board of School Commissioners of Mobile County v. Davis*, 11 L. ed. 2d 26 (1963); *Keyes v. School District No. 1, Denver*, 396 U.S. 1215 (1970); and *Alexander v. Holmes County Board of Education*, 396 U.S. 1218 (1969).

The record in the instant case embraces hundreds of pages of evidence, orders, and judgments, and for that reason, the case lends itself to much writing. But the issues arising in the case are simple, and it would complicate that simplicity to analyze the cited decisions in detail. In their ultimate analysis, they interpret the Equal Protection Clause as follows:

1. The Equal Protection Clause makes it unconstitutional for a state to deny any child admission to any public school it operates on account of the child's race.

2. In consequence, the Equal Protection Clause imposes upon a state, acting through its appropriate agencies, the responsibility to establish a system of determining admission to its public schools on a non-racial basis.

3. A state, which operated a racially segregated system of public schools on May 17, 1954, fulfills this responsibility by converting its dual public school system into a unitary public school system.

4. A unitary public school system is one "within which no person is to be effectively excluded from any school because of race or color."

When the Equal Protection Clause as thus interpreted is applied to the facts in this case, it is obvious that the School Board has fully converted its *Pre-Brown* dual school system into a unitary school system within which no child is actually excluded from any school because of race or color. The School Board has done this by creating non-discriminatory attendance districts or zones and assigning all children, black and white, to neighborhood schools in the district or zone in which they reside without regard to their race.

These conclusions are explicit in the rulings made by the District Court and the Circuit Court in 1965 and 1966. *Swann v. Charlotte-Mecklenburg Board of Education,* 243 F.Supp. 667 (1965); *Swann v. Charlotte-Mecklenburg Board of Education,* 369 F.2d 29 (1966). They are implicit in the findings made by the District Court in its order of April 23, 1969, that the School Board had "achieved a degree of desegregation of schools apparently unsurpassed in these parts" and had "exceeded the performance of any school board whose actions have been reviewed in the appellate court decisions," (311a-312a) and that the Schools of Charlotte, in essence, conform to de facto patterns of residential segregation. (305a)

To be sure, the District Court, acting *sua sponte,* undertook to recall these findings in its Memorandum Opinion of November 7, 1969, and to assert that racial imbalances in the Schools of Charlotte are "not innocent or *de facto.*" (662a)

The amicus curiae submits in all earnestness that there is no evidence in the record to sustain the District Court's assertion in this respect. Be this as it may, the Supreme Court is empowered in cases of an equitable nature and cases involving constitutional questions to review the evidence and make its own findings. If it follows this course in this case, the Supreme Court will be impelled to the conclusion that there is not a vestige of state-imposed segregation in the Charlotte-Mecklenburg School System.

Besides, the District Court's assertion that racial imbalances in the schools of Charlotte are "not innocent or *de facto*" is totally repudiated by its subsequent finding that there is no way to desegregate the black schools in northwest Charlotte without transporting thousands of children by bus or other means. (1208a)

When all is said, the School Board went far beyond the call of any duty imposed upon it by the Equal Protection Clause when it proposed in its plan of February 2, 1970, to gerrymander attendance districts or zones in order to achieve the highest degree of desegregation obtainable without virtual abandonment of the neighborhood school concept. The amicus curiae expresses no opinion as to whether this proposal is repugnant to the constitutional or legal rights of any child.

II.

The Equal Protection Clause of the Fourteenth Amendment does not require or empower a Federal Court to order a public school board to assign children to the schools it operates merely to balance the student bodies in such schools racially, or to bus children outside reasonable geographic attendance districts or zones to effect such purpose. The District Court ordered the Charlotte-Mecklenburg School Board to do both of these things, and the Circuit Court erred insofar as it affirmed the District Court order.

The facts make it clear that the order entered by the District Court on February 5, 1970, requires racial balancing in the Charlotte-Mecklenburg School System and the busing of thousands of children outside their geographic attendance districts or zones to effect such balancing.

Indeed, the District Court virtually admits this to be true by setting forth in its Supplemental Findings of Fact of March 21, 1970, a specific finding that there is no other way to desegregate the black schools in northwest Charlotte. (1208a)

Upon the entire record, the conclusion is inescapable that the District Court fell into error because it honestly believed that the Equal Protection Clause and certain decisions interpreting it impose upon a public school board an absolute duty to do these things:

1. To balance racially to the highest degree possible all the schools subject to its control if black and white children are available for that purpose anywhere within the territory subject to its jurisdiction, no matter how vast such territory may be; and

2. To effect such racial balancing by denying both black and white children admission to their neighborhood schools and busing them to other schools in other areas in sufficient numbers to overcome racial imbalances either in their neighborhood schools or in the other schools, regardless of

whether the racial imbalances result from de facto residential segregation or other cause, and regardless of these other factors: the distances the children are to be bused, the time required for their busing, the impact of their exclusion from their neighborhood schools and their busing upon their minds and hearts, the effect of these things upon the management of the homes which must nurture them, the traffic hazards involved, and the additional expense foisted upon heavily burdened taxpayers.

There is no other rational explanation for the court order which disrupts the lives of thousands of school children and the management of the thousands of homes from which they come, and diverts tremendous sums of tax-raised moneys from the enlightenment of their minds to the busing of their bodies.

The Equal Protection Clause does not require any court to enter any such order. It does not empower any court to enter any such order. Indeed, it forbids any court to do so.

As interpreted in the first *Brown Case*, 347 U.S. 483 (1954), and all subsequent Supreme Court decisions relevant to the subject, the Equal Protection Clause forbids a public school board, which acts as a state agency, to deny any child admission to any school it operates on account of the child's race. A public school board obeys the Clause by maintaining a unitary school system, i.e., a school system "within which no person is to be effectively excluded from any school because of race or color." *Northcross v. Board of Education of the Memphis City Schools*, 397 U.S. 232 (1970); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969). See also the opinion of Mr. Justice Black, acting as Circuit Justice, in *Alexander v. Holmes County Board of Education*, 396 U.S. 1218 (1969).

The power to assign children to state supported schools belongs to the public school board which operates them. The Equal Protection Clause does not undertake to transfer this power to the Federal Courts. It merely subjects the

exercise of the power by the public school board to this limitation: The board must not exclude any child from any school it operates because of the child's race.

If it faithfully observes this limitation upon its power, a public school board has the right to assign children to the schools it operates in any non-discriminatory fashion satisfactory to itself.

The School Board exercised this right when it created non-discriminatory attendance districts or zones and assigned all children, whether black or white, to neighborhood schools in the districts or zones of their residence without regard to race.

Since the children are similarly situated and the School Board treats them exactly alike, its action is in complete harmony with the Equal Protection Clause. It accords, moreover, with the implementing decision in the second *Brown Case*, 349 U.S. 294 (1955), which expressly recognizes that a school board may employ non-discriminatory geographic zoning of school districts "to achieve a system of determining admission to the public schools on a non-racial basis."

As is true in respect to virtually every city of any size in our land, the different races are concentrated to a substantial degree in separate residential areas in Charlotte, and for this reason the School Board's non-discriminatory geographic zoning and assignment program necessarily results in some racial imbalances in some schools.

Notwithstanding this, the order of the District Court commanding the School Board to exclude thousands of children from their neighborhood schools and to bus them long distances to other schools to overcome these racial imbalances is without support in the Equal Protection Clause.

This is true for an exceedingly plain reason. The Equal Protection Clause does not prohibit any discrimination except that which is arbitrary or invidious.

It inevitably follows that where school attendance areas are not arbitrarily or invidiously fixed so as to include or exclude children of a particular race, the Equal Protection Clause does not prohibit a state or local school board from requiring that the children living in each attendance area attend the school in that area, even though the effect of such a requirement, in a locality where the different races are concentrated in separate residential areas, is racial imbalance or de facto segregation in the schools.

The conclusion that the Equal Protection Clause does not impose upon a public school board any mandate to remove any racial imbalance in its schools occasioned by de facto residential segregation or non-discriminatory geographic assignments is expressly supported in *Bell v. School City of Gary, Ind.* (7 CA-1963), 324 F.2d 209, and *Downs v. Board of Education of Kansas City, Kansas* (10 CA-1964), 336 F.2d 998. Moreover, it is compelled by first *Brown*, 347 U.S. 483 (1954), and all the subsequent Supreme Court cases applying its holding, as well as by the language of the Equal Protection Clause itself.[1]

Despite the fact that the Charlotte-Mecklenburg School System is in the South, racial imbalances produced in its schools by de facto residential segregation are just as innocent as racial imbalances produced in the public schools of the North by the same cause, and are equally exempt from federal interference, whether legislative, executive, or judicial, under the Equal Protection Clause, which, as already pointed out, condemns no discrimination except that which is arbitrary or invidious.

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[1]While such action may not be customary in briefs, the amicus curiae wishes to note that this conclusion is supported by the text writer in 15 Am. Jur. 2d, Civil Rights, Section 39, Page 433, and by one of the most recent commentaries on the Constitution of the United States, i.e., Bernard Schwartz's "Rights of the Person," Volume II, Section 501, Page 593-596.

The amicus curiae is confident that the Supreme Court will so adjudge. Indeed, it must do so if the United States is truly one nation under one flag and one Constitution.

It no longer comports with intellectual integrity to call all racial imbalances in the public schools of the South de jure, and all racial imbalances in the public schools of the North de facto.

There is now no de jure school segregation anywhere in our land. Racial imbalances in public schools are either arbitrary or invidious and, hence, constitutionally impermissible, both North and South, or innocent and, hence, constitutionally permissible, both North and South. Racial imbalances resulting from de facto residential segregation or non-discriminatory districting or zoning, whether in the North or in the South, are clearly innocent and constitutionally permissible.

Moreover, it no longer comports with reality, common sense, or justice to apply one rule to the North and another to the South because the South did not precede the Supreme Court in discovering that the "separate, but equal doctrine" had ceased to be the law of the land.

III.

The Fifth Section of the Fourteenth Amendment Empowers Congress to Enforce the Equal Protection Clause by Appropriate Legislation, the First Section of Article III of the Constitution Empowers Congress to Regulate the Jurisdiction of United States District Courts and United States Circuit Courts of Appeals, and the Second Section of Article III of the Constitution Empowers Congress to Regulate the Appellate Jurisdiction of the Supreme Court. Congress Exercised all of These Powers in an Appropriate Fashion When it Enacted Title IV of the Civil Rights Act of 1964, Which Prohibits the Assignment of Students to Public Schools to Balance the Student Bodies in Such Schools Racially, and to bus Them From Some Schools to Other Schools, or From Some School Districts to Other School Districts to Effect Such Purpose. The Act's Prohibition on Busing is Absolute and Deprives Federal Courts of Jurisdiction to Compel School Boards to Bus Students to Overcome Racial Imbalances in Schools, Even if Such Imbalances Result From Discriminatory School Board Action. The District Court Order Violated This Act by Commanding the Charlotte-Mecklenburg School Board to do the Things Prohibited by it, and the Circuit Court Joined in Such Violation Insofar as it Affirmed the District Court Order.

The Equal Protection Clause is limited in objective and operation. It imposes this duty and this duty only on a state, i.e., to treat in like manner all persons similarly situated.

In consequence, it forbids a public school board, acting as a state agency, to exclude any child from any school because of the child's race.

Further than that it does not go. It does not rob any public school board of its inherent authority to assign child-

ren of any race to their neighborhood school if the school board acts for reasons other than racial reasons, such as a purpose to promote ease of school administration, convenience of the children and the homes from which they come, or economy of operation.

Hence, it does not empower federal courts to deny children of any race admission to their neighborhood schools and to bus them to other schools in other areas to remedy racial imbalances in their neighborhood schools or the other schools arising out of the residential patterns of their neighborhoods or of the other areas.

And, above all things, the Equal Protection Clause does not intend that little children, black or white, shall be treated as pawns on a bureaucratic or judicial chess board.

When it enacted Title IV of the Civil Rights Act of 1964 to enforce the Equal Protection Clause, Congress recognized the validity of these observations concerning the meaning of the Equal Protection Clause. Moreover, it was not oblivious to the inescapable reality that the different races are concentrated to substantial degrees in separate residential areas throughout the nation, and that it would be virtually impossible to keep the public schools of the country racially balanced, even if the Equal Protection Clause did not prohibit such action.

For these reasons, Congress vested in the Commissioner of Education, the Attorney General, and the Federal Courts certain responsibilities regarding what it called the desegregation of public education, but limited the powers of the Commissioner of Education and the Attorney General, and the jurisdiction of the Federal Courts to keep them within constitutional bounds.

Congress was authorized to do these things by the Fifth Section of the Fourteenth Amendment, which expressly empowers Congress to "enforce, by appropriate legislation" the Equal Protection Clause; the First Section of Article III of the Constitution, which authorizes Congress to prescribe the

jurisdiction of the inferior courts created by it, *Chisholm v. Georgia*, 2 Dall. (U.S.) 419, 432 (1793); *Turner v. Bank of North America*, 4 Dall. (U.S.) 8 (1799); *Ex Parte Bollman*, 4 Cranch (U.S.) 75, 93 (1807); *Cary v. Curtis*, 3 How. (U.S.) 236, 245 (1845); *Sheldon v. Still*, 8 How. (U.S.) 441 (1850); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Lauf v. E. G. Skinner & Co.*, 303 U.S. 323, 330 (1938); *Lockerty v. Phillips*, 319 U.S. 182 (1943); and *Yakus v. United States*, 321 U.S. 414 (1944); and the Second Section of Article III of the Constitution, which vests Congress with legal power to regulate the appellate jurisdiction of the Supreme Court, *Wiscart v. D'Auchy*, 3 Dall. (U.S.) 321, (1796); *Durousseau v. United States*, 6 Cranch 309 (1810); *Barry v. Mercein*, 5 How. (U.S.) 103, 119 (1847); *Daniels v. Railroad Co.*, 3 Wall. (U.S.) 250, 254 (1866); *Ex Parte McCardle*, 6 Wall. (U.S.) 318 (1868); *The Francis Wright*, 105 U.S. 381, 386 (1882); *Kuntz v. Moffitt*, 115 U.S. 487, 497 (1885); *Cross v. Burke*, 146 U.S. 82, 86 (1892); *Missouri v. Pacific Railway Co.*, 292 U.S. 13, 15 (1934); and *Stephan v. United States*, 319 U.S. 423, 426 (1943).

The conclusion that Title IV of the Civil Rights Act of 1964 is designed to enforce the Supreme Court rulings that the Equal Protection Clause forbids a school board, acting as a state agency, to deny any child admission to any school it operates because of the child's race is vindicated by the legislative history of the Act, as well as by its language.

During the course of the debate on the bill which became the Civil Rights Act of 1964, Senator Byrd of West Virginia addressed this question to Senator Humphrey, the floor manager of the bill, and received this reply from Senator Humphrey:

> "MR. BYRD, of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under Title VI school children may not be bused from one end of the community to another end of

the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?"[1]

"MR. HUMPHREY. I do."[2]

Senator Humphrey made these further statements relating to the purposes of the bill:

"MR. HUMPHREY. Mr. President, the Constitution declares segregation by law to be unconstitutional, but it does not require integration in all situations. I believe this point has been made very well in the courts, and I understand that other Senators will cite the particular cases.

"I shall quote from the case of Bell against School City of Gary, Ind., in which the Federal court of appeals cited the following language from a special three judge district court in Kansas: 'Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.' *Brown v. Board of Education*, D. C. 139 F. Supp. 468, 470.

"In *Briggs v. Elliott* (EDSC), 132 Supp. 776, 777, the Court said: 'The Constitution, in other words, does not require integration. It merely forbids discrimination.' In other words, an overt act by law which demands segregation is unconstitutional. That was the ruling of the historic *Brown* case of 1954."[3]

The language of the Act discloses this two-fold Congressional intent:

1. To enforce the Supreme Court rulings that the Equal Protection Clause prohibits the State from denying to any

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[1]Senator Byrd was evidently referring to Title IV, instead of Title VI.

[2]Congressional Record, Volume 110, Part 10, Page 12,714, June 4, 1964.

[3]Congressional Record, Volume 110, Part 10, Page 13,821, June 15, 1964.

child admission to any school it operates because of the child's race; and

2. To keep overzealous bureaucrats and federal judges from straying beyond constitutional limits in cases involving the desegregation of public schools.

Since no action of his is involved in this case, the amicus curiae pretermits discussion of the provisions of the Civil Rights Act of 1964 relating to the Commissioner of Education.

In phrasing the Act, Congress uses the terms "desegregation" and "discrimination" interchangeably to express the concept made familiar by the prevalent use of the word "discrimination" to mean state action denying persons admission to public colleges or public schools because of their race.

This observation is made indisputable by Section 401(b) which expressly declares that "desegregation" merely means "the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin"; Section 407(a)(1) and (2) which refer to children who "are being deprived by a school board of the equal protection of the laws" and individuals who have "been denied admission" to a public college or permission "to continue at a public college by reasons of race, color, religion, or national origin"; Section 409 which directs its attention to "discrimination in public education"; and Section 410 which stipulates that "nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

There is not a single syllable in Title IV of the Civil Rights Act of 1964 giving any support to a different interpretation.

Section 401(b) merits further consideration because it specifies not only what Congress means by the term "desegregation", but also what Congress does not mean by that term.

Section 401(b) consists of two clauses. The first clause provides that "desegregation" as used in Title IV "means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin," and the second clause provides that "desegregation" as used in Title IV "shall not mean the assignment of students to public schools in order to overcome racial imbalance."

As a law made by Congress, Title IV is binding on federal judges, and defines their jurisdiction in respect to public schools operated by public school boards acting as state agencies.

The first clause of Section 401(b) commands school boards to ignore race, color, religion, and national origin as factors in assigning students to public schools. Since federal judges have no power to add anything to the laws they enforce, this clause merely confers upon federal judges the limited jurisdiction to enforce its command by decrees which prevent recalcitrant school boards from denying otherwise eligible children admission to schools on account of their race, color, religion, or national origin.

Since federal judges do not have power to subtract anything from laws they enforce, the second clause of Section 401(b) denies to federal judges jurisdiction to compel school boards to assign "students to public schools in order to overcome racial imbalance." By this clause, Congress forbids federal judges to make decrees compelling school boards to take affirmative steps to commingle black and white children in public schools in proportions satisfactory to themselves to remedy racial imbalances occasioned by de facto residential segregation or non-discriminatory action on the part of school boards.

This interpretation of Section 401(b) is completely confirmed by Section 407, 409, and 410 of Title IV.

Before the enactment of Title IV of the Civil Rights Act of 1964, only the individuals aggrieved thereby had legal

standing to make complaint in federal courts concerning state-imposed segregation in public education. They were restricted to seeking relief for themselves and their children and other persons similarly situated. They did not have the right to demand that federal courts should substitute federally coerced integration for state-imposed segregation.

When it drafted Title IV, Congress decided to extend to the Attorney General standing to sue for "such relief as may be appropriate" in behalf of two groups of people if he believes their complaints to be "meritorious" and concludes that they are "unable *** to initiate and maintain appropriate legal proceedings for" their own "relief." These groups of people are described, in essence, as children who "are being deprived by a school board of the equal protection of the laws" and individuals who have been "denied admission" to a public college or "permission to continue in attendance at a public college by reason of race, color, religion or national origin." To this end, Congress inserted Section Section 407(a) in Title IV.

At the same time, however, Congress decided to preserve intact the existing rights of individuals to sue in their own behalf for relief against state-imposed segregation. To accomplish this purpose, Congress stipulated in Section 409 that nothing in Title IV "shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education."

Congress was determined, however, not to increase the powers of federal judges when it gave the Attorney General standing to seek relief against discrimination in public education in behalf of the aggrieved persons designated in Section 409(a). Moreover, Congress was equally as determined that federal judges should not have jurisdiction to compel school boards to deny children admission to their neighborhood schools and transport them hither and yon to achieve racial balances in public schools, regardless of whether the racial imbalances sought to be removed to accomplish such purpose arise out of innocent causes or discriminatory action on the part of school boards.

Congress made these purposes manifest by inserting in Section 409(a) language expressly providing "that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

By so doing, Congress deprived all federal courts of the jurisdiction to order public school boards to bus children from one school to another or from one school district to another to remedy racial imbalances in public schools regardless of whether such imbalances arise out of innocent causes or discriminatory school board action. As appears from the cases which the amicus curiae has previously cited, Congress had undoubted power to do this under the First Section of Article III of the Constitution, which empowers it to define the jurisdiction of inferior federal courts, and under the Second Section of Article III of the Constitution, which expressly provides that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

It necessarily follows that the District Court violated the provisions of the Civil Rights Act of 1964 when it ordered the Charlotte-Mecklenburg School Board to bus thousands of children from some schools to other schools and from some school districts to other school districts to overcome racial imbalances in any of its schools regardless of the origin of such racial imbalances; and that the Circuit Court erred in affirming the provisions of the District Court order relating to the transportation of senior high school and junior high school students.

While such statutes apply to the Executive Department of the Federal Government only, and for that reason are not controlling in this case, it seems not amiss to direct the atten-

tion of the Supreme Court to congressional hostility to the busing of children to achieve racial balancing in public schools. Congress manifested its hostility to such action by the Elementary and Secondary Education Act of 1965, as amended in 1966, which forbids "any department, agency, officer, or employee of the United States * * * to require the assignment or transportation of students or teachers in order to overcome racial imbalance," (P.L. 89-10, Title VIII, Section 804; 20 U.S.C. Section 884); the Department of Labor, and Health, Education, and Welfare Appropriation Act of 1969, which provides that "no part of the funds contained in this Act shall be used to force busing of students * * * in order to overcome racial imbalance as a condition precedent to obtaining Federal funds otherwise available to any State, school district, or school", (P.L. 90-557, Title IV, Section 410); and the Office of Education Appropriation Act of 1971, which provides that "no part of the funds contained in this Act shall be used to force any school or school district which is desegregated as that term is defined in Title IV of the Civil Rights Act of 1964, Public Law 88-352, to take any action to force the busing of students" (P.L. 91-380, Title II, Section 210).

IV.

A School Board has the Power to Devise and Implement any Non-discriminatory Plan for the Assignment of Children to the Public Schools it Operates. The District Court not Only Rejected a Non-discriminatory Assignment Plan Submitted by the Charlotte-Mecklenburg School Board, but it Usurped and Exercised the Authority of the School Board in this Respect by Devising a Plan of its Own Which Commands the School Board to Deny Thousands of Children Admission to Their Neighborhood Schools, and to bus Them to Other Schools to Mix the Races in the Various Schools in Numbers or Proportions Satisfactory to the District Court. By so Doing, the District Court Ordered the School Board to Deny to the Thousands of Children Affected by its Order Admission to Their Neighborhood Schools in Violation of the Equal Protection Clause, and to Bus Them to Other Schools or Other School Districts in Violation of Section 407(a)(2) of the Civil Rights Act of 1964. The Circuit Court Concurred in These Violations, and Erred Insofar as it Affirmed the Order of the District Court.

A school board, acting as a state agency, has the power to assign children to the public schools it operates free from interference by the Federal Judiciary as long as it obeys the Equal Protection Clause and does not exclude any child from any school because of the child's race.

When a school board violates the Equal Protection Clause, a Federal Court has jurisdiction to order the school board to devise and implement a plan sufficient to remedy its discriminatory assignment of children to its schools, and to punish the members of the school board for contempt of court if they fail to obey the order. Nevertheless, the power to devise and implement a plan to remedy the discriminatory assignment continues to reside in the school board, and the Federal Court is without power to reject a non-discriminatory

plan submitted by the school board because such non-discriminatory plan will not mix the races in the schools in numbers or proportions satisfactory to the Federal Court.

Besides the Federal Court cannot usurp and exercise the power of the School Board to devise a non-discriminatory assignment plan because the Federal Court wishes to mix the races in the schools in greater numbers or proportions than the non-discriminatory plan of the School Board envisages.

The District Court violated all of these principles when it made its order of February 5, 1970 (819a-839a), its supplemental findings of fact of March 21, 1970 (1198a-1220a), and its supplemental memorandum of March 21, 1970 (1221a-1238a).

Pursuant to the order which the District Court had entered on December 1, 1969, the Charlotte-Mecklenburg School Board submitted to the District Court on February 2, 1970 its plan for desegregation of schools (726a-742a). By this plan the School Board undertook to restructure its geographical attendance districts or zones in such a manner as to promote the highest degree of racial integration obtainable by geographical districting or zoning, and to assign all school children, black or white, to the neighborhood schools in the district or zone of their residence, regardless of race. The plan undertook to further augment desegregation by a transfer system heavily weighted in favor of permitting black children to transfer from predominantly black schools to predominately white schools.

Inasmuch as it treated all children similarly situated exactly alike and did not exclude any child from any school on account of the child's race, the plan submitted by the School Board on February 2, 1970, was in complete harmony with the Equal Protection Clause and it was obligatory for this reason for the District Court to approve it and permit the School Board to implement it.

Instead of doing so, the District Court rejected the non-discriminatory plan submitted by the School Board, and usurped and exercised the power vested in the School Board by adopting a plan of its own. The District Court accomplished this purpose by engrafting upon the plans of the School Board drastic alterations and revisions recommended by Dr. Finger, which commanded the School Board to deny thousands of children admission to their neighborhood schools, and to bus them long distances from some schools to other schools, and from some school districts or zones to other school districts or zones.

When all is said, the District Court commanded the School Board to take this action to remedy racial imbalances in black schools in northwest Charlotte arising out of de facto residential segregation in that area, and to produce racial commingling in these schools of northwest Charlotte and other schools in other areas in numbers or proportions greater than those envisaged by the plan of the School Board.

The District Court virtually confesses that its order was designed to effect these purposes by this recital which appears in its supplemental findings of fact of March 21, 1970:

> "Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion." (1208a)

In addition to usurping and exercising power vested by law in the School Board, the District Court order commands the School Board to violate rights vested in thousands of school children by the Equal Protection Clause and the Civil Rights Act of 1964.

Since the power to assign children to public schools belongs to the school board administering such schools, no child has the constitutional or legal right in the first instance to attend any particular school, but when a school board adopts a non-discriminatory system for assigning children to neighborhood schools in the attendance district or zone of their residence, children acquire, as against every governmental agency except the school board, the legal right to attend the schools to which they have been so assigned. This right is additional to their right not to be excluded from such schools because of their race.

By its previous practices and its plan of February 2, 1970, the School Board had assigned thousands of senior high school, junior high school, and elementary school children to their neighborhood schools in a wholly non-discriminatory fashion.

By its order of February 5, 1970, the District Court commanded the School Board to do two things which clearly offend the Equal Protection Clause. In the first place, the District Court commanded the School Board to treat differently children similarly situated by allowing thousands of children to attend their neighborhood schools, and by excluding thousands of other children from admission to their neighborhood schools; and in the second place, the District Court commanded the School Board to bus the thousands of children excluded from their neighborhood schools to some other schools in other districts or zones to desegregate both their neighborhood schools and the other schools in numbers or proportions satisfactory to the District Court.

No amount of sophistry can erase the plain truth that the second group of children were denied admission to their neighborhood schools on account of their race.

Manifestly, the Equal Protection Clause does not confer upon any Federal Court jurisdiction to enter a wondrous order to compel a school board to obey the Equal Protection Clause by violating it. Congress apparently realized this bizarre result of busing children from one school to

another, or from one school district or zone to another di
trict or zone, when it prohibited any officer or Court of th
United States to require such action to achieve the raci
balancing of schools.

The Circuit Court erred in affirming the order of the Di
trict Court rejecting the plan submitted by the School Boar
and in affirming, in part, the order of the District Cou
excluding children from their neighborhood schools and r
quiring them to be bused to other schools and other scho
districts in other areas.

CONCLUSION

For the reasons stated, the Court should reverse the pr
visions of the judgment of the Circuit Court insofar as th
relate to the assignment and busing of senior high scho
and junior high school students; approve the provisions
the judgment of the Circuit Court insofar as they vaca
the order of the District Court relating to the assignme
and busing of elementary school children; and grant the m
tion of the School Board to stay the order of the Distri
Court reinstating its previous orders relating to the assig
ment and busing of elementary school students.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved

1. The First Section of the Fourteenth Amendment, which reads, in pertinent part, as follows: "nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws."

2. The Fifth Section of the Fourteenth Amendment, which specifies that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

3. The First Section of Article III, which states, in pertinent part, that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

4. The Second Section of Article III of the Constitution, which reads, in pertinent part, as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of Admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction,

both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Statutory Provisions Involved

1. Title IV of the Civil Rights Act of 1964 which originally appeared in Title IV of Public Law 88-352 of the 88th Congress and is now codified as 42 USC 2000c - 2000c-9. This statute reads as follows:

"Title VI - Desegregation of Public Education Definitions

"Sec. 401. As used in this title -

"(a) 'Commissioner' means the Commissioner of Education.

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.

"(c) 'Public school' means any elementary or secondary educational institution, and 'public college' means any institution of higher education or any technical or vocational school above the secondary school level, provided that such public school or public college is operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from a governmental source.

"(d) 'School board' means any agency or agencies which administer a system of one or more public schools and any other agency which is responsible for the assignment of students to or within such system.

Survey and Report of Educational Opportunities

"Sec. 402. The Commissioner shall conduct a survey and make a report to the President and the Congress, within two years of the enactment of this title, concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia.

Technical Assistance

"Sec. 403. The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools. Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation, and making available to such agencies personnel of the Office of Education or other persons specially equipped to advise and assist them in coping with such problems.

Training Institutes

"Sec. 404. The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation. Individuals who attend such an institute on a full-time basis may be paid stipends for the period of their

attendance at such institute in amounts specified by the Commissioner in regulations, including allowances for travel to attend such institute.

Grants

"Sec. 405. (a) The Commissioner is authorized, upon application of a school board, to make grants to such board to pay, in whole or in part, the cost of -

"(1) giving to teachers and other school personnel in-service training in dealing with problems incident to desegregation, and

"(2) employing specialists to advise in problems incident to desegregation.

"(b) In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Commissioner shall take into consideration the amount available for grants under this section and the other applications which are pending before him, the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity of its problems incident to desegregation; and such other factors as he finds relevant.

Payments

"Sec. 406. Payments pursuant to a grant or contract under this title may be made (after necessary adjustments on account of previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, as the Commissioner may determine.

Suits by the Attorney General

"Sec. 407. (a) Whenever the Attorney General receives a complaint in writing -

"(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

"(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

"(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"(c) The term 'parent', as used in this section includes any person standing in loco parentis. A 'complaint' as used in this section is a writing or document within the meaning of section 1001, title 18, United States Code.

"Sec. 408. In any action or proceeding under this title the United States shall be liable for costs the same as a private person.

"Sec. 409. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

"Sec. 410. Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.

FILE COPY

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SEP 25 1970
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

SWANN,
Petitioner
vs.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,
Respondent

SUPREME COURT
CASE # [redacted] 281

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

Made in the absence of consent being seasonably received from the Parties to this case.

Comes now before this Court, Newton Collier Estes, to request an opportunity to file a brief in opposition to the Fourth Circuit Court's ordering busing of public school children to achieve arbitrary numerical racial balances in student bodies.

A. He states that his interest in the Court's decision is based on:

1) The assumption that the decision rendered will serve as a legal guideline for school assignment rulings to be rendered at Federal Court hearings in the City of Memphis, where he is a resident, and in whose school system he has children registered.

2) That a decision requiring coercive busing would reduce his power to affect the policies and actions of his locally-constituted

governments.

3) That he and his family would be denied the right to make many of the day-to-day household decisions, such as when to get up in the morning and where they would go when they leave the house -- decisions which form a considerable part of one's pursuit of happiness.

B. He wants to call to the Court's attention:

1) The argument of what constitutes a "unitary" school system has so far been the prime consideration in every Federal Court hearing on where children must attend school.

2) That arguments have not been fully presented on whether methods thus far ordered to achieve this type of school system might run counter to the Constitutional requirements that the main function of governments is to enact and operate laws, after obtaining consent of those governed (through the election process), which tend to insure domestic tranquility, and to guarantee individual liberty now and in the future.

C. He wishes to suggest to the Court that any decision it renders in this hearing should be within the framework of the stated purposes for which our Constitutional government was instituted.

He believes the Court must make its disposition of this case relate to those stated Constitutional principles, because a failure to do so would dramatically alter the relationship

the American citizen has always had with his government.

He would cease to be a formulator in the operations of his government, and would feel the need to participate as an active defender of his Constitutional rights against a Court-ordered federal tyranny.

He does now submit that a decision which would, in effect, abrogate the Preamble to the Constitution should be construed by those Americans, who regard liberty as the single most important of all human rights, as a declaration of war by the Federal government on its citizens.

THESE PREMISES CONSIDERED, I, Newton Collier Estes pray that I be given leave to file a brief with the Court, and be granted permission to present oral arguments in its support before the Court.

Newton C. Estes

Newton C. Estes

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Memphis, Tennessee

COPY

Supreme Court, U.S.
FILED
OCT 8 1970
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

SWANN, Petitioner	)	SUPREME COURT
	)	CASE # 281
vs.	)	(formerly # 1713)
	)	
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,	)	

BRIEF OF AMICUS CURIAE
IN SUPPORT OF RESPONDENT

Comes now before this Court, Newton Collier Estes to file a brief in opposition to the Fourth Circuit Court's ordering busing of public school children to achieve arbitrary numerical racial balances in student bodies.

A. He states that his interest in this case is based on the belief that coercive busing would jeopardize his family's right to freely choose the activities they might wish to undertake in their pursuit of happiness.

1) He believes his right to choose what is best for his family may only be limited under our Constitution by the restriction that, in so doing, he does not deny anyone else what is rightfully his.

2) He wants to show the Court that he would become subject to taxation without representation if the elected officials in his locality should lose the authority to spend school tax monies according to the desires of the electorate.

3) He believes that he has the God-ordered duty to make decisions calculated to enhance his children's health, safety and happiness. He believes coercive busing would be tantamount to forcing him to delegate this duty to others, who could not be held responsible for the deterioration or loss of these fundamental goals of human endeavor.

4) He wants to show the Court that coercive busing would alienate the general public from its interest and support of public education. This circumstance would certainly lower the quality of education in this area, and quite probably would reduce school budgets to such an extent, that for many children there would be no nearby school open for classes.

B. He wishes to present logical argument showing Supreme Court ordered busing would nullify these basic tenets of our Constitution and Declaration of Independence.

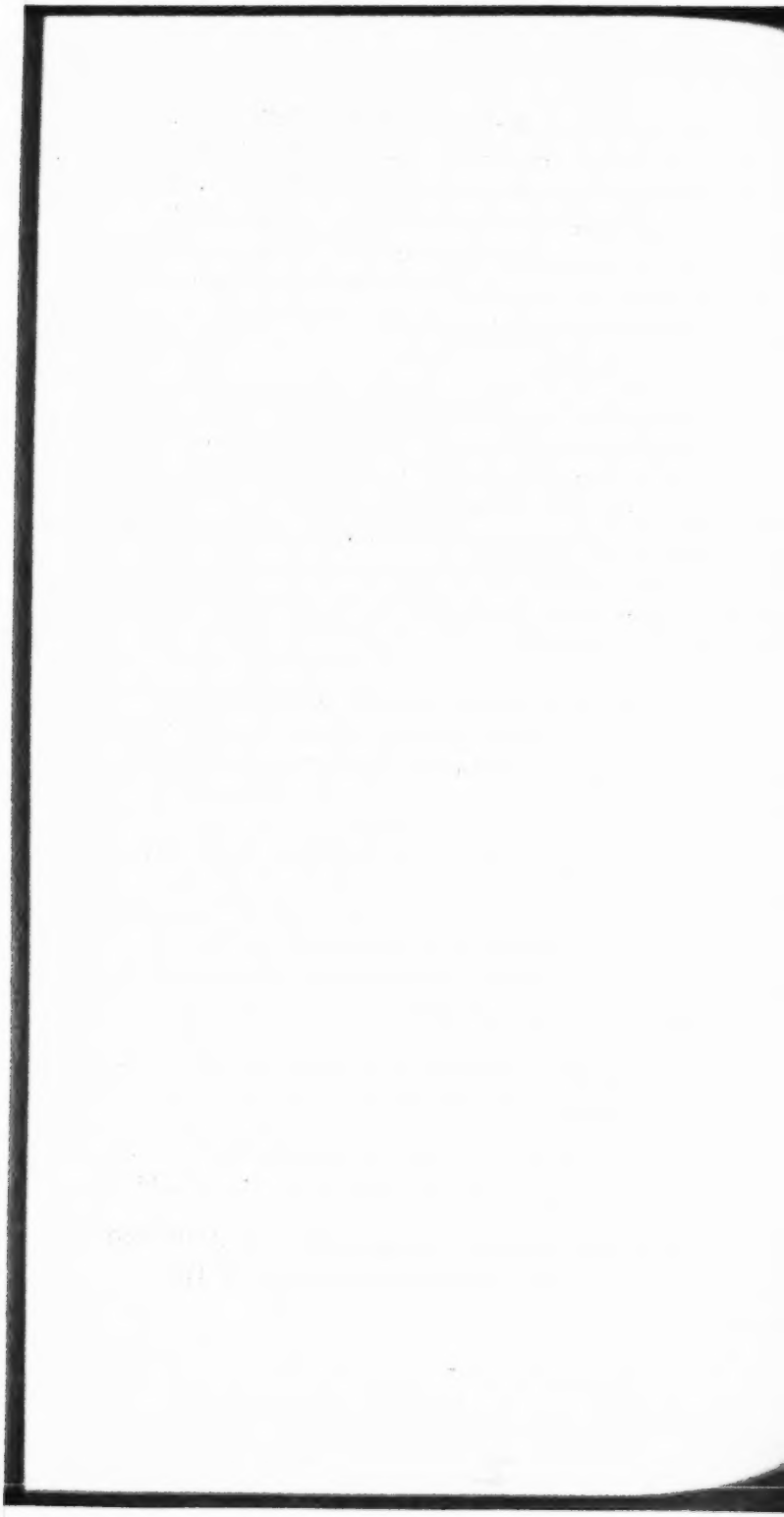
. That the people are to be ruled only with their consent.

. That all powers not delegated by the Constitution to the federal government are reserved to the states and to the people.

. That a basic function of government is to act to insure domestic tranquility.

. That a basic function of government is to act to secure the blessings of liberty to its citizens.

. That the federal government's actions are to be motivated by the expressed desires of its citizens.



. That laws should be enacted without regard to race, color or creed.

. That the fundamental purpose of our Constitutional system is for the government to be controlled by the people - never that it should exercise tyranny over the people.

1) He states that no body of local citizens would benefit or be served by coercive busing, because there is no evidence that large numbers of parents of school children have joined into efforts to request this of local governments.

2) He suggests that the impetus for coercive busing arises from two sources.

a) The disappointment among those groups who were instrumental in the outlawing of de jure segregation and in the enactment of public accommodation legislation that the new opportunities to integrate have not been seized upon by those who were restrained by law from doing so in the past.

b) That Supreme Court rulings calling for "unitary" school systems, without further definition, has given some legal standing for actions designed to force citizens to do that which it was assumed they themselves would freely choose to do, but which, for reasons of their own, it has now become apparent they do not wish to do.

3) He states that a ruling requiring coercive busing would say, in effect, that local laws permitting students to attend their nearest school, or to transfer to a better one, are un-constitutional because they permit people to do what they wish, rather than forcing them to do what their federal government says they <u>should</u> wish to do.

4) He states that a ruling requiring coercive busing would in effect be judicial legislation in direct conflict with recently enacted laws at both the state and federal levels. Such action undertaken against the expressed will of the people would represent an act of tyranny by government over the people.

5) He suggests that the Court should reject those reasons given by the advocates of coercive busing because they are based on a proposition which, if accepted by the Court, would suggest to the American Negro citizen that his own government sees him as inferior to other races.

This comes when you accept that it is a deprivation for Negroes to associate primarily with Negroes. The same cannot also be said in a straightforward manner about whites in an effort to lessen the stigma; because the achievement of Western Civilization refutes it.

The acceptance of such arguments will place a heavy burden upon the Negro in his climb toward self-esteem.

6) He suggests a ruling requiring coercive busing would reinstate the condition prior to the 1954 Brown decision, because it would require school boards to exclude a student from attending his nearby school because of his race.

How much worse for this to be done by the federal government against the will of the majority - than by the states acting in accord with the Tenth Amendment and with the consent of the governed!

He suggests that the Court is now in a
on to re-enunciate the principles upon
this country was founded. In so doing, it
elieve the great fear that ours may be the
eneration recorded in the history of the
d States which received freedom as its
ge, but failed to preserve it and pass it on
next.

It can do so by premising its ruling on
fundamentals of freedom.

1) Our Constitution was instituted for the
sed purpose of guaranteeing that citizens
be ruled only with their consent.

2) That to legislate against the desires of
itizens constitutes tyranny which Americans
be rightful to oppose.

3) That the pursuit of happiness is deeply
in the right of an individual to freely choose
d of neighborhood in which the fruits of his
ould allow him to live and send his children
ol.

4) To deny American citizens these free-
to lose the right to require their allegiance.

A ruling which would accomplish these ends
state that the Constitution does not require
busing of students to achieve racial
. It not only does not require it, but unless
cted people request it, the Constitutional
governing people only with their consent
prohibits any branch of the federal
ent from requiring coercive school busing.

These Premises considered, I, Newton Collier Estes pray that this brief be accepted by the Court, and that I be permitted to argue this brief before the Court.

Newton C. Estes

Newton C. Estes

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Memphis, Tn. 38118

FILE COPY

Supreme Court, U.
FILED
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E. ROBERT SEAVER, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, *et al.*,
Petitioners

versus

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION, *et al.*,
Respondents.

Certiorari to the United States Court of Appeals
for the Fourth Circuit

AMICUS BRIEF OF THE SCHOOL BOARD OF MANATEE COUNTY, FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, *et al.*,
Petitioners

versus

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION, *et al.*,
Respondents,

Certiorari to the United States Court of Appeals
for the Fourth Circuit

AMICUS BRIEF OF THE SCHOOL BOARD OF MANATEE COUNTY, FLORIDA

NATURE OF INTEREST OF AMICUS CURIAE

This brief is filed in behalf of the School Board of the County of Manatee, a political subdivision of the State of Florida, and is sponsored by the attorney for the School Board of Manatee County, Florida, the authorized law officer thereof, under Rule 42 (4) of the Rules of the Supreme Court of the United States.

The interest of the School Board of Manatee County arises because the Fifth Circuit Court of Appeals in *Caroline Harvest, et al. The Board of Public Instruction, Manatee County, Florida, et al., vs. Jerome Pratt, et al.*, 5 Cir. 1970 ---F. 2d.--- [No. 29,425, June 26, 1970], affirmed an order of the District Court, Middle District of Florida, entered on January 29, 1970, which order directed the pairing and clustering of certain elementary schools in a manner which achieved an artificial racial balance in all elementary schools. The same order, in effect, necessarily required the bussing of students from their neighborhood school areas to another neighborhood school area where classes were to be held, a condition which did not previously exist prior to the entry of the aforementioned orders.

QUESTIONS PRESENTED

1. Does the Constitution require substantial racial balance in the system?
2. Does the United States Constitution authorize a court to order a plan which, of necessity, requires bussing for its implementation?

ARGUMENT

The Constitution requires wholly non-racial public school systems. This Court has never ruled that a unitary school system is one in which substantial racial balance as to student body composition is required. There appears to be a subliminal theme in desegregation cases decided by this Court indicating that race must not be considered. This starts in *Brown v. Board of Education* I, 347 U.S. 483, and runs through *Alexander v. Holmes County Board of Education*, 396 U.S. 19. This Court in

Alexander held that a unitary system is one within which "no person is to be effectively *excluded* from any school because of race or color." (emphasis added). There is no requirement that a person be included because of race or color, and, in fact, to so require would result in an exclusion from another school solely on the basis of race or color.

The necessity or non-necessity of racial balance is an important question of federal law which should be settled by this Court. It is a question in which there is a conflict among the decisions of the Courts of Appeal in the several circuits. The Sixth Circuit in *Deal v. Cincinnati Board of Education*, 369 F. 2d. 55, cert. denied 389 U.S. 847, 88 S. Ct. 39, 19 L.Ed. 2d. 114 held that there is no constitutional duty on the part of a Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance. The Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education*, 369 F. 2d. 29, holds that substantial racial balance is not necessary. Other cases in other circuits have made similar rulings. The Fifth Circuit is unsettled but in recent cases has become extremely color conscious and has demanded racial balance. See *United States v. Jefferson County Board of Education*, 372 F. 2d. 836, cert. denied *sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840.

Another question which arises, assuming this Court determines that substantial racial balance is required within a unitary system is whether or not each school within a system must have both black students and white students within its student body composition. It is obvious that the lower Court in this case ruled that there must be blacks and whites in every school whenever possible. The various Circuits are in conflict over this question. This problem appears in the Fifth Circuit case of *Graves v. Walton County Board of Education*, 403 F. 2d. 184, wherein the Court holds that if there are still all-Negro schools, the plan fails, as a matter of law, to meet constitutional standards established in the *Green* case. This theorem is carried forward in the Eighth Circuit in *Jackson v. Marvell School District*, 416 F. 2d. 380. The Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education, supra*, holds that the presence of an all black school will not invalidate an

otherwise unitary system. The same conclusion is reached in the Sixth Circuit in the *Deal* cases and has also been reached in the Fifth Circuit in *Ellis v. Board of Public Instruction of Orange County*, 423 F. 2d. 203. The contradictory positions reached in the Fifth Circuit may be attributed to the fact that different panels sat in these cases.

Nothing in the Constitution of the United States permits, much less requires, the bussing of school children to achieve racial balancing. The direction (*Alexander v. Board of Education*, 396 U.S. 19) "to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color" forbids the result obtained below, which in fact excludes several hundred white children from the walk-in schools nearest their homes simply because admitting them there fails to achieve racial balancing within the entire system. Past discrimination in one direction does not justify present discrimination in another.

CONCLUSION

The issues are of concern throughout the country and the lack of answers and guidelines have caused confusion, endless litigation and inflamed emotions. The answers must be supplied and supplied now. Amicus urges the Court to set forth comprehensive guidelines and to hold that racial balance is not required for a unitary system; that neighborhood schools should be preserved and that education must be the primary concern in a unitary school system.

Respectfully submitted,

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Supreme Court of the United States

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No. 281

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE

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BRIEF AMICUS CURIAE

All parties having consented, William B. Spong, Jr., pro se, hereby respectfully files a Brief Amicus Curiae in this case.

The interest of William B. Spong, Jr., arises from the fact that he is a United States Senator from the State of Virginia, and decisions in this case may be determinative of cases pending in the lower federal courts involving the urban school systems of Virginia.

The School Board of the City of Norfolk, Virginia, filed a Petition for a Writ of Certiorari on June 26, 1970, in *School Bd. of City of Norfolk, Va., et al.* v. *Brewer, et al.*, No. 1753,

Oct. Term, 1969, seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit entered on June 22, 1970. That Petition was denied on June 29, 1970, the last day of the October, 1969, Term, with Mr. Justice Black being of the opinion that Certiorari should be granted.

The aforesaid Petition is attached hereto and is adopted as the Brief Amicus Curiae.

Many of the issues in the Norfolk case are now before the Court in this case, and those issues are more clearly delineated in the Norfolk case than in any other case. The arguments presented in the Norfolk case are highly pertinent and of great importance to a decision in this and the related cases, and such arguments may not otherwise be presented to the Court in such manner that they may receive the consideration which is warranted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1969

No. 1753

THE SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL.,
Petitioners,

v.

CARLOTTA MOZELLE BREWER, ET AL.,
AND
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION TO ADVANCE*

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Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The School Board of the City of Norfolk, Virginia, petitioner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 22, 1970.

OPINIONS BELOW

Although this proceeding has been pending for more than thirteen years, resulting in a substantial number of opinions

of the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit, the opinions of the courts below directly preceding this petition are as follows:

1. The opinions of the Court of Appeals filed June 22, 1970, not yet reported, are as follows:

(a) Opinion for the Court by Judge Butzner (Appendix hereto p. 1).[1]

(b) Opinion of Judge Bryan specially concurring (App. 13).

2. Memorandum Opinion of the United States District Court for the Eastern District of Virginia, quoted at 308 F. Supp. 1274 (App. 16).

3. Memorandum Opinion of the United States District Court for the Eastern District of Virginia, reported at 302 F. Supp. 18 (App. 58).

JURISDICTION

The judgments of the Court of Appeals were entered on June 22, 1970 (App. 15A and 15B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a school system in which there is no current racial residential discrimination, but in which the application of neutral and objective standards to the assignment of pupils would result in a number of all Negro and all white schools because of racial residential patterns,

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[1] The appendix (App.) of opinions below is presented in a separate volume because it is voluminous.

(a) is it constitutionally permissible for the School Board [in determining the extent of the affirmative action to be taken to achieve integration] to take into account the fact that once the ratio of Negro pupils to whites passes beyond a critical point the benefits from integration are completely lost;

(b) is the constitutionality of a plan for desegregation principally determined by the degree of success in obtaining the racial mix of pupils or by the degree of success in providing equality of educational opportunity for all pupils where both purposes cannot be simultaneously achieved;

(c) does good faith implementation of governing constitutional principles require racial balancing in each individual school throughout the system, comprised of many different schools, where it is freely conceded that massive compulsory busing will be required?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

1. Introduction

The Petitioners are seeking a review of an *en banc* decision of the United States Court of Appeals for the Fourth Circuit, reversing and remanding an Order of Walter E. Hoffman, Chief Judge of the Eastern District of Virginia, which had approved, in most aspects, the long range plan for the integration of the Norfolk school system.

2. Proceedings Below

Judge Hoffman's opinions followed hearings extending over many days during which he received evidence and made meticulous findings with respect to the housing patterns and demography of Norfolk and adjacent communities, the educational principles of the School Board plan, the financial and transportation resources of the school system, and the feasibility of alternative proposals advanced by the respondents. He found no racial discrimination by the School Board and that the School Board had affirmatively sought to obtain the maximum degree of equal educational opportunity within the capacity of the system.

The Court of Appeals, without holding that the District Court's findings were clearly erroneous, set aside the judgment of the trial court and directed that a new plan be filed by July 27, 1970, and implemented by September, 1970. Although the Court of Appeals did not expressly order the racial balance of the schools, that appears to be the effect of its holding, and such a result is beyond the capacity of the Norfolk school system.

This petition is filed four days after the entry of judgment. Precedent of other similar cases does not indicate that any stay is to be expected. Irreparable disruption caused by a "best efforts" implementation of the order of the Court of Appeals will be so erosive of the school system as to place in jeopardy the implementation of the School Board Plan in the event the District Court Order is reinstated.

3. Demography of Norfolk

The Norfolk system is generally typical of southern school systems of its size. It consists of 56,000 students in 72 schools, with a 6-3-3 pattern including 56 elementary, 11 junior high and 5 senior high schools. At the elementary level, 44%

of the students are Negro. Over all, the system contains 42.4% Negro students.

The City of Norfolk has a population of approximately 300,000 and is 61 square miles in area. 80% of the Negro population of Norfolk is concentrated in a large densely populated area in the south central sector of the City.

The School Board has no bus system for the transportation of pupils to and from the schools. Approximately 8,000 students, only a few of whom are at the elementary level, now use public transportation at their own expense.

The District Court found that evidence introduced fell short of establishing discriminatory racial residential patterns about the City and that "unless a spot of the disease poisoned the entire city, there remained other areas in Norfolk which could not be considered *de jure* constituted." 308 F. Supp. at 1303; 302 F. Supp. at 27. Whether or not any area of the City has a racial residential pattern which originated in discriminatory action, there is no significant governmental or private discriminatory action restraining free residential patterns at this time. 308 F. Supp. at 1307.

4. Background of Long Range Plan

To assist its own Director of Educational Research and Planning, Dr. John C. McLaulin, the School Board obtained the services of Dr. James Bash, Director of the University of Virginia Desegregation Institute, operated under funding by the Department of HEW, and Mr. Howard O. Sullins and Mr. Albert Tippett, representatives of the Department of HEW. There came to the attention of the Board a substantial body of learning, recently developed and based upon the analysis and definition of the relationship between integration and educational opportunity. Among the literature primarily influencing the development of the plan by the Board were the following:

1. *James S. Coleman, "Equality of Educational Opportunity,"* (1966), based upon a broad and exhaustive survey carried out pursuant to the Civil Rights Act of 1964 by the United States Office of Education and generally known as the COLEMAN REPORT. (SBX, April No. 1);

2. *Racial Isolation in the Public Schools Vol. 1,* prepared by the United States Commission on Civil Rights pursuant to request of the President and generally known as RACIAL ISOLATION. (SBX, April No. 2);

3. *Equal Educational Opportunity,* 38 Harvard Education Review, (Winter 1968), (SBX, April No. 4);

4. *Weinberg, Desegregation Research: An Appraisal* (SBX, April No. 3);

5. *Armor, School and Family Effects on Black and White Achievement: A Re-examination of the USOE Data,* (SBX, Oct. No. 24);

6. *Pettigrew, Advantages for the Disadvantaged in Equality of Educational Opportunity in the Large Cities of America: The Relationship between Decentralization and Racial Integration.* (Govt. Ex., Oct. No. 8);

7. *Wilson, Educational Consequences of Segregation in a California Community,* RACIAL ISOLATION Vol II, p. 165. (SBX, April No. 2).

The Board became convinced that, aside from the requirements of law, integration provides the conditions for an improved educational program for the City as a whole. Norfolk's was the first system to formulate principles for a plan based on the best available social science data.

The basic principles adopted by the Board can be summarized as follows:

(a) Children of all backgrounds and races do better in schools with a predominant middle class millieu. The entire argument for the efficacy of desegregation in providing equal educational opportunity ultimately depends upon this simple truth and upon it also rests the ultimate success of any long range plan for integration.

Aside from the family background of the individual student, a factor which is beyond the control of the School Board, the social class[2] climate of the school is the single most important school factor affecting student performance and attitudes. (RACIAL ISOLATION, Vol. 1, p. 89). The social class climate factor is so powerful that it may be more important than all other factors combined.

(b) There is a high correlation between socio-economic class and race. While more than 60% of white America is middle class, only one Negro in four is middle class (whether defined by income, white collar occupation, or high school education). A comparable correlation exists in Norfolk. The significance of the correlation is that desegregation is required to provide a predominantly middle class milieu for Negro pupils.

(c) The beneficial effects of desegregated schools for Negro children are not linear; that is, Negro test scores do not rise evenly with increasing percentages of white children in the classroom. Achievement in classes with less-than-half whites is associated with scores not significantly different from those in all-Negro classrooms. The research shows that significant improvement does not begin until the school is at least half-white, and that a simple majority is not suffi-

[2] The term "socio-economic class" more accurately expresses the meaning, but "social class" has been commonly employed with the same connotation in most instances.

cient to obtain the desired benefits of desegregation. Instead there must be a clear, but not overwhelming, white majority. Dr. Armor's analysis of the COLEMAN REPORT data showed that the optimal point, taking into account both the social class and race effects is about 30% Negro.

(d) White students do less well in majority Negro schools than they do in majority white schools. The conclusion is a necessary corollary to the principle that children of all backgrounds do better in schools with a predominant middle class milieu.

(e) A plan for the City of Norfolk will work best to the extent that it arrives at 30% Negro in as many schools as possible and, for this reason, that percent Negro is considered optimal. The purposeful establishment of schools in which there are more than 40% Negro will not provide any improvement of educational opportunities in such schools for either white or Negro. In determining the effects of optimal desegregation, the inquiry is not limited to educational achievement. Rather, the concept of optimal desegregation is equally concerned with racial attitudes, racial behavior, racial preferences, and college and occupational aspirations.

5. Development of Long Range Plan

The principles of the plan were applied to the circumstances of the Norfolk school system with the clear purpose of providing the maximum degree of integration which is feasible.

The development of the plan for elementary schools began with a geographical attendance area plan based on neutral and objective lines, with each student attending the school within the natural capacity zone in which his residence fell. The socio-economic data of each such zone was then carefully analyzed. With the use of this base data, the designers of the zones set about to achieve zones which were hetero-

geneous in terms of socio-economic class and race, rather than homogeneous. Neither natural boundary lines nor community of interest of a given area was allowed to interfere with this purpose. Natural boundaries were departed from and neighborhoods were intentionally divided among different schools. Every plan or device suggested in any writing or by any consultant or by the NAACP or the Civil Rights Division was given mature consideration, and a number of such suggestions were incorporated. None of them was rejected if it was found to be currently feasible for the purpose of providing more integration than the plan which was adopted. A number of subsidiary concepts, such as the consolidation of schools, the closing of schools, and the changing of the location of schools, was adopted.

All of the experts testifying complimented the School Board on the job that was done. The degree of success was favorably compared with that which could be obtained by a computer. No one was able to point out a single instance in which lines were drawn to avoid desegregation. Because of racial residential patterns, it would not be possible, without massive cross busing, to create a much greater percentage of desegregation in the system. On the basis of that the educational opportunity offered to Negroes in majority Negro schools would be no better and perhaps not as good as that offered in an all Negro school and that the opportunity offered to white students would be substantially less than that which would be offered to them in a majority white school, majority Negro elementary schools were not created. The intentional creation of a majority Negro school would provide a net loss to the community rather than a net gain in terms of the feasible achievement of the benefits of integration.

No one is able to suggest any device which will effectively increase the results obtained by 20%, 10% or even 5%. The only alternative to the School Board plan recommended is

the complete racial balance of every school in the system through massive cross busing. The School Board cannot overcome the physical obstacles to massive cross busing by the 1970-71 school year.

REASONS FOR GRANTING THE WRIT

1. Introduction

Brown v. *Board of Education,* 347 U.S. 483 (1954), takes its place among the more important decisions of this Court because it determined that there was a relation between segregation of public Schools and equal educational opportunity. The record in this case for the first time presents a clear and exhaustive analysis and definition of the nature of that relationship.

Brown I established the constitutional *right* of minorities to desegregated schooling and expressly based its determination upon the right to equal educational opportunity.

Brown v. *Board of Education,* 349 U.S. 294 (1955), and all of the subsequent cases decided by this Court essentially deal with the *remedy* which the Court felt to be realistically available at the time of the decision. The relief granted by the Court in *Brown II* constituted a negative mandate, requiring the school boards to admit students to public schools "as soon as practicable" on a non-discriminatory basis, "with all deliberate speed." 349 U.S. at 300, 301. In more recent cases, culminating in *Alexander* v. *Board of Education,* 396 U.S. 19 (1969), this Court has removed the conditions of "as soon as practicable" and "with all deliberate speed" from the negative mandate. Further, this Court has asserted the affirmative duty of school boards to adopt the most "feasible" and "reasonably available" alternatives to affirmatively effectuate integration. *Green* v. *County School Board,* 391 U.S. 430 (1968); *Raney* v. *Board of Education,*

391 U.S. 443 (1968); and *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968). In view of the fact that circumstances in such cases all pointed in the same direction, this Court has not yet defined the nature and extent of the remedy provided by such affirmative mandate. It is submitted that, in arriving at that definition, it should be kept in mind that the constitutional right to be provided is equal educational opportunity and that mixing races is but a means to that end.

The conclusions of educational and social science with respect to the nature and extent of the relation between integration and education have in recent years been widely disseminated and, by and large, accepted. The Commission on Civil Rights quoted that "On the basis of its findings, the Commission has made recommendations which provide a basis for action by government at all levels; * * *." *Racial Isolation in the Public Schools Vol. I,* p. ix.

On March 24, 1970, Richard Nixon, President of the United States, issued a policy statement entitled SCHOOL DESEGREGATION: "A Free and Open Society." (116 Cong. Rec. S4351, Daily Ed., March 24, 1970). In that statement he said:

> "Available data on the educational effects of integration are neither definitive nor comprehensive. But such data as we have suggest strongly that, under the appropriate conditions, racial integration in the classroom can be a significant factor in improving the quality of education for the disadvantaged. At the same time, the data lead us into several more of the complexities that surround the desegregation issue.
>
> "For one thing, they serve as a reminder that, from an educational standpoint, to approach school questions solely in terms of race is to go astray. The data tell us that in educational terms, the significant factor is not race but rather the educational environment in the

home—and indeed, that the single most important educational factor in a school is the kind of home environment its pupils come from. As a general rule, children from families whose home environment encourages learning—whatever their race—are higher achievers; those from homes offering little encouragement are lower achievers.

"Which effect the home environment has depends on such things as whether books and magazines are available, whether the family subscribes to a newspaper, the educational level of the parents, and their attitude toward the child's education.

"The data strongly suggest, also, that in order for the positive benefits of integration to be achieved, the school must have a majority of children from environments that encourage learning—recognizing, again, that the key factor is not race but the kind of home the child comes from. The greater concentration of pupils whose homes encourage learning—of whatever race—the higher the achievement levels not only of those pupils, but also of others in the same school. Students learn from students. The reverse is also true: the greater concentration of pupils from homes that discourage learning, the lower the achievement levels of all.

"We should bear very carefully in mind, therefore, the distinction between educational difficulty as a result of race, and educational difficulty as a result of social or economic levels, of family background, of cultural patterns, or simply of bad schools. Providing better education for the disadvantaged requires a more sophisticated approach than mere racial mathematics."

The quoted statement of policy of the United States is quite remarkably consonant with the policies promulgated by the School Board in its long range plan in June, 1969, and approved by the District Court on December 30, 1969, and here presented to this Court for consideration.

It is clearly established that the quality of educational opportunity offered to pupils of both races in schools which have a majority Negro is no better, if as good, than that offered to pupils of all Negro schools. It is difficult to find any situation in which integration has been successful in terms of educational opportunity or stability where white pupils have not been in a substantial majority. A determination of whether or not the Norfolk School Board and other school boards similarly situated are entitled to take this phenomenon of social science into account in determining the extent of affirmative action to be taken to achieve integration appears to be essential to the development of public education of this country at this time. Is a rule such as the one man —one vote rule of the apportionment cases appropriate to the education cases? If it is not educationally desirable or even relevant that the racial composition of a school be a mirror image of the racial composition of the community, should such a goal be sought by any plan? These are among the basic practical problems to be resolved which are appropriately presented by this case.

2. The Opinion of the Court of Appeals

The opinions of the Chief Judge of the District Court deal in depth with the educational principles and the phenomena of social science with respect to integration and with the demography and financial, transportation and other resources of the school system. It was found that the School Board had affirmatively sought to obtain the maximum degree of educational opportunity within the capacity of the system.

The opinion of the Court of Appeals appears to be based primarily if not entirely upon the degree of success in obtaining a racial mix in schools. The word "education" is not mentioned on a single occasion in the majority opinion.

The Court of Appeals failed to deal with the important questions set forth in this petition. Conclusions are arrived at in its opinion which are contrary to the findings of fact of the District Court without any acknowledgment thereof. The capacity and resources of the Norfolk school system are not delineated or discussed by the Court of Appeals, but the judgment would appear to call for action by the School Board beyond the capacity and resources found to exist by the District Court.

CONCLUSION

The reasons for the degree of success or failure of existing integration plans in attaining educational goals can be properly understood only by examination in light of the social phenomena explicated in this proceeding. Such success or failure of proposed plans can be accurately predicted by application of these principles of social science. The extent to which such principles may or must be taken into account under constitutional mandates has not been considered or determined by this Court. It is vital that such determination be made at this time.

The importance of the issues raised in this proceeding to the Norfolk school system are obvious. Although the circumstances and predicaments of each school system with respect to desegregation are to some extent peculiar to it, Norfolk fits a not uncommon pattern. The issues are also important to many other such similar school systems. The cases pending on petitions for writs of certiorari from the cities of Charlotte, North Carolina, and Little Rock, Arkansas, together with the issues presented here appear to cover the spectrum of the most pressing problems requiring decisions by the lower courts, local governments, educators and minorities.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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This 1st day of October, 1970.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN ET AL.,
Petitioners,

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONSENT TO FILE BRIEF AMICUS CURIAE

With consent of all counsel "CONCERNED CITIZENS ASSOCIATION, INC.", a non-profit Georgia corporation; its officers, Board of Directors and members respectfully file a brief *amicus curiae* in support of the respondents.

The written consent of counsel for the respondents and for petitioners to file a brief *amicus curiae* in behalf of the respondents is filed herewith.

STATUS OF AMICUS CURIAE

"CONCERNED CITIZENS ASSOCIATION, INC.", is a non-profit corporation organized and existing under the laws of the State of Georgia. It is a voluntary organization comprised primarily of laymen who are concerned with education in the public school system of the city of Savannah and the county of Chatham. To this end the organization is committed to preserving the effectiveness of the public schools by reducing discord and turmoil through the admission of pupils into neighborhood schools. As a coroliary to this principle, it opposes the transportation of pupils past neighborhood schools to remote areas for the purpose of achieving racial balance.

ARGUMENT

"As soon as possible, however, we ought to resolve some of the basic practical problems . . . including whether as a constitutional matter, *any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; to what extent transportation may or must be provided to achieve the ends sought by prior holdings of this Court.*" (Emphasis added)

So admonished Mr. Chief Justice Burger in *Northcross* v. *Board of Education of Memphis*, 25 L. Ed. 2d 246 (1970). In doing so he voiced the unknown about the unitary rule established in *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19 (1969).

The orders in this case by the lower courts challenge this Court to remove the gnawing doubt which pervades the minds of the public school administrators.

Is a person effectively excluded from a school because a school by location is remote from that person's

neighborhood? Does geography create a normal limitation upon access to a school because of the pragmatic problems of transportation? Reason dictated by practicality negates the former question but affirms the latter question.

A concomitant is the neighborhood school concept. Its proximity to home, its community of friends, and its identity with the neighborhood have created a milieu conducive to the best educational environment. Oblivious to this are those who urge this Court to callously cast aside this acknowledged cornerstone of the elementary school system. With characteristic disregard, they assert, "integration is education". It is not and never shall be.

Education begins at school but finds its stimulus at home where homework is done under the application of the pupil and the supervision of the parent. The home environment is what assures the highest academic achievement of the pupil.

"Freedom of choice" has been assailed as constitutionally objectionable. In support of this attack are listed: intimidation, harassment, fear, distance, and inconvenience. These very objections can be listed against pairing and bussing—particularly harassment, distance and inconvenience. As a result many pupils arrive at school demoralized and agitated. This emotional condition is their school day companion.

This Court is now confronted with the monumental question: What is the paramount duty that this Nation through its school systems owes to the "citizen-parent" and the "student-child"? Is it racial balance at whatever the immediate and future costs, or is it the best education that can be provided in an environment conducive to the highest educational achievement? It is the conviction of the *amicus curiae* that the latter question must predominate

over the former if public education is to survive and the security of our Nation preserved.

The *amicus curiae* does not advocate turning back the clock. However, it does ask this Court to apply the rule of reason enunciated by the Circuit Court of Appeals but subsequently ignored in its affirmation of the ruling of the District Court. The *amicus curiae* suggests that the following propositions, which were held by the Circuit Court of Appeals, be utilized in support of the respondents. They are: first, that not every school in a unitary school system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, school boards must take further steps to assure that pupils are not excluded from integrated programs on the basis of race.

The *amicus curiae* concurs in the in part dissent of Judge Bryan of the Circuit Court of Appeals. He properly concluded that the command of that Court to provide the bussing of pupils to achieve integration was a misnomer as it achieved racial balance. The Congress has expressed its disapproval of the principle of achieving racial balance by bussing. It categorically denounced this procedure with the enactment of the 1964 Civil Rights Act, 42 U. S. Code Section 2000 c-6(a) (2). The majority's dismissal of the impact of that statute as not applicable to schools with a *de jure* history of segregation collides with the clear intent of the Congress. Support for the passage of the act was not sectional but national. It was legislation which reflected the attitudes of the majority of the people of this Country. The Courts should not restrict what the people have willed through their elected representatives.

To apply the anti-bussing statute only in those states where *de facto* segregation exists is judicial hypocrisy. The thesis of dualism which this Court condemns in the southern school systems, and which this Court has declared must be dismantled, would receive this Court's imprimatur if it should find that the anti-bussing statute has exclusive application to those states which practice *de facto* segregation. This Court should emphatically reject the double standard embraced by the Circuit Court of Appeals in its refusal to apply the anti-bussing provision of the Civil Rights Act of 1964.

The *amicus curiae* anticipate that the petitioners in support of bussing will argue that the bussing of pupils in the public school system is common as apple pie and will emphasize that the present objection should be dismissed because it was the vehicle for the maintenance of the dual system. If the proscription of the Fourteenth Amendment condemns bussing to evade integration, the proscription should condemn with equal finality the bussing of students to achieve integration. One is just as discriminatory as the other; particularly, where as in this case, bussing is used to achieve a predetermined racial balance. Racial balance is not required by the Fourteenth Amendment or by any directive of this Court.

CONCLUSION

In *Green* v. *School Board of New Kent County*, 391 U. S. 430, 20 L. Ed. 2d 716, 724, Mr. Justice Brennan established this test:

> "Where the Court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief."

Does the plan of the respondent, school board, meet this test? It does. For example, school districts were gerrymandered to comply with the unitary rule. Staff, transportation, programs and other aspects of the school system have been integrated to dismantle the dual system. The respondents have met the test of good faith and have provided effective relief.

For these reasons, the Circuit Court of Appeals erred in rejecting the respondents' plan.

Respectfully submitted,

OWEN H. PAGE
Attorney for "Concerned Citizens Association, Inc.", Amicus Curiae

CERTIFICATE OF SERVICE

I, Owen H. Page, of counsel for the "Concerned Citizens Association, Inc.", hereby certify that I have served a copy of the foregoing ~~petition~~ matter by depositing a copy of the same in the United States mail, properly stamped and addressed to each of the following:

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AMICUS CURIAE BRIEF OF WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, IN SUPPORT OF THE RESPONDENTS

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I.

PRELIMINARY STATEMENT — AUTHORITY TO FILE

The Winston-Salem/Forsyth County Board of Education submits this brief, amicus curiae, in the hope that it may be of constructive assistance to the Court in its deliberations on this extremely important case.

All parties have consented to the filing of this brief. A copy of each consent, given by counsel for Petitioners and counsel for Respondents, respectively, is being filed with the Clerk simultaneously with the filing of this brief.

II.

POSTURE OF THE AMICUS CURIAE

The Amicus Curiae filing this brief, Winston-Salem/Forsyth County Board of Education, is defendant in a desegregation suit currently on appeal, by both parties, to the Court of Appeals for the Fourth Circuit.

Forsyth County is roughly rectangular in shape, its longest East-West dimension being about 26 miles and its longest North-South dimension about 20 miles. It comprises 424 square miles. The estimated current population of the County, according to the preliminary 1970 census figures, is 215,594, of whom approximately 22.5% are non-white. Winston-Salem, the principal city in Forsyth County, comprises 57.5 square miles and has an estimated current population, according to the preliminary 1970 census figures, of 133,820. Most of the black population of the County resides in the northern, eastern, and to some extent, southern portions of the City of Winston-Salem. Less than 10% of the County's population, outside of the City of Winston-Salem, is non-white.

The Winston-Salem/Forsyth County School System is a consolidated system, containing, in 1969, sixty-seven (67) schools and fifty thousand four hundred fifty-five (50,455) students. Of these students, thirty-six thousand five hundred twenty-one (36,521) are white, thirteen thousand eight hundred seventy-nine (13,879) are black. Like Charlotte-Mecklenburg and other consolidated city-county school systems throughout the North and South, Negro residences in Winston-Salem and Forsyth County are concentrated in certain urban areas. Unlike Charlotte-Mecklenburg, however, the Court in the Winston-Salem case (Scott v. Winston-Salem/Forsyth County Board of Education, No. 174-WS-68, M.D.N.C., June 25, 1970) found that:

> "The reasonable conclusion to be drawn from the evidence is that even though in times there has been some discrimination in the sale and rental of property, the concentration of the Negro population in the northeastern quadrant of the City has been caused by economic factors and the desire of blacks to live in the areas where they do live rather than in white or predominantly white areas. This conclusion is confirmed by the fact that in resettling displaced blacks as a result of public housing projects that without exception the blacks asked to be resettled in the same area where they lived, that is, in black or predominantly black areas even though other areas were open. The concentration of blacks cannot be fairly attributed

to public and private discrimination, and it is concluded that the housing patterns are not the result of such discrimination. In any event, where de jure segregation has been eliminated and de facto segregation remains, there surely must come a time when the stigma of de jure segregation is removed, certainly so in this situation, particularly in those areas once populated by whites and now all-black or predominantly black."

The District Court upheld the assignment plan of the Winston-Salem/Forsyth Board except in the case of three all-black schools which were ultimately ordered to be clustered with five predominantly white schools. The plaintiffs appealed from the failure of the District Court to order the integration of all the schools in the system and the defendant School Board appealed from the order requiring the clustering of the eight schools.

It is quite apparent that the District Court found no discrimination in the operation of the Winston-Salem/Forsyth County School System and would not have ordered the clustering of the eight schools above referred to (which required the busing of approximately 2,000 pupils and was for the purpose of achieving a racial balance in those schools) had it not been for the compulsion imposed upon the Court by appellate decisions, particularly the decision in Charlotte-Mecklenburg. In Judge Gordon's order of August 17, 1970, he stated:

> "If this Court were writing on the proverbial 'clean slate', the clustering of the eight schools would not have been ordered initially, as it is believed that freedom to go to any school you wish is the ultimate in freedom. However, trial courts have a solemn obligation to follow appellate court decisions, and a fair reading of these decisions demands what has been ordered by this Court. If this Court is in error, it can and will soon be corrected on appeal."

III.

BRIEF STATEMENT OF ARGUMENTS SUPPORTED BY THIS AMICUS CURIAE, WHICH ARE, IN GENERAL, COVERED IN GREATER DETAIL IN OTHER BRIEFS FILED WITH THE COURT.

1. Decisions decreeing that there can no longer be any "white" schools or any "black" schools — but that there shall be "just schools", which are not racially identifiable as "black" or "white", *must* be construed to mean that schools shall be operated for all pupils within normal geographic areas which may be served by them — and that no person shall be deliberately or effectively excluded on account of race. If they purport to mean anything else, they are meaningless; first, because the great majority of Americans are white, and, second, because it would be impossible to require all schools or even a sizable percentage of all schools throughout the United States to include among their pupils 20%, or 15%, or 10%, or 5%, or even 1% black persons — unless this nation is prepared to control everyone's place of residence. So long as the black population in the District of Columbia remains at its present level, anyone visiting those schools will find most, if not all, of them to be "black" schools insofar as the racially identifiable appearance of the pupils is concerned, but this does not make them "black" schools in a legal sense. This does not mean that the District of Columbia is failing to operate a unitary system. Conversely, so long as the white population of Ashe County, North Carolina (or any one of thousands of other counties throughout the United States) remains at its present level, anyone visiting the schools of that county will find them to be "white" schools insofar as the racially identifiable appearance of the pupils is concerned. Again, this does not make them "white" schools in a legal sense; nor does it mean that they are failing to operate a unitary school system. The same is true, in varying degrees, according to the racial makeup of each community, throughout the nation.

2. The same law should apply North, South, East and West. Any distinction between "de jure" and "de facto" is not justifi-

ble for two reasons: First, because racial residential patterns in reas (and particularly in urban areas) populated by both lacks and whites are substantially the same everywhere, regardless of whether their origin was "de facto" or "de jure"; nd, second, because there is no longer any such thing as "de ure" segregation in a true legal sense. The laws which permitted it have been held unconstitutional, and anyone who considers himself to be a victim of racial discrimination in housing has a remedy at law.

3. The argument that if it was all right to bus blacks extreme distances, past white schools, to attend black schools, it is now all right to do the same in reverse to force a racial balance — is neither legally nor morally sound. It was wrong to do the former, and it is proper to right the wrong by saying that no child shall be discriminated against or required to attend any particular school because of race. But two wrongs do not make a right. To require pupils to travel extreme distances past nearby schools simply because of race for the sole purpose of forcing a prescribed racial balance is committing the same wrong decried in *Brown*. The only difference is that in the first instance it was to force a separation of the races, whereas in the latter instance it is to force a mixing of the races. The basic wrong in both instances is that persons are being *forced* to do an extreme, artificial act to accomplish a racially motivated objective.

4. The argument that since some pupils must be bused to school, others should not object to the same treatment is spurious. It is one thing to provide transportation for a pupil who lives one and one-half or more miles from the nearest school; it is quite another to force a pupil who lives within easy walking distance of the nearest school to attend a school located one and one-half or more miles from his home.

5. Where a child lives close enough to school to walk the distance in five or ten minutes, is it right to force him to spend an additional thirty minutes to an hour every morning and every afternoon, five days a week, nine months a year, traveling by bus to a distant school for the sole purpose of achieving a particular racial balance in that school? Childhood hours and

days are precious and few as it is — and certainly the Constitution should not be so construed as to force, unnecessarily, the loss of time for sleep, work or recreation. Sociological advantages to be gained from racial mixing in the public schools beyond that which results naturally from residential patterns should be a matter of choice — not legal compulsion.

6. How can it be right for the Constitution to be so construed as to result in the forcing of a black pupil whose family lives in a predominantly white residential neighborhood, near a public school, to be transported past that school to a much more distant school in a predominantly black neighborhood? This is one of the results that can and does occur with pairing or clustering and other artificial devices to achieve racial balance.

7. Both the Executive and Legislative branches of our Government (through the President's March 27, 1970, statement, and the Civil Rights Act of 1964 [78 Stat. 246, 248, 42 U.S.C. 2000c(b), 2000c-6(a)(2)] have supported the doctrine of *Brown*, without concluding that that doctrine requires an abandonment of the neighborhood concept. The President expressly disapproved "transportation of pupils beyond normal geographical school zones for the purpose of achieving racial balance". The Congress expressly provided that "desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance" and, further, that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance."

IV.

FUNDAMENTAL POSITION OF AMICUS CURIAE

The fundamental position of the Winston-Salem/Forsyth County Board of Education in this brief is that the equal protection clause of the Fourteenth Amendment requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws", that this clause, when applied to pupil

assignment in public education, requires — and requires only — that pupils be assigned to public schools on a nondiscriminatory, non-racial basis, to the end that no person shall be effectively excluded from any school because of race or color.

Anything more than this; anything less than this; anything different from this — is contrary to the fundamental law of our land.

V.

FUNDAMENTAL PRINCIPLE OF BROWN — TRANSITION — FUTURE

The pertinent portion of the Fourteenth Amendment reads:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The fundamental question decided by the Court in *Brown I* was stated and answered by the Court as follows:

> "We come to the question presented: Does segregation of children in public schools *solely on the basis of race*, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." (Emphasis added). *Brown* v. *Board of Educ.*, 347 U. S. 483, 493, 75 S. Ct. 753, 98 L. Ed. 873 (1954).

Having made that decision the Court called for further briefs and arguments to assist the Court in determining whether the Court should enter a decree

> "(a) . . . providing that, *within limits set by normal geographical school districting*, Negro children should forthwith be admitted to *schools of their choice*, or
>
> "(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system *not based on color distinctions?*" (Emphasis added). 347 U. S. at 495 n. 13.

Clearly, from both of the above quotations, the Court interpreted the equal protection clause as it related to pupil assignment in public education, to require the elimination of segrega-

tion by law solely on the basis of race and to require conversion "to a system not based on color distinctions." The Court quite clearly felt that the admission of Negro children "to schools of their choice" . . . "within the limits set by normal geographic school districting" would constitute compliance with the new doctrine enunciated by the Court.

In *Brown II* the Court recognized the tremendous practical problems which would be encountered in effectuating the transition required under *Brown I*, and, applying equitable principles, directed that the transition be accomplished "with all deliberate speed." In *Brown II* the Court again made it clear that the doctrine of *Brown I* was *nondiscrimination:*

> "These cases were decided on May 17, 1954. The opinions of that date *declaring the fundamental principle that racial discrimination in public education is unconstitutional*, are incorporated herein by reference." (Emphasis added). *Brown v. Board of Educ.*, 349 U. S. 294, at 298, 74 S. Ct. 686, 99 L. Ed. 1083 (1955).
>
> "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis.*" 349 U. S. at 300.
>
> ". . . the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, *revision of school districts and attendance areas into compact units to achieve a system of determining admission to public schools on a nonracial basis*, . . . They will also consider the adequacy of any plans the defendants may propose to meet these problems *and to effectuate a transition to a racially nondiscriminatory school system* . . . .
>
> ". . . and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees *consistent with this opinion* as are necessary and proper *to admit to public schools on a racially nondiscriminatory basis* with all deliberate speed the parties to these cases. (Emphasis added) 349 U. S. at 300-01.

Nowhere in either of these landmark decisions did the Court once suggest or even intimate that under the newly enunciated

doctrine of *Brown I* the Constitution required the achievement of any particular racial ratio in the schools or that boards of education might be required to force a balance if it did not result naturally. The terms the Court did use were terms such as "nondiscriminatory", "nonracial", "revision of . . . attendance areas into compact units", "racially nondiscriminatory", "a system not based on color distinctions", and admission of Negro children "to schools of their choice" . . . "within limits set by normal geographic school districting".

At that point — in 1955 — the clear mandate and teaching of the Supreme Court was that the goal which must be achieved in all public school systems was the assignment of pupils on a nondiscriminatory basis, without regard to race.

At that point — in 1955 — the Court also clearly recognized that because of the long-established tradition of dual school systems throughout the South the achievement of this goal would take time.

Now — looking back from 1970 — we look back upon fifteen years of transition.

Some have found the transition too slow, others have found it too fast. The fact remains that there *has* been a great change — there *has* been a transition from the former dual school systems to unitary school systems. And most systems, Charlotte-Mecklenburg and Winston-Salem/Forsyth included, are now operating unitary systems.

The difficulty now is that there are those who have lost sight of the fundamental, abiding principle of nondiscrimination laid down in *Brown* and are contending that cases which dealt only with what had to be done in particular school systems in order to "effectuate the transition" are the cases which must be followed on a continuing basis by all school systems in order to operate a unitary system, even after the transition has been effectuated.

Arguing largely from the "transition" cases and virtually disregarding *Brown* and the updating of Brown in *Alexander* v. *Holmes County Bd. of Educ.*, 396 U. S. 19, 90 S. Ct. 29, 24 L. Ed. 2nd 19 (decided October 29, 1969), where the Court de-

fined a unitary system as one in which "no person is effectively excluded from any school because of race or color", such persons forsake principle and find ultimate solutions in terms of numbers and percentages, which they would have the Courts first sanction and then police and enforce.

If their contentions should find favor with the Court, the net result will be:

To keep the federal courts in the public school business ad infinitum; to have every district court retain jurisdiction over every school case; to have the court require every school to be "racially balanced", to require the submission of periodic reports on the racial composition of every school and to order a reshuffling of students every time changes in residential patterns upset the prescribed racial ratio in any school; to have the court pass judgment on the expansion of every exisiting school and the location of every new school; to have the court determine whether the employment and assignment of all staff members, principals and teachers upsets the prescribed racial balance or is racially motivated — in short, to have an interminable, intolerable court-operated "big brother" approach to public education.

We believe the idea of such a result is as abhorrent to the court as it is to school boards and to the vast majority of the public, but this is exactly the situation confronting Charlotte-Mecklenburg, and many, many other school boards, today and it bids fair to become a way of life — or death — for public education in the South if nothing is done by the Supreme Court to stop it.

The Court has already decreed that the time for effectuating the transition has run out. This being true, it would seem that it would now be appropriate for the Court to encourage the District Courts to review the school cases pending before them for the purpose of assuring that the school systems involved are now operating on a nondiscriminatory basis — i.e., that no person is being effectively excluded from any school because of race or color and that affirmative steps be taken toward the entry of final judgments as rapidly as each case will permit.

Finally, the Court should not misconstrue the absence of widespread boycotts or other disruptive or destructive acts in the Charlotte-Mecklenburg, or Winston-Salem/Forsyth County School Systems as an acceptance by the public of court-ordered, artificial measures to achieve racial balance. All this proves is that the public strongly supports education and that the paramount issue, for most whites, is not whether blacks and whites shall attend the same school. The public, generally, objects strenuously and deeply to court-imposed, artificial measures to force a racial balance, and to the application of standards for the South which are different from those applied in other parts of the Nation, for this is neither freedom nor equality. If the practice is continued the public will respond in the only ultimately effective way left open to them: They will fail to vote for school bonds needed for public education and will otherwise abandon their support of public education, in favor of private education. Historically, the South has supported public education, with rich and poor alike generally attending public schools. This has been healthy — and good sociologically as well as educationally. *Brown*, properly construed and applied, with blacks and whites accorded equal treatment without discrimination, can save and strengthen public education; *Brown*, improperly construed and applied, can destroy public education.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 281, 349

JAMES E. SWANN, ET AL., PETITIONERS, CROSS-RESPONDENTS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., RESPONDENTS, CROSS-PETITIONERS

No. 436

BIRDIE MAE DAVIS, ET AL., PETITIONERS

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

1. *Charlotte-Mecklenburg.* This case was commenced in January 1965, and the district court thereafter approved a free-transfer desegregation plan. 243 F. Supp. 667 (W.D.N.C.), affirmed, 369 F. 2d 29 (C.A. 4). The present proceedings were initiated

in September 1968 by the plaintiffs' motion for supplemental relief based on *Green* v. *County School Board,* 391 U.S. 430, and its companion cases. Following an evidentiary hearing, the district court held on April 23, 1969, that the school system was not being operated in conformity with constitutional requirements and directed submission of a plan for faculty desegregation to be effective in the fall of 1969 and for student desegregation to be implemented in two steps at the commencement of the 1969 and 1970 school years (App. 285a). The school board, in substance, declined to submit a plan for either faculty or student desegregation (App. 330a–340a).

Further evidentiary hearings were held, and on June 20, 1969, the district court again directed submission of a plan (App. 448a). The school board thereafter proposed a plan by which some all-black schools would be closed and students from those schools, as well as from over-crowded black schools, would be permitted to attend predominantly white schools, and otherwise the free-transfer plan would remain in effect; no faculty desegregation plan was offered (App. 480a). The district court approved the board's submission on an interim basis and directed the preparation by November 17, 1969, of a plan for student and faculty desegregation to be effective for the 1970–1971 school year. The school board, indicating that a plan was being prepared, moved for an extension of time until February 1970. The district court denied the motion (App. 655a), and the board again indicated that a plan for student

desegregation was being prepared based on the premises that only rezoning would be used to achieve desegregation and that no school to which white students were assigned would be less than 60 percent white (App. 670a–671a).

On December 1, 1969, the District court held that the board's submission was unacceptable and appointed an education expert to prepare a desegregation plan (App. 698a). Plans were filed by the school board (App. 726a) and the court-appointed expert. On February 5, 1970, the court adopted, with some modifications, the board's plan for secondary schools and the expert's plan for elementary schools (App. 819a) and adopted a timetable for implementation suggested by the board.

Implementation of the plan was partially stayed by the Court of Appeals for the Fourth Circuit on March 5; and thereafter stayed in its entirety by the district court (App. 1255a). This Court declined to disturb the Fourth Circuit's order. 397 U.S. 978. On appeal, the court of appeals indicated approval of the district court's order of February 5 insofar as it rejected the school board's plan but vacated the order and remanded the case for reconsideration and to permit the board to submit a new elementary school plan (App. 1262a). This Court granted certiorari on June 29, 1970, directing reinstatement of the district court's order pending further proceedings in that court (App. 1320a; 399 U.S. 926).

On remand, two new plans for elementary schools were submitted: a plan prepared by the United States

Department of Health, Education, and Welfare based on contiguous grouping and zoning of schools, and a plan prepared by four members of the nine-member school board achieving substantially the same results as the court-expert plan but requiring somewhat less transportation. A majority of the school board declined to amend its proposal. After a lengthy evidentiary hearing, the district court directed the board to adopt the minority board plan or to submit a new, equally effective plan; the court ordered that the court-expert plan would remain in effect in the event that the school board declined to adopt a new plan. On August 7 the board so declined.

2. *Mobile County.* This case was initiated by private plaintiffs in 1963, and the United States intervened as a party-plaintiff in 1967. The history of the litigation is recorded in a lengthy series of decisions cited on page two of the Memorandum for the United States on the petition for a writ of certiorari.

In June 1969 the Court of Appeals for the Fifth Circuit reversed the district court's approval of a desegregation plan combining elements of freedom of choice, geographic zoning, and minority-to-majority transfers. 414 F. 2d 609. The district court was directed to order the school board to engage the assistance of the United States Department of Health, Education, and Welfare in preparing a new desegregation plan for the entire system. HEW developed a two-step desegregation plan, reaching all rural schools and the schools in the western portion of metropolitan Mobile in 1969 and reaching the eastern urban schools

n 1970. The district court adopted a plan substantially the same as the first step of the HEW plan and directed submission of revised plans for the eastern schools. That decision was affirmed *sub nom. Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (C.A. 5) (en banc) (per curiam), reversed in part *sub nom. Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (per curiam).

On December 1, 1969, plans were filed by the school board and HEW. At the district court's request, the Department of Justice filed on January 27, 1970, a separate proposal for implementation pendente lite. On January 31 the district court adopted, with some modification, the school board's submission based on geographic zoning. The plaintiffs and the United States appealed.

On June 8, 1970, the court of appeals reversed, adopting with some modifications the plan submitted by the Department of Justice, and the plaintiffs petitioned for a writ of certiorari. The court of appeals has since twice amended its mandate (see decision reprinted in appendix to the government's memorandum on the petition and *Davis* v. *Board of School Commissioners of Mobile County,* No. 29,332 (C.A. 5, Aug. 28, 1970)).

ARGUMENT

INTRODUCTION AND SUMMARY

Several threshold considerations may serve to illuminate the issues in these two school desegregation cases.

First, these are school districts which contain large metropolitan areas. While this Court has dealt with such districts in the past, it has not had occasion since the *Green* trilogy [1] and *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, to define with particularity the obligations of large metropolitan school systems with respect to pupil assignment. *Green* and *Alexander* answered many of the questions as to the obligations of rural and small town systems, and the question now is the extent to which the remedial principles developed in those cases of classic dualism apply to large metropolitan systems. In this sense, these are cases of first impression.

Second, both of these school systems are characterized by residential patterns of racial separation as well as a history of racial separation in the public schools. The two types of separation are interrelated, but the extent of the relationship is at best speculative. These cases might thus involve the questions whether school boards can retain a "neighborhood school" assignment policy where the result is to operate some schools that are racially identifiable at least to the extent reflected by the racial composition of the student bodies, whether the Fourteenth Amendment requires school boards to achieve some mathematical degree of integration regardless of housing patterns, and the extent to which the burdens of alleviating racial isolation are to be borne by school boards and

[1] *Green* v. *County School Board*, 391 U.S. 430; *Raney* v. *Board of Education*, 391 U.S. 443; *Monroe* v. *Board of Commissioners*, 391 U.S. 450.

school children rather than being shared by other governmental institutions and agencies having the power to affect such isolation.

Third, there is evidence that these school boards previously maintained aspects of dualism—such as some dual, overlapping zones, faculty segregation, and dual transportation systems. If these school districts are, therefore, properly regarded as traditionally dual school systems, whose obligation is to convert to unitary systems, the question remains: what constitutes a unitary system? Stating this question another way: what remedial adjustments would bring these school districts into compliance with constitutional requirements? And, when school boards have failed to select a method of compliance, a further question arises as to the scope of judicial discretion in ordering appropriate remedial adjustments.

These questions relate both to rights and to remedies and raise yet another question: In desegregating school systems is there a conflict between individual rights and public need, and, if so, is there some proper balance between them? We think there could be such a conflict if the Fourteenth Amendment granted students an absolute right to attend school with children of other races, *i.e.*, required some form of racial balance, or if there were an unyielding public need which would justify the wholesale maintenance of racial segregation; but we think the first of these conflicting goals is not prescribed, and the second not countenanced, by the Constitution. Rather, we think the right of school children articulated in *Brown* is to

attend school in a system where the school board exercises its decision-making powers so as to operate a nonracial unitary school system free from discrimination, and that where this has not been done there is a violation of the rights of such children requiring remedial adjustments which give proper weight to that which is feasible and that which is just. If choices exist which may have a racial impact, they cannot be exercised in a racially neutral manner where to do so is to perpetuate segregation. Thus, the right and the remedy are interrelated.

This interrelationship is most easily perceived in rural systems, such as New Kent County, Virginia, where the violation was the maintenance of two twelve-grade schools, one nearly all white and one black, each serving the entire system. Pairing or zoning the two schools were remedies that flowed naturally from this violation. But where scores of schools serve the same grades, some attended largely by students of one race, the remedy is not self-evident.

The controversy in these cases is over the standards to be applied in fashioning remedies for state-imposed segregation in large metropolitan areas. We believe that an appropriate standard should give proper attention to a number of circumstances, such as the size of the school district, the number of schools, the relative distances between schools, the ease or hardships for the school children involved, the educational soundness of the assignment plan, and the resources of the school district.

All these circumstances have been taken into account by HEW's Office of Education in the development of desegregation plans for urban school systems. That Office has followed the general principle that school districts which are under a duty to reorganize have an obligation to make all reorganizational decisions so as to eliminate the vestiges of dualism, but are free at the same time to take into account the benefits to be derived from preserving the traditional neighborhood method of school assignment. In applying this principle, the Office has employed the techniques of expanding contiguous geographic zones and pairing or clustering schools having contiguous zones. This principle has found general acceptance in the lower courts and should be adopted by this Court.

This Court observed in *Green* v. *County School Board*, 391 U.S. 430, that "*Brown II* was a call for the dismantling of well-entrenched dual [school] systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution," *id.* at 437, and held that "[s]chool boards * * * then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437–438; see *Raney* v. *Board of Education*, 391 U.S. 443, 447–448; *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 458–460. Last Term this Court held that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only

unitary schools." *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, 20; see *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290; *Northcross* v. *Board of Education,* 397 U.S. 232.

These decisions clearly contemplated the reorganization of racially segregated, dual school systems. But, like earlier school desegregation decisions of this Court, they arose in the context of rural, classically dual systems or the perpetuation of the most egregious forms of racially dual operation. New Kent County operated two schools, one attended solely by Negroes and the other almost exclusively by whites, offering exactly the same grades and serving exactly the same attendance area (coextensive with the entire county), while both whites and blacks resided throughout the district. Similarly, in *Raney* "[t]here [were] no attendance zones, each school complex providing any necessary bus transportation for its respective pupils." 391 U.S. at 445. In *Monroe* v. *Board of Commissioners, supra,* involving a small city school district in which many residential areas were racially segregated, a zoning plan had "assigned students to * * * schools in a way that was capable of producing meaningful desegregation," 391 U.S. at 458, but a free-transfer option superimposed on geographic zoning had "permitted the 'considerable number' of white or Negro students * * * to return, at the implicit invitation of the Board, to the comfortable security of the old, established discriminatory pattern." *Id.* at 458–459.

Hence, while this Court has dealt with large urban school districts in the past, including Topeka, Kansas, *Brown* v. *Board of Education,* 347 U.S. 483; Little

Rock, Arkansas, *Cooper* v. *Aaron*, 358 U.S. 1; Knoxville, Tennessee, *Goss* v. *Board of Education*, 373 U.S. 683; Richmond, Virginia, *Bradley* v. *School Board*, 382 U.S. 102; Montgomery, Alabama, *United States* v. *Montgomery County Board of Education*, 395 U.S. 225; and Memphis, Tennessee, *Northcross* v. *Board of Education*, 397 U.S. 232, the Court has not had an occasion to define with any degree of finality the constitutional obligations—particularly the pupil assignment obligations—of such school systems. The *Green-Raney-Monroe* trilogy presented issues associated with traditional dualism. In the circumstances of those cases, freedom of choice and free transfer were held to be unacceptable methods of student assignment because they maintained racial segregation by tacitly perpetuating dual, overlapping attendance areas, "[t]he central vice in a formerly de jure segregated public school system," *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 867 (C.A. 5), affirmed on rehearing, 380 F. 2d 385 (C.A. 5) (en banc), certiorari denied *sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840.

In accordance with the mandate of *Green* and this Court's definitive announcement in *Alexander* v. *Holmes County Board of Education, supra,* and *Carter* v. *West Feliciana Parish School Board, supra,* that dual systems must be converted "at once," nearly all of the traditionally dual school districts are desegregating by implementing desegregation plans based on compact geographic zones and grade restructuring, through either litigation or voluntary

agreements with the United States Department of Health, Education, and Welfare.[2]

Most of these are rural systems which, by the use of contiguous zoning and contiguous pairing, have converted to systems "without a 'white' school and a 'Negro' school, but just schools." *Green,* 391 U.S. at 442. In urban school systems like Mobile and Charlotte, however, the constructive use of contiguous zoning and pairing places biracial student populations in most, but not all, schools. This distinction was well stated by Judge Butzner in the *Charlotte* case below:

> All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering, or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettos so large that integration of every school is an improbable, if not an unattainable, goal. [App. 1267a–1268a.]

In this respect, then, these cases present issues of first impression for this Court and may require the Court to distinguish between rural and metropolitan school districts.

I. THE CHARLOTTE AND MOBILE SCHOOL SYSTEMS HAVE FOLLOWED POLICIES AND PRACTICES WHICH PERPETUATE THE DUAL SYSTEM

Racial dualism in large urban systems may be found not only in overlapping attendance areas but also in

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[2] See Appendix, *infra*, for a summary of the status of school districts in eleven Southern states, which brings up to date the table in the Appendix to the government's Supplemental Memorandum filed in this Court in *Alexander* v. *Holmes County Board of Education*, No. 632, October Term, 1969.

the organizational decisions of the system in furtherance of racial separation. It may be manifested in distorted grade structures, outsized schools, gerrymandered zones, curriculum manipulation, and various other devices for accommodating the organization of the system to fluctuating racial residential patterns.

Neither North Carolina nor Alabama presently requires racial segregation in public education by law; and insofar as an official policy of segregation plays a part in defining the Charlotte and Mobile school boards' present constitutional obligation, it is meaningful only to the extent that it is manifested in the decision-making (involving both long-range planning and day-to-day operations) of the boards. Accordingly, all of those decisions must be considered in determining the extent to which a school district has engaged in discrimination contrary to *Brown of Education,* 347 U.S. 483. See *Brown* v. *Board of Education,* 349 U.S. 294, 300–301; *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836 (C.A. 5). See, also, *Smith* v. *Texas,* 311 U.S. 128, 132.

Site selection and school construction are important aspects of a school board's decision-making responsibilities in school districts characterized by racial residential segregation, because they have been used as substitutes for dual zoning. The records in both *Charlotte-Mecklenburg* and *Mobile* suggest that the school boards have consciously selected building sites and

constructed schools in a manner designed to perpetuate separate schools for whites and blacks. Thus in 1963, when the Mobile board sought a stay of a Fifth Circuit order directing it to commence admitting Negro students to white schools under the Alabama pupil-placement laws, the board argued that

> desegregation would "seriously delay and possibly completely stop" the Board's building program, "particularly the improvement and completion of sufficient colored schools which are so urgently needed." In recent years, more than 50% of its building funds, the Board pointed out to the parents and guardians of its colored pupils, had been spent to "build and improve colored schools," and of eleven million dollars that would be spent in 1963, over seven million would be devoted to "colored schools."

Board of School Commissioners v. *Davis,* 11 L. Ed. 2d 26, 28 (Black, J., on application for a stay). As Mr. Justice Black then observed, "It is quite apparent from these statements that Mobile County's program for the future of its public school system 'lends itself to perpetuation of segregation,' a consequence which the Court recently had occasion to condemn as unlawful." *Id.* at 28–29. This policy continued until at least June of 1969. See *Davis* v. *Board of School Commissioners of Mobile County,* 414 F. 2d 609 (C.A. 5).

Similarly, in *Charlotte-Mecklenburg* the district court found that the "[l]ocation of schools in Charlotte has followed the local pattern of residential development, including its *de facto* patterns of segre-

gation. With a few significant exceptions * * * the schools which have been built recently have been black or almost completely black, or white or almost completely white, and this probability was apparent and predictable when the schools were built." *Charlotte* App. 305a; see *id.* at 456a–457a.

Other necessary educational and administrative decisions must be coordinated with a school-construction program; and the record in *Mobile* is especially clear on the potential effects of those decisions on racial separation. The capacities of schools can be based on the size of the racially identifiable areas they are to serve. Two junior high schools were constructed, for example, to serve relatively small white neighborhoods virtually surrounded by predominantly Negro residential areas; accordingly, the capacities of those schools were far smaller than the capacities of other schools in the system serving the same grades. Brief for Petitioners in *Mobile,* Appendix at 15, n. 24. The same is true of grade structures. No reason can satisfactorily explain, for instance, why one all-Negro school was the only school in the city to offer all twelve grades except that the Negro area to be served by the school was relatively small, compact, and surrounded by white residential areas.[3] *Id.* at 4, 15 n. 24; see, also, *id.* at 10. The *Mobile* record contains evidence of numerous instances in which port-

[3] That school has now been fully desegregated by reducing the number of grades and expanding the neighborhood zone to be served.

able classrooms were used at schools serving one race while nearby schools offering the same grades but serving another race operated under capacity. *Id.* at 10–11; see, also, *id.* at 64–67. The location of attendance-zone boundaries (including the use of noncontiguous zones) has also been utilized in *Mobile* to produce segregation. *Id.* at 7–9.

We submit, therefore, that the constitutional violations which have occurred in these two cases are the products of a process of decision-making in which the state chose, in spite of the availability of feasible alternatives, courses which perpetuated the racially segregated dual systems. In light of the fact that in many metropolitan school systems "black residential areas [may be] so large that not all schools can be integrated by using reasonable means," *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 14,517 (C.A. 4) (App. 1267a), it is appropriate, therefore, to look to that decision-making process as the focal point of a proper remedy. Accordingly, an appropriate remedy is to require that the governmental decisions affecting racial segregation be so made and implemented, when feasible alternatives are available, as to disestablish the dual system and eliminate its vestiges. In this sense, the remedy is a dynamic one, cf. *Clark* v. *Board of Education of Little Rock School District,* 426 F. 2d 1035 (C.A. 8), and not a static one. And, as we shall now show, it does not require, as an *a priori* constitutional standard, racial balance or integration of every all-white, all-Negro, or predominantly Negro school.

II. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE, AS A MATTER OF LAW, RACIAL BALANCE IN ALL PUBLIC SCHOOLS OR INTEGRATION OF EVERY ALL-WHITE OR ALL-NEGRO SCHOOL

The plaintiffs-petitioners in both *Charlotte-Mecklenburg* and *Mobile* argue that school boards have a constitutional obligation to eradicate the "racial identifiability" of all schools within their jurisdiction. In this view a predominantly Negro school would be "racially identifiable" in a school district having a majority of white students such as Charlotte and Mobile. It would appear that all school boards, according to the petitioners' theory, must be required to ensure that the ratio of white to black students in each school is as near as possible to the ratio of white to black students in the system as a whole. We do not agree that either general constitutional principles[4] or the holdings of this Court or the courts of appeals with respect to disestablishment of dual school systems compel acceptance of this formulation of school boards' remedial duty. In our view, "[h]ow far that duty extends is not answerable perhaps in terms of an unqualified obligation to integrate public education without regard to circumstance * * *." *Branche* v. *Board of Education of Hempstead,* 204 F. Supp. 150, 153 (E.D.N.Y.).

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[4] It is, of course, clear that the Fourteenth Amendment's requirement of due process and equal protection does not, by itself, prescribe any particular racial (or other) admixture in the membership of individual institutional groups, such as a particular jury. *Cassell* v. *Texas,* 339 U.S. 282.

As the court of appeals stated in the *Charlotte* case, "if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation * * * should not void an otherwise exemplary plan for the creation of a 'unitary school system'" (App. 1268a). Neither, on the other hand, do the decisions support the use of racial quotas, as in the Charlotte-Mecklenburg school board's plan, as a limitation on the extent of a school board's remedial obligation.

Federal courts have made basically three uses of such expressions as "racially identifiable schools," "all-Negro schools," and "racial balance," none of which supports the near-absolute standard suggested by the plaintiffs-petitioners. The courts have used these expressions as a characterization of the state's holding out a classically dual school system in tacit perpetuation of legally required segregation, as an analytical starting point, and as a convenient reference to a remedial standard requiring the comparison of available alternatives.

This Court said in *Green* that an acceptable desegregation plan must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. But that remark was made in the context of the state's holding out one school for whites and another for blacks serving the same attendance area, just as it had done when racial segregation was enforced by law. In holding that the state could not maintain such a system, even though it had the appearance of racial

neutrality in the sense that student assignments were based on free choice, this Court might well have said that the schools of New Kent County must be merged or "racially balanced," for the simplest techniques of effecting desegregation (such as zoning and pairing, see 391 U.S. at 442 n. 6) would necessarily promise exactly that result in the circumstances of that case. It was in the same context, namely, the failure of freedom of choice to alter significantly the racially dual attendance patterns of the past, that the Court of Appeals for the Fifth Circuit adopted the rule, now moribund, that an existing student-assignment plan was unacceptable if it retained an all-Negro school. See, *e.g.*, *Adams* v. *Mathews*, 403 F. 2d 181 (C.A. 5); *Hall* v. *St. Helena Parish School Board*, 417 F. 2d 801 (C.A. 5), certiorari denied, 396 U.S. 904; *United States* v. *Hinds County School Board*, 417 F. 2d 852 (C.A. 5), related order reversed *sub nom. Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (reversing as to timing). But see *Harris* v. *St. John the Baptist Parish School Board, sub nom. Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211, 1221 (C.A. 5) (en banc).

The Fifth Circuit, although no longer relying on a standard of no all-Negro schools, has required a showing and findings of the specific "reasons, if any, for the continuation of any all Negro or all white schools" under proposed desegregation plans. *Singleton* v. *Jackson Municipal Separate School District*, No. 29,226, at 14 (C.A. 5, May 5, 1970); *Andrews* v. *City of Monroe*, 425 F. 2d 1017, 1021 (C.A. 5). This

requirement, obviously, is an analytical starting point designed to inform the court of appeals of both the extent to which racial concentration remains in a school district and the feasibility of reducing concentration by alternative means. For numerous recent decisions of that court, including the decision in *Mobile,* have approved plans even though all-Negro schools remained. See, *e.g., Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28,639 (C.A. 5), modified on rehearing (C.A. 5, July 28, 1970); *Valley* v. *Rapides Parish School Board,* No. 30,099 (C.A. 5, Aug. 25, 1970); *Mannings* v. *Board of Public Instruction of Hillsborough County,* No. 28,643 (C.A. 5, May 11, 1970). Similarly, the Court of Appeals for the Eighth Circuit observed with respect to racial balance:

> We do not rule that precise racial percentages across the District at the respective elementary, junior high, and high school levels are as yet constitutionally required. * * * We certainly can conceive of a fully desegregated system where percentages do vary from school to school and in which even one school might have a black majority and another a white majority but still, when all factors are fairly and unemotionally considered, the system is "unitized" within the Supreme Court's *Alexander* requirement. That happy day may not yet be upon us and until it arrives percentages may be more significant than they eventually deserve to be.

Kemp v. *Beasley,* No. 19,782, at 14–15 (C.A. 8, March 17, 1970) (El Dorado, Arkansas); see *Swann* v.

Charlotte-Mecklenburg Board of Education, 306 F. Supp. 1299, 1312 (W.D.N.C.) (App. 710a); *United States* v. *Georgia,* C.A. No. 12,972 (N.D. Ga., Dec. 17, 1969) (and subsequent orders amending the formula in light of the circumstances of individual school districts).

Finally, the standard of no predominantly Negro schools has been used as a means of translating into remedial terms a finding, in view of available alternatives, of the extent to which racial concentration could feasibly be eliminated. See, *e.g., Spangler and United States* v. *Pasadena City Board of Education,* unreported order entered on findings and conclusions reported at 311 F. Supp. 501 (C.D. Calif.). Such an articulation of remedial obligations cannot be read in the unyielding terms suggested by the plaintiffs-petitioners. Indeed, the district court in *Charlotte-Mecklenburg,* while approving the plan supported by the plaintiffs, was careful to point out, "This court has not ruled, and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; * * * nor that the particular order entered in this case would be correct in other circumstances not before this court." *Swann* v. *Charlotte-Mecklenburg Board of Education,* C.A. No. 1974, at 12 (W.D.N.C., Aug. 3, 1970); see *id.* (Feb. 5, 1970) (App. 822a). Insofar as such remedial expressions are made on the basis of a record and findings on "the availability to the board of other more promising courses of action," 391 U.S. 439, they

represent no departure in constitutional principle from *Green,* which directed district courts to assess proposed plans "in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Ibid.*

The desegregation plan supported by the Charlotte-Mecklenburg school board is based on the premise that "[n]o school district to which white students are assigned should have less than 60 per cent white student population * * *." App. 671a. In the factual circumstances of the Charlotte school system, this rule, when coupled with the board's declining to consider any technique of desegregation except geographic zoning, inevitably constitutes a limitation on the extent of desegregation to be achieved: Whenever an all-Negro school could not be so zoned as to make it at least sixty percent white, this limitation would require that it remain all-Negro. As the district court observed, such a use of a " '60–40' ratio is a one-way street," App. 701a, and the court of appeals properly rejected it. App. 1276a. See *Lee* v. *Macon County Board of Education,* C.A. No. 604–E (M.D. Ala., April 3, 1970) (Conecuh County); *Brewer* v. *School Board of City of Norfolk,* No. 14,544 (C.A. 4, June 22, 1970), reversing 302 F. Supp. 18, 308 F. Supp. 1274 (E.D. Va.). No use of racial quotas "of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment." *Goss* v. *Board of Education,* 373 U.S. 683, 689.

III. THE CHARLOTTE AND MOBILE SCHOOL BOARDS ARE REQUIRED, IN CONVERTING FROM DUAL TO UNITARY SYSTEMS, TO MAKE ORGANIZATIONAL AND ASSIGNMENT ADJUSTMENTS TO ELIMINATE THE VESTIGES OF THE DUAL SYSTEM BUT NOT TO ACHIEVE ANY PARTICULAR RACIAL BALANCE OR RATIOS

1. Clarification of the proper remedial standards in this field thus begins, in our view, with recognition of the basic principle that the constitutional requirement of "a completely unified, unitary, nondiscriminatory school system" (*Montgomery*, 395 U.S. at 235) is not a requirement that racial balance need be achieved in all schools within the system or that all instances of non-discriminatory racial isolation need be eliminated. It is, instead, a requirement of a school "system in which racial discrimination * * * [has been] eliminated root and branch" (*Green*, 391 U.S. at 438). It follows that the constitutional objective can, in most situations, be achieved by means of any of a variety of methods of pupil assignment, and that the choice of the particular method, or combination of methods, to be employed is a matter of educational policy within the discretion of the school board—so long as that choice accomplishes the constitutional objective. As this Court said in *Green* (391 U.S. at 439):

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circum-

> stances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. * * *

Indeed, the Court in *Green* specifically declined to "hold that 'freedom of choice' can have no place in such a plan," or "that a 'freedom-of-choice' plan might of itself be unconstitutional" (391 U.S. at 439), even though it noted that "the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation" (391 U.S. at 440) and held that in the three cases before it the freedom-of-choice plans were constitutionally inadequate. And the Court specifically indicated in *Green* that either geographic zoning or pairing (consolidation) of the two schools in the rural district involved in that case would be an acceptable method of pupil assignment (391 U.S. at 442 n. 6).

We submit that a system of pupil assignment on the basis of contiguous geographic (residential) zones—the "neighborhood" school system, which is the most familiar and traditional method of pupil assignment employed throughout the Nation—is constitutionally acceptable in desegregating urban school systems also. We recognize, however, that where dual systems have previously been maintained, school buildings and facilities will frequently be located on sites which would not have been chosen had the system been operated on a unitary basis, and that there will generally be available to school boards more than one choice of pupil

assignment plans which would be consistent with the neighborhood school concept.

In many such districts the constitutional adequacy of the "neighborhood school" method of converting a dual system into a unitary one will, accordingly, depend on the choice of those complementary techniques designed to eliminate the effects of state-imposed discrimination that would otherwise remain (see *supra,* pp. 13–16). The techniques available to school officials include:

> (*a*) Change the grade structure. A school with fewer grades can accommodate more children in each grade, so that it would serve a larger area.
>
> (*b*) Permit students to transfer from a school in which their race is in the majority to one in which it is in the minority. The courts below, in adopting this technique, also required that such students be provided transportation.
>
> (*c*) Close unneeded or substandard schools.
>
> (*d*) Draw zone lines so that they cut across racially impacted residential areas instead of encircling them.
>
> (*e*) Plan new construction of school facilities so as to serve students of both races.

All of these techniques are utilized in the plan approved by the court of appeals in *Mobile,* and they have been used successfully elsewhere. See, *e.g., Singleton* v. *Jackson Municipal Separate School District,* No. 29,226 (C.A. 5, Aug. 12, 1970); *Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28,639 (C.A. 5, July 28, 1970); *Mannings* v. *Board of Public*

Instruction of Hillsborough County, No. 28,643 (C.A. 5, May 11, 1970); *Henry* v. *Clarksdale Municipal Separate School District*, No. 29,165 (C.A. 5, Aug. 12, 1970). The good faith utilization of such techniques to promote desegregation would, in our view, ordinarily enable any district which prefers a "neighborhood" school policy to achieve compliance with constitutional requirements by means of that method of pupil assignment.[5] Such racial isolation as might then persist, not attributable to school officials, can best be undone through the action of the numerous public and private agencies and individuals whose daily decisions can influence the racial composition of a neighborhood.

2. In the present cases, the courts of appeals correctly held that neither school board came forward with a pupil assignment plan adequate to meet its constitutional obligations. Nothing in the record in either case would suggest that either school board's objective in the plans it offered was anything other than to attempt to maintain racial segregation while eliminating overlapping attendance zones. This plainly did not fulfill the boards' "affirmative duty" (*Green*, 391 U.S. at 437) to eliminate the effects of racial discrimination, "root and branch" (391 U.S. at 438).

[5] Of course, the Constitution does not require the adoption of a "neighborhood" pupil assignment policy, and school districts are free, if they prefer, to choose an assignment method designed to achieve racial balance or any other non-discriminatory assignment method. See Memorandum for the United States as Amicus Curiae in *McDaniel* v. *Barresi*, No. 420, this Term.

We come, then, to the precise issue in these cases: the question of the propriety of the remedies adopted by the courts below in the face of each school board's default. This Court has consistently held, in accordance with general principles of equitable remedies, that in this situation the lower federal courts have wide discretion in formulating appropriate relief. See, *e.g.* *Brown* v. *Board of Education*, 349 U.S. 294, 299–300; *United States* v. *Montgomery County Board of Education*, 395 U.S. 225; *Green* v. *County School Board*, 391 U.S. 430, 438 n. 4, 439, 442 n. 6; *Griffin* v. *School Board*, 377 U.S. 218, 232–234; cf. *Carter* v. *Jury Commission*, 396 U.S. 320, 336–337; *Turner* v. *Fouche*, 396 U.S. 346, 355. Indeed, this Court has authorized requiring implementation of desegregation plans although recognizing that the particular plans were not the exclusive means of satisfying constitutional mandates. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290. It is, in general, incumbent on the federal courts to assess the school boards' proposals "in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness" (*Green*, 391 U.S. at 439). And, "in this field the way must always be left open for experimentation" (*Montgomery*, 395 U.S. at 235).

In *Mobile*, we believe that the plan approved by the court of appeals meets these standards. It is basically a "neighborhood" school plan, supplemented by judi-

cious use of complementary techniques (see *supra*, p. 25) designed to minimize residual racial isolation. Especially in light of the court's inclusion of a majority-to-minority transfer option and its scrupulous attention to desegregation of faculty and of school facilities and activities (See Pet. App. 12a–13a, 16a), the plan, in our view, "promises realistically to work, and promises realistically to work *now*" (*Green*, 391 U.S. at 439). It should, of course, be re-evaluated in practice by the courts below, after it has been in operation for a sufficient time (see 391 U.S. at 439; *Raney* v. *Board of Education*, 391 U.S. 443, 449).

In *Charlotte*, we believe the court of appeals correctly sustained the district court's judgment as to the junior and senior high schools, in light of the unacceptability of the school board's proposal and the feasibility and practicality of the court's modifications thereof. We also believe the court of appeals was correct in remanding the case to the district court for further consideration of that aspect of the court's order requiring far-reaching cross-busing of elementary school pupils, since the district court had initially indicated some doubt as to whether racial balance was the constitutionally required objective (see App. 710a) and may, therefore, have exercised its remedial discretion in pursuit of an erroneous constitutional standard. On remand, the district court reconsidered the matter. Although it had another opportunity to do so, the school board again failed to come forward with a constitutionally adequate plan. The Department of Health,

Education, and Welfare did submit a plan of contiguous zoning which we believe was constitutionally acceptable, but the school board objected to it strongly and indicated that it might prefer the court's original plan.*

In these circumstances the district court rejected the HEW plan. If the decision of the district court was based on an understanding that racial balance is a constitutional requirement, it cannot be supported for the reasons stated in earlier portions of this brief. In light of the fact that the plan ultimately adopted by the court went beyond the HEW plan in departing from the neighborhood school concept, and the fact that the school board rejected any alternative to its own plan which failed, in our opinion and the opinions of the courts below, to meet constitutional requirements, we believe that in further consideration of the problem the board should be required to choose

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* See Transcript of Hearing, July 15–24, 1970, at 1071, 1077–1078 (Mr. Waggoner, attorney for the school board):

> The HEW plan, under anybody's estimation, is a plan that doesn't produce any satisfactory solutions in any way.
>
> * * * * *
>
> So we take the position, if the Court please, that there is no reasonable alternative between the Finger plan and the Board plan, the alternatives suggested here or portions thereof are unreasonable, and this places * * * the Board and the plaintiffs in the difficult position of seeing a situation where an appellate court has ruled one plan doesn't go far enough and the other plan goes too far. We feel this is where the chips in this case fall, there is no middle ground.

See, also, *id.* at 1113.

from among those plans in the record, including the "Finger" plan, the minority board plan, and the HEW plan, or in the alternative submit to the district court a plan meeting the standards and requirements of the Constitution as enunciated by this Court.

The decisions below should not be regarded as prescribing the only method of pupil assignment which may, in the future, be used in these districts. It is still the school boards, and not the federal courts, that have the authority, within constitutional limitations, to make educational policy—including pupil assignment policy. The role of the courts in these matters arises only because of the school boards' failure to fulfill their constitutional obligations. So long as that failure persists, the courts must, to a limited extent, assume the functions of the school boards and, within the traditional confines of equitable discretion, engage in "experimentation" (*Montgomery,* 395 U.S. at 235) comparable to that appropriate for the boards in achieving the constitutionally required objective. The boards are free, however, to reassert their authority whenever they wish, by coming forward with constitutionally acceptable proposed modifications of the court's plan or with an entire new plan that meets constitutional standards. We see no reason why the school boards in these cases should not be permitted to propose, for the approval of the courts below, new pupil assignment plans (if they so desire) for implementation in the 1971–1972 school year.

CONCLUSION

In view of the district courts' express retention of jurisdiction to entertain amendments to the plans,[7] it would be appropriate for this Court to enunciate the standards which are applicable to cases of this sort and to remand the cases to those courts for further proceedings in the light of those standards.

Respectfully submitted.

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Solicitor General.

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OCTOBER 1970.

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[7] The August 3, 1970, decision of the district court in *Charlotte* properly retained jurisdiction pursuant to the directive of the court of appeals that "after a plan has been approved, the district court may hear additional objections or proposed amendments, but the parties shall comply with the approved plan in all respects while the district court considers the suggested modifications." In *Mobile* the court of appeals also directed the district court to retain jurisdiction.

APPENDIX

The following status report on eleven southern states as of September 1970, indicates how many school districts were unitary prior to 1970–71, how many are committed to terminal 1970–71 plans, and how many are currently not committed to a terminal 1970–71 plan. This information was compiled from a central status report now maintained jointly by the Department of Justice and the Department of Health, Education and Welfare. While absolute accuracy in placing school systems in appropriate categories is not possible, every effort has been made to reconcile the sometimes conflicting information by using the most recent data.

Under the heading "Unitary Prior to 70–71" are included the following:

1. Those desegregated districts as enumerated by HEW.
2. Those few districts operating under court-ordered freedom of choice plans which, according to the statistics, are effectively desegregating the systems.
3. Those districts ordered by district courts to desegregate totally before 1970–71.

Under the heading "Committed—1970–71 Terminal" are included:

1. Those districts for which the district court has ordered a terminal 1970–71 plan.
2. Those districts for which such a plan has been achieved through voluntary agreement with HEW.

Under the heading "Uncommitted—1970–71 Terminal" are included:

1. Those systems currently in court proceedings where a final plan has not yet been filed or ordered.

2. Those districts which are under court order but which (a) have been ordered to implement a terminal 1971–72 plan, or (b) are operating under a freedom of choice or other court-ordered plan (terminal later than 1971–72) which does not appear to be effectively desegregating the system for 1970–71; districts in this category are not currently involved in court proceedings.

3. Those districts which are committed to neither a court order nor a voluntary plan; this category includes districts from which HEW is trying to obtain voluntary compliance, those which are involved in out-of-court negotiations with the Justice Department, and those which have reneged on voluntary plans.

Under the heading "Private Suit-Status Unknown" are included districts involved in private suits where our information regarding the progress or status of that suit is not current.

The use of the word "terminal" to describe a plan and "unitary" to describe a system means that the system has been ordered or has agreed to follow a plan which would achieve conversion to a unitary system by the fall of 1970. But some cases are on appeal, some plans may not be fully implemented, and all may still be subject to challenge or modifications in the district courts. In Texas, we have classified as unitary prior to 1970–71 some all-black districts; a govern-

ment suit to merge some of these districts with integrated districts is pending. Because Texas law did not require segregation of Spanish-surnamed students, the report does not take into account litigation involving discrimination against Spanish-surnamed students.

STATUS OF SCHOOL SYSTEMS IN 11 SOUTHERN STATES

	Alabama	Arkansas	Florida	Georgia	Louisiana	Mississippi	North Carolina	South Carolina	Tennessee	Virginia	Texas	Total
Unitary prior to 1970-71	22	205	35	66	33	63	96	12	100	107	1,126	1,866
Committed: 1970-71 terminal:												
Court order	98	18	23	102	26	56	10	22	23	14	28	420
Voluntary plan	0	48	9	13	3	28	35	49	0	11	35	240
Subtotal	120	271	67	181	62	147	143	93	141	122	1,189	2,666
Uncommitted: 1970-71:												
In current court proceedings	2	7	0	1	2	1	4	0	0	1	4	22
Under court order:												
(a) 1971-72 terminal	1	1	0	0	0	1	0	0	0	0	0	3
(b) Not unitary and not in current court proceedings	1	1	0	1	1	0	0	0	0	0	0	13
Not committed to voluntary plan and not in litigation	0	3	0	5	1	1	2	0	3	0	2	17
Subtotal	4	12	0	7	4	3	6	0	3	1	15	55
Private suit—Status unknown	0	3	0	3	0	0	4	0	5	2	3	20
Total number of districts	124	286	67	191	66	150	153	93	149	135	1,207	2,721

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

Preliminary Statement

The respondents and cross-petitioners (hereinafter school board) seek to pose the issue in this case of whether a school board may continue to operate one or more pre-

dominantly black schools. We feel that the issue is more properly posed in the decision of the district court below, namely, whether in the context of the facts developed in this case, the pervasive role of the state and its agencies in creating and perpetuating a racially segregated system, a school board may continue to deny equal educational opportunities to black children on the pretext of preserving "neighborhood schools" or avoiding transportation of students when a feasible alternative is available for complete desegregation. This reply is addressed to the activities and practices of the state, particularly those of the school board, which produced the segregated system which the district court sought to eliminate; the feasibility and practicability of the plan directed by the court; and the fact that the school board and the various amici who have submitted briefs in this matter suggest no viable alternative rule of law to that adopted by the district court and advocated by the petitioners herein. We also discuss the possible applicability of the decision of the Court in this case to other jurisdictions and the applicability of §§401(b) and 407(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000c(b) and 42 U.S.C. §2000c-6(a).

For the Court's information we are attaching as an appendix to this reply a copy of the interim report filed by the school board showing the results of desegregation for the present school term under the plan directed by the district court. As the report demonstrates the plan eliminates all racially identifiable schools in the system with the exception of 3 elementary schools and as to these 3 schools some steps are now being taken in order to alleviate the overcrowded conditions and to prevent resegregation.

ARGUMENT

I.

The Charlotte-Mecklenburg County Schools Were Segregated by Unconstitutional Governmental Action.

The School Board and several amici[1] challenge for the first time the district court's findings of state created and perpetuated racially segregated housing and public schools.[2] They contend that the admitted segregation is merely adventitious. The record, however, clearly demonstrates the contrary. As the district court stated in its Memorandum Opinion of November 7, 1969, segregation of the races in the Charlotte-Mecklenburg system is not "constitutionally benign."

> In previous opinions the facts respecting [the location of schools] . . . their controlled size and their popu-

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[1] See, e.g., Amicus Curiae Brief for the Classroom Teachers Association of the Charlotte-Mecklenburg School System, Incorporated, pp. 20-21.

[2] The Commonwealth of Virginia suggests that such inquiry is irrelevant. See, e.g., Brief for the Commonwealth of Virginia, Amicus Curiae, pp. 8-10. The district court found, however, that the varied actions of the state, including the School Board, had resulted in racially segregated schools as condemned in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955); that inquiry into the forces of the state creating or perpetuating racial discrimination were indeed appropriate and required by decisions of this Court; see, e.g., *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), for the Fourteenth Amendment prohibits "State support of segregated schools through any arrangement, management, funds, or property." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). This Court further stated in *Cooper*, supra at 17: "In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly . . . nor nullified indirectly . . . through evasive schemes for segregation whether attempted 'ingeniously' or 'ingenuously.'" Finding state imposed segregation and a feasible means to correct it, the district court was obligated by the Constitution to enforce the constitutional rights of the black children of this school system.

lation have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school buses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or "de facto," and the resulting schools are not "unitary" or desegregated.[3] (657a, 661a-662a).

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[3] Contrary to the board's assertion (see Briefs of Respondents and Cross-Petitioners, p. 46), this finding did not constitute a reversal of the previous findings of the court; rather it was at this point that the court was pointedly advised by the board, that the board had no intention of complying with the directives of the court. The district court has described its painstaking, patient, but unsuccessful efforts to encourage the board to discharge its affirmative duty to desegregate. (See Supplemental Memorandum 1221a-1238a). It was the board's recalcitrance which led Judge Sobeloff to note in dissent that "this Board, through a majority of its members, far from making 'every reasonable effort' to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn." (No. 9, 1291a-1293a) Moreover, the record clearly demonstrates that the constitutional violations which the district court sought to remedy resulted not just from practices of other governmental agencies but to a large extent from the board's conduct and action in locating and controlling schools, school sites, capacities, attendance districts, etc., all taken in conjunction with and in furtherance of the developing racial housing patterns, both before and after this Court's decision in *Brown*.

We discuss below some of the record evidence supporting these findings.

In the district court's findings of April 23, 1969 (285a, 296a), the court described Charlotte and Mecklenburg County as follows:

> The central city may be likened to an automobile hubcap, the perimeter area to a wheel, and the county area to the rubber tire. Tryon Street and Southern Railroad run generally through the county and the city from the northeast to the southwest. Trade Street runs generally northwest to southeast and crosses Tryon Street at the center of town at Independence Square. Charlotte originally grew along the Southern Railroad tracks. Textile mills with mill villages, once almost entirely white, were built. Business and other industry followed the highways and the railroad. The railroad and parallel highways and business and industrial development formed something of a barrier between east and west.
>
> By the end of World War II many Negro families lived in the center of Charlotte just east of Independence Square in what is known as the First Ward-Second Ward-Cherry-Brooklyn area. However, the bulk of Charlotte's black population lived west of the railroad and Tryon Street and north of Trade Street in the northwest part of town. The high-priced, almost exclusively white, country was east of Tryon Street and south of Trade in the Myers Park-Providence-Sharon-Eastover area. Charlotte thus had a very high degree of segregation of housing before the first Brown decision.

Today, the degree of segregation in housing is even more pronounced. Some of the factors which have contributed to the school segregation follow:

1. *Location and control of schools.* Prior to 1954 all public schools in the City of Charlotte and Mecklenburg County were segregated pursuant to the state law and Constitution.[4] The district court attached as an Exhibit to its Memorandum of Decision and Order of August 3, 1970 a collection of segregation codes of the state which, as indicated by the Memorandum Decision (Br. A4), remained in the state statutes as late as 1969. Schools were located and students and staff personnel were assigned to the various schools on the basis of race. Subsequent to the *Brown* decision and prior to the institution of this proceeding no affirmative steps were taken by the board to disestablish the racially segregated system. Some token integration did take place under the North Carolina Pupil Assignment Act, N. C. Gen. Stat. §115-176, pursuant to which a few black students requested transfer to previously all-white schools. The school board, however, continued to locate and control the various capacities of schools in order to maintain racial segregation.[4a] These practices have continued even through the present day.

In conjunction with the racially developing residential patterns, the school board built or made additions to the following schools subsequent to 1954 solely to accommodate black students.

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[4] Separate boards governed the city and county schools until 1961, at which time the two school units were merged.

[4a] The board controlled grade structures to maintain segregation. In 1965 the system had a basically 6-3-3 grade structure, except that some black schools had different patterns to facilitate racial segregation such as grades: 1-4, 1-7, and 5-9, for example. (See Appellants' Appendix in 1966 appeal to the 4th Circuit, No. 10207, pp. 25-29).

Schools	Year of Construction	Years of Additions
Burns	1968	
Marie Davis	1951	1953 1957 1959
Double Oaks	1952	1955 1965
Druid Hills	1960	1964
First Ward	1912	1950) 1961) 1968) practically complete new facilities.
Lincoln Heights	1956	1958
Oaklawn	1964	
University Park	1957	1958 1964

(Plaintiff's Exhibit 1 in original record; 124a-132a)[5]

Several white schools were built in white areas and predictably enrolled only white students:

Schools	Year of Construction
Devonshire	1964
Albemarle Road	1968
Beverly Woods	1969

These examples are not meant to be exclusive but only exemplary of the practices followed by the board prior

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[5] "Q. Dr. Self, when you built schools since 1954, what efforts did you make, other than what you testified to yesterday, to locate the schools in an area that would effect the greatest maximum integration of students in the system? A. The schools were located in such a way as to house the youngsters, Mr. Chambers, not to effect a maximum amount of integration.

"Q. You did not attempt to do it? A. We made an attempt to house the youngsters in the neighborhood." (132a)

• • •

"Q. And I think that on your drawing board right now are plans to build more schools that are going to be all white and some that will be all black. A. I'm sure that the enrollment in the schools will be affected by the neighborhood served." (129a)

to and since *Brown*. (Plaintiffs' Ex. 1 in original record; 127a-129a). Even at the time of the March 1969 hearing the board was proceeding with construction of a new junior high school (Carmel Road) which under the board's most recent attendance zone plan would have been 100 per cent white (512a (designated "Project 600"), 747a).

Additionally, the board has added mobile units in order to accommodate any influx of black or white students in the segregated schools rather than redraw attendance districts and assign either black or white students to schools of the opposite race (Pls'. Ex. 1 in original record). Defendants have controlled school districts in order to limit the race of students assigned to the various schools (Compare Pls'. Exs. 1, 4, 24). As the court noted in its Opinion and Order of June 20, 1969:

> "[I]t may be timely to observe and the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of 'building schools where the pupils are' without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James obviously serve school zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not named as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true 'neighborhood school' philosophy." (455a-456a) (see also note 5, supra; 132a).

Transportation has been arranged for students in order to perpetuate segregation. Even through the 1964-65 school year, the board continued racially overlapping bus routes.

For students in the city and its immediate environs, black schools have been located within convenient walking distance of black residential areas. White schools have generally been located in outlying white residential areas necessitating bus transportation. Thus of the 23,384 students provided transportation during the 1969-70 school year only 541 of such students were transported to black schools (1014a-1032a, 1203a-1204a). Coupled with these practices the school board continued freedom of choice to permit those students enclosed within school districts of the opposite race to transfer to other schools where their race would be in the majority.

2. *Urban Renewal.* Urban renewal has contributed to the residential segregation by relocating black families from urban renewal areas to black residential areas or areas rapidly changing to black. Principally, all of the black families relocated by the city urban renewal programs, principally all of which have taken place since 1960, have been relocated in black residential areas and the few white families who have been relocated have been relocated in white residential areas. A similar practice has prevailed in the relocation of families uprooted by new streets and highways (209a-214a, 282a-283a; Plaintiffs' Exhibit 42). The court characterized this practice as follows:

> Under the urban renewal program thousands of Negroes were moved out of their shotgun houses in the center of town and have relocated in low rent areas to the west. This relocation of course involved many ad hoc decisions by individuals and by city, county, state and federal governments. Federal agencies (which hold the strings to large federal purses) reportedly disclaim any responsibility for the direction of the migration; they reportedly say that the selection of urban renewal sites and the relocation of dis-

> placed persons are matters of decision ("freedom of choice"!) by local individuals and governments. This may be correct; the clear fact however is that the displacement occurred with heavy federal financing and with active participation by local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon-railroad area, or on its immediate eastern fringe (297a-298a).

The record demonstrates, however, that even this relocation did not afford the affected families a "free" choice for, as indicated below, homes in other areas were simply not available to black families (Plf. Exhs. 14, 19, 42 in the original record; 28a-64a, 208a-215a, 282a-283a). Moreover, with the overcrowding of schools which resulted from the relocations, the school board simply added additional rooms to existing black schools to accommodate the black students.

3. *Public Housing.* Consistent with the city's zoning practices of locating multi-family and low income housing in black residential areas, all public housing, built principally since 1960 and now generally occupied by blacks, has been located in black residential areas. Even projected public housing has been designated for black residential areas (Plf. Exhs. 14, 19, 29 and 42 in original record; 215a-217a). The effects of such practices in perpetuating segregated housing is seen even in the most recent plan directed by the district court where three of the elementary schools and one of the junior high schools, projected to be predominantly white, have since the beginning of this school year become predominantly black because of the relocation of additional black families in federally financed, low-income housing in black residential areas of the four school districts (Reply Brief App. 10a-15a).

4. *City Zoning.* City zoning has influenced separation of the races by marking out and designating by land usage those areas of the city occupied by blacks and those occupied by whites. Beginning in 1947, the city enacted its first zoning ordinance and in effect delineated the black and white residential areas. All white residential areas were zoned residential with restricted land usage. All black residential areas, with the exception of two small pockets adjacent to white residential areas, were zoned industrial for multi-land usage, including heavy industry, multi-family homes and high density areas. Even the two excepted black areas were zoned for higher density use than the white residential areas (174a, 202a-207a, 251a, 268a, 272a-283a). This difference in zoning practices for black and white residential areas has been carried forward to the present day in the major revisions of the zoning ordinance in 1962.

Industrial zones have continued to be restricted to black residential areas. Additionally, the residential zoning authorized for the black areas in the 1962 zoning ordinance has been limited to high density zones, R-6 and R-9 requiring 6,000 square feet and 9,000 square feet, respectively, for a single family home. No black residential area in the City today has a higher density zoning than R-9 while principally all white residential areas have restricted zoning of R-12, R-15 or above (206a-208a; Plf. Exh. 10 in original record (maps showing present zoning for city of Charlotte)). As testified by plaintiffs' witness during the March 1969 hearing, the effect of such zoning makes the land in the black residential areas accessible to other uses; permits the rapid deterioration of the quality of the land—"and this is clearly evident from the amount of industrial development which has taken place in areas of Negro residences;" reduces the housing value; and introduces blighted and noxious usages into the area (204a).

It delineates for governmental and private developers, school officials and home buyers and renters those areas of the city for blacks and those for whites.

5. *City Planning.* City planning has further enforced segregation in housing. In a comprehensive proposal in 1960 entitled "The Next Twenty Years" (Plf. Exh. 12 in the original record), the City Planning Commission proposed the continuation of basically the same racially discriminatory zoning practices with high density and multi-land usage in black residential areas and restricted zoning in the white residential areas. While the proposal itself, absent approval by the City Council, should have no controlling effect, it nevertheless provided the blueprint for developers of what land usage would be permitted in the future. As plaintiffs' witness testified:

> The only elements of the plan which develop any compelling force are those elements which relate to facilities or land uses which are normally provided by government, things such as roads, or public buildings. Quite naturally, the development of residential or industrial land is subject to the decision-making of private developers within, of course, whatever the legal constraints are which the city imposes. But the plan very definitely sets a direction in the recoommendations which it develops and it's those recommendations which are particularly significant in this case (188a).
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> • • •
>
> This planning document ["The Next Twenty Years"] was developed in 1960 so that this is the major impact. The secondary effect of this document is the proposed interstate highway system and the major arterial streets in the Charlotte area. And again one can see that the major north-south route—I-77—tends to reinforce this north-south division by running adjacent

to and parallel to the industrial band which runs through the city [separating the black residential area on the west from the white residential area on the east] (195a, 196a).

The Planning Commission's proposal was largely enacted by the City Council in the revised zoning code of 1962 (202a, 220a).

6. *Streets and Public Highways.* Streets and public highways have perpetuated barriers between the races. Streets have been designed to provide ease of communication only within the separate white or black residential areas with little means of communication between them. Additionally, one of the major federally financed interstate routes now being constructed through the city, the North-South Expressway (I-77), further marks, along with the Tryon Street-Southern Railroad, the division between the racially separate areas (195a, 216a-217a; Plf. Exh. 13 in original record).

7. *Private Discrimination.* Private discrimination has been pervasive in establishing and perpetuating the racially segregated housing that exists in the city. Blacks simply have been denied access or the right to purchase or rent in white residential areas. Construction firms and real estate agents and banking institutions, including the federal government, have planned and developed racially segregated areas. As the court below noted (1264a), such developments were perpetuated by racially restrictive covenants which were enforced by the North Carolina Supreme Court until this Court's decision in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). See, e.g., *Phillip* v. *Wearn*, 226 N.C. 290, 37 S.E. 2d 895 (1946); *Eason* v *Buffaloe*, 198 N.C. 520, 152 S.E. 496 (1930); *Vernon* v. *R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710 (1946). Such developments have been followed by the school board with con-

struction of new schools "to house the youngsters in the neighborhood." (132a) Black areas or developments have been purposely located west of the Tryon Street-Southern Railroad dividing line and white developments on the east side of the dividing line. Prior to the 1968 Civil Rights Act, 42 U.S.C. §§3601 et seq., real estate agents were bound by their code of ethics to perpetuate this policy of discrimination (Plf. Exhs. 33, 34, 35, 36 in original record; 28a-57a, 282a-283a). Limitations on the ability and freedom of blacks to purchase and rent homes in other areas of the city continue today.[6]

The school board now proposes to engraft on this segregated system, district and housing pattern zones which would leave the majority of the black and white students in racially segregated schools (See projected enrollment under board's plan of February 2, 1970, 744a-748a). The pervasiveness of the state practices in creating and perpetuating the housing patterns and segregated schools is no different than the former constitutional provisions compelling racial separation in public schools. It is clearly illusory to contend otherwise for the black students in the all black and predominantly black schools would be locked into those schools just as effectively and with as much state control as they were under the former compulsory system rejected in *Brown.* Cf. *Brewer* v. *School Board of City of Norfolk,* 397 F.2d 37, 41-42 (4th Cir. 1968). The district court addressed this problem in its Memorandum Decision and Order of August 3, 1970.

> "The principle difference between New Kent County, Virginia, and Mecklenburg County, North Carolina, is

[6] A black family which moved into a home in a white residential area of the city on September 4, 1970 was intimidated and threatened repeatedly and nightriders fired shotgun blasts into their home while the family was asleep. *Charlotte Observer,* Sept. 5, 1970, at 1A.

that in New Kent County the number of children being denied access to equal education was only 740, whereas in Mecklenburg that number exceeds 16,000. If *Brown* and *New Kent County* and *Griffin* v. *Prince Edward County* and *Alexander* v. *Holmes County* are confined to small counties and to "easy" situations, the constitutional right is indeed an illusory one. A black child in urban Charlotte whose education is being crippled by unlawful segregation is just as much entitled to relief as his contemporary on a Virginia farm." (Br. A10)

Additionally, the court noted that the issue involved here is not the validity of a "system" but the *rights* of individual people:

> If the rights of citizens are infringed by the system, the infringement is not excused because in the abstract the system may appear valid. "Separate but equal" for a long time was thought to be a valid system but when it was finally admitted that individual rights were denied by the valid system, the system gave way to the rights of individuals." (Br. A13)

The court again noted that "the essence of the *Brown* decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and breadth of experience, and that segregated education itself is inherently unequal." (Br. A15)

Testing results which the court had noted in previous orders (see Order of August 15, 1969, 579a, 586a-590a; Opinion and Order of December 1, 1969, 698a, 702a-706a; Supplemental Findings of Fact of March 21, 1970, 1198a, 1206a) further substantiated the adverse effect that racially segregated schools have on black children in the Charlotte-Mecklenburg school system.

It was this record of state imposed segregation which led the court to reject any finding of de facto or constitutionally benign racially segregated schools and housing in the Charlotte-Mecklenberg system. The Fourth Circuit held these findings to be "supported by the evidence" and accepted "them under familiar principles of appellate review." (264a).

It is these facts and findings which required that appropriate steps be taken by the school board to disestablish the state imposed segregated system.

Several lower court decision have held that school officials under these circumstances may not perpetuate segregated schools under the guise of a neighborhood system. *Henry* v. *Clarksdale Municipal Separate School District*, 409 F.2d 682 (5th Cir. 1969) *cert. den.* 396 U.S. 940 (1969); *United States* v. *Greenwood Municipal Separate School District*, 406 F.2d 1086 (5th Cir. 1969) *cert. den.* 395 U.S. 907 (1969); *United States* v. *Indianola Municipal Separate School District*, 410 F.2d 626 (5th Cir. 1969), *cert. den.* 396 U.S. 1011 (1970); *Valley* v. *Rapides Parish School Board*, 423 F.2d 1132 (5th Cir. 1970); *United States* v. *Board of Education of Baldwin County*, 423 F.2d 1013 (5th Cir. 1970); *Mannings* v. *Board of Public Instruction of Hillsborough County*, 427 F.2d 874 (5th Cir., No. 28643, May 11, 1970); *Ross* v. *Eckels*, —— F.2d —— (5th Cir. No. 30080, Aug. 25, 1970); *Kemp* v. *Beasley*, 423 F.2d 851 (8th Cir. 1970); *United States* v. *School District, 151 of Cook County, Illinois*, 286 F Supp. 786 (N.D. Ill. 1968), *affirmed* 404 F.2d 1125 (7th Cir. 1968); *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla. 1965) *affirmed* 375 F.2d 158 (10th Cir. 1967), *cert. den.*, 387 U.S. 931 (1967); *Keyes* v. *School District No. 1, Denver*, 303 F. Supp. 79 (D. Colo. 1969).

Such holdings are based on the long established principle that a state may not evade the prohibition of the Fourteenth Amendment by engrafting neutral, or otherwise unobjectionable practices upon constitutionally objectionable ones, where the effects would perpetuate constitutional deprivations. See, e.g., *Lane* v. *Wilson*, 307 U.S. 268 (1939); *Commonwealth of Pennsylvania* v. *City of Philadelphia*, 353 U.S. 230 (1957); *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); cf. *Gaston County* v. *United States*, 395 U.S. 285 (1969), affirming 288 F. Supp. 678 (D.D.C. 1968). See also *Coppedge* v. *Franklin County Board of Educ.*, 394 F.2d 410 (4th Cir. 1968), affirming 273 F. Supp. 289 (E.D.N.C. 1967); *Local 189, Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); pp. 32-34 Brief Amicus Curiae for the National Education Association.

II.

The Assignment Plan Now in Effect Is Workable and Desegregates the Schools.

The school board urges here that the pupil assignment plan it offered to the district court on February 2, 1970, which has been rejected in every respect by both courts below, should have been approved. We have discussed at some length in our brief on the merits the court directed plan which is now in effect and the majority board plan.[7]

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[7] The board plan is actually the plan of five of the nine members of the board. Four members of the board offered an alternative plan for the complete desegregation of the system at the July, 1970 hearing. Judge McMillan found that plan acceptable, but the board chose to implement the plan which had been directed on February 5, 1970 (BR. A1 et seq.).

We respond here only to respondents' discussion in support of their plans for junior and senior high schools, matters not directly addressed by our brief on the merits.

The Junior High School Plan. The board's principal attack on the present assignment plan as ordered by the court is that it employs the technique of satellite zones while under the board plan all students would be assigned to a school within a zone which surrounds their school. The board therefore says that its plan maintains the "neighborhood school" concept. The court-ordered plan, it says, does not. We have previously demonstrated that the neighborhood school theory cannot be supported in history and tradition as a justification for continued segregation because it was widely and invariably disregarded in order to promote segregation.[8] Moreover, a comparison of the two plans shows that the board's arguments are entirely spurious.

At the junior high school level the court ordered plan draws zones around the twenty-one schools. In addition some smaller zones (satellites) are made in the black inner-city area which do not surround any schools. The black children in these zones are assigned to nine of the 21 junior high schools;[9] 12 of the schools have no satellites.[10] (See Respondents-Cross Petitioners' Brief Appendix, Map 7.) The board's plan includes no satellites. (See Respon-

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[8] See Brief for Petitioners, pp. 80-83. See also, Opinion and Order, April 23, 1969, 305a-306a.

[9] There are satellites for Eastway, Cochrane, Wilson, McClintlock, Albemarle Road, Carmel (sometimes referred to as P-600), Smith, Quail Hollow and Alexander Graham (sometimes referred to as "A.G.").

[10] The schools without satellites are: Alexander, Coulwood, Ranson, Northeast (sometimes referred to as J. H. Gunn, Wilgrove or P-601), Williams, Northwest, Spaugh, Kennedy, Sedgefield, Piedmont, Hawthorne and Randolph.

ents'-Cross-Petitioners' Brief Appendix, Map 6.) However, the board would leave 842 black children in Piedmont Junior High, a racially identifiable school (830a). This would nearly double the number of black students at Piedmont from the 1969-70 school year (Ibid). The board's justification for leaving a segregated black junior high school is its adherence to what it calls the neighborhood school concept. We suppose a neighborhood school means that the children who attend the same school are "neighbors." A close examination of the board's maps shows that the white and black children attending the junior high schools are as much "neighbors" under one plan as under the other.

The board zones are drawn so that there are corridors which lead into and include portions of the black community in order to integrate the formerly white schools.[11] Four of the five predominantly black schools were dealt with by extending the zones to include white areas. (Id. Map. No. 6)[11a] Five of the predominantly white schools under the board's plan would remain nearly all-white (830a).[12]

The court ordered plan, on the other hand, eliminates the board's corridors leading from black neighborhoods to white schools and simply assigns the black students to the outlying white schools. In fact, some of the same students residing within satellites of five of the schools would be assigned to the same school under the board plan.[13] Other black children were assigned from satellite

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[11] See, e.g., Coulwood, Ranson, Cochrane, Eastway, Wilson, Sedgefield, Smith and Randolph.

[11a] See, e.g., Hawthorne, Kennedy, Northwest, and Williams.

[12] Albemarle Road, McClintock, Quail Hollow and the two schools opened for the 1970-71 year, Carmel (P-600) and Northeast (referred to variously as J. H. Gunn, Wilgrove and P-601).

[13] Smith, Eastway, Cochrane, Wilson, and Alexander Graham (A.G.).

zones in the central city to predominantly white schools not desegregated by the board's plan. Under both plans black children are assigned to outlying schools and white children are assigned to formerly black inner-city schools. The principal difference in technique therefore between the plans is that the court ordered plan does not have connecting corridors between the white schools and the black areas. The principal difference in result is that court's plan is effective, complete and stable while the board's plan is limited, incomplete and is subject to the problems of resegregation.[14] We offer the following additional commitments about the board's connecting corridors and the administrative workability of the plans.

The board's connecting corridors bear no relationship to any conceivable neighborhood concept nor any relationship to any natural landmarks such as major thoroughfares. Therefore, the transportation system would be considerably more complex under the board's plan than under the plan adopted by the court. Judge McMillan emphasized this point in the Supplemental Findings of Fact of March 21, 1970:

> "Two schools may be used to illustrate this point. Smith Junior High under the board plan would have a contiguous district six miles in length extending 4½ miles north from the school itself. The district throughout the greater portion of its length is one-

[14] This is emphasized by the board's Interim Report on Desegregation, of September 23, 1970 (printed as an appendix herein, 10a-15a), which describes a developing problem of resegregation at Spaugh caused by new public housing projects. The board's limiting requirement that all students must reside within a zone surrounding a school would make it impossible to deal effectively with this situation caused by the policies and actions of governmental officials. By using the techniques of the court-ordered plan, the board can control the population at Spaugh so that it does not become a racially identifiable black school.

half mile wide and all roads in its one-half mile width are diagonal to its borders. Eastway Junior High presents a shape somewhat like a large wooden pistol with a fat handle surrounding the school off Central Avenue in East Charlotte and with a corridor extending three miles north and then extending at right angles four miles west to draw students from the Double Oaks area in northwest Charlotte. Obviously picking up students in narrow corridors along which no major road runs presents a considerable transportation problem.

The Finger plan makes no unnecessary effort to maintain contiguous districts, but simply provides for the sending of busses from compact inner city attendance zones, non-stop, to the outlying white junior high schools, thereby minimizing transportation tie-ups and making the pick-up and delivery of children efficient and time-saving. (1210a-1211a).

The district judge's finding was supported by the testimony of the court consultant[15] and the superintendent of schools:[16]

> Dr. Self, the school superintendent, and Dr. Finger, the court appointed expert, both testified that the transportation required to implement the plan for junior highs would be less expensive and easier to arrange than the transportation proposed under the board plan. The court finds this to be a fact. (1210a).

He concluded his analysis of the plan in the following way:

> In summary, as to junior high schools, the court finds that the plan chosen by the board and approved by the

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[15] 957a-958a.

[16] 803a-804a.

court places no greater logistic or personal burden upon students or administrators than the plan proposed by the school board; that the transportation called for by the approved plan is not substantially greater than the transportation called for by the board plan, that the approved plan will be more economical, efficient and cohesive and easier to administer and will fit in more nearly with the transportation problems involved in desegregating elementary and senior high schools, and that the board made a correct administrative and educational choice in choosing this plan instead of one of the other three methods (1211a-1210a).

The Senior High School Plan. The board also complains about the approval by the courts below of the satellite zone for Independence High School from which 300 black children are assigned to a school which would have had only 23 blacks enrolled under the board plan. Judge Butzner in approving this portion of the plan observed that:

> The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools (1273a).

He also noted that the non-stop bus trips for these students compares favorably in terms of distance with the transportation of other students assigned to Independence "and is substantially shorter than the systems average one-way trip of 17 miles" (1273a, n. 6).

The distance involved is also substantially equivalent to the distance to be traveled under the board's high school

plan by inner-city black students assigned to South Mecklenburg, East Mecklenburg, and West Mecklenburg and by which students are assigned to the formerly all-black West Charlotte School. (See Respondents-Cross-Petitioners' Brief Appendix, Map No. 8.)

Moreover, the children living within the Independence satellite zone would, under the board's plan, be assigned to Harding and West Mecklenburg high schools serving the area which the board reports is experiencing greater black enrollment than expected at the elementary and junior high school levels because of recently completed public housing.[17] If the 300 black children now going to Independence were, instead, going to Harding and West Mecklenburg, we would expect that the board would be reporting the anticipated resegregation at the high school level which they now expect at Spaugh Junior High School. Spaugh now has a 38.4% black enrollment. Under the board plan the combined enrollment at Harding and West Mecklenburg High Schools would be 39% black.[18] The combined enrollment is now only 31% black. Presumably the forces which the board expects to create resegregation at Spaugh Junior High School, if not corrected, including the anticipated early occupancy of 240 additional public housing units at Little Rock Homes would also have had the same effect upon Harding and West Mecklenburg High School if the district court had not required the assignments to Independence.

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[17] See appendix to this brief, 10a-15a.

[18] This figure is computed by adding 300 black students to the September 23, 1970 enrollments reported at Harding and West Mecklenburg.

III.

The School Board Proposes No Viable Rule of Law to Define the Goal of a Unitary System.

The board asks this Court to "give instruction and guidance to school boards" as to the requirements of a unitary school system. (Brief of Respondents p. 32; hereinafter referred to as "Brief") They offer, however, no standard or rule which would clarify the law.

The school board's position, as we understand it, is that the legal conclusions drawn by the Fourth Circuit are correct (*Id.* p. 36). The board supports the court's rule of reasonableness (*Ibid.*) which was stated as follows:

> "[S]chool boards must use all reasonable means to integrate the schools in their jurisdictions." (1267a)

The board does not seem to deny that it has some affirmative duty to desegregate.[19] Indeed, it quotes with approval

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[19] Respondents are not clear as to what they view as their minimal obligations to desegregate. They claim that "In formulating its plan, the Board to a very significant degree has elected to exceed Constitutional requirements" (Brief, p. 80). However, we do not understand them to adopt the position of several of the *amici* that a unitary system is created by engrafting upon a dual school system an ostensibly neutral geographic assignment plan, which leaves racial segregation intact. *Amicus Curiae* Brief for the Classroom Teachers Association of the Charlotte-Mecklenburg School System, Incorporated; *Amicus Curiae* Brief of the State of Florida; cf. *Amicus Curiae* Brief of William C. Cramer, *et al.* Such a position clearly conflicts, we think, with the decisions of this Court in *Brown* v. *Board of Education, supra; Green* v. *Country School Board of New Kent County*, 391 U.S. 430 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *Raney* v. *Board of Education*, 391 U.S. 443 (1968); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969) and *Northcross* v. *Board of Education*, 397 U.S. 232 (1970). The other circuits are in agreement with the court below that a dual school

the conclusion of the court that smaller school districts are required to desegregate completely: "All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering or consolidating schools and transporting pupils." (1267a quoted at p. 36, Brief for Respondents).

In our brief on the merits we have criticized the "reasonable means" test (pp. 58-65) on the ground that it is a subjective standard which portends a new era of litigation and which sanctions a great deal of continuing segregation. The board's position underscores what we have said. They would have this Court adopt the rule of the Court of Appeals, but reject its application to the facts of this case. The board thus argues that its affirmative duty to eliminate the vestiges of segregation would be satisfied by its desegregation plan of February 2 (726a-748a) even though more than one-half of the black children would still be attending racially identifiable black schools because it says its plan employs all reasonable means. In concluding their brief, the board asserts that the means they have chosen are reasonable because their choices represent the "value judgments of the elected school board and the educators or its administrative staff" (*Id.*, at 100).

At bottom, the board is arguing that locally elected school boards must be vested with the discretion to determine not only the means but also the extent of desegrega-

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system is not dismantled by simply drawing zone lines which leave racial segregation in the schools undisturbed. See, e.g., *Henry* v. *Clarksdale Municipal Separate School District supra; Mannings* v. *Board of Public Instruction of Hillsborough County, supra; Ross* v. *Eckels, supra;* see analysis of Fifth Circuit's "Neighborhood School" concept in Brief for Petitioners *Davis* v. *Board of School Commissioners of Mobile County*, O.T. 1970, No. 436; *United States* v. *School District, 151 of Cook County, Illinois, supra; United States* v. *Board of Education, School District No. I, Tulsa, Okla.*, —— F.2d —— (10th Cir. 1970). We therefore do not address further the arguments of the above *amici*.

tion which is to occur within their jurisdictions. This plea for school board discretion is echoed in several *amicus curiae* briefs filed in this case. Brief for the Commonwealth of Virginia, *Amicus Curiae*, p. 27; Brief of the City of Chattanooga, Tenn., *Amicus Curiae*, p. 28; *Amicus Curiae* Brief of David E. Allgood, An Infant etc., *et al.*, p. 13.[20]

If the constitutional rights of black children to a desegregated school are to be left to the best judgments of local school boards, then, of course, many of the legal problems will be solved. A unitary school system would be whatever a local school board determines it to be. It would also, almost inevitably, be a segregated school system. Judge Sobeloff spoke to the matter of school board discretion in his dissent below:

> In making policy decisions that are not constitutionally dictated, state authorities are free to decide in their discretion that a proposed measure is worth the cost involved or that the cost is unreasonable, and accordingly they may adopt or reject the proposal. This is not such a case. Vindication of the plaintiffs' constitutional rights does not rest in the school board's discretion as the Supreme Court authoritatively decided sixteen years ago and has repeated with increasing emphasis (1288a).

The board offers no rule which would resolve the questions which it claims need answers,[21] other than its request that

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[20] Some of these amici seem also to argue for a "colorblind" test of the variety described in the preceding footnoote.

[21] The State of Florida, Governor Claude R. Kirk, Jr., The Commonwealth of Virginia, The Chattanooga Board of Education, the Concerned Citizens of Norfolk, Virginia and the Classroom Teachers Association of the Charlotte Mecklenburg School System, Inc., as *amici curiae*, join in respondents insistence that there are important questions to be answered. We perceive no viable answers in their

the discretionary decision of school boards be honored by the courts. We cannot believe that these crucial constitutional rights are to be left to a majority vote.

The school board offers no viable definition of a unitary school system. The Fourth Circuit's reasonable means test is "inherently ambiguous" (1289a) and is "a new litigable issue" which, as the board's brief makes clear would be "exploit[ed] . . . to the hilt." (1290a). Petitioners urge this Court to reject the reasonableness test either as announced in the court below or as would be further limited by the school board. The only thing certain about "reasonableness" as a standard in this context is that it sanctions a significant amount of continued segregation in the public schools.

Petitioners find no warrant in *Brown* or its progeny for any standard or test which at the outset assumes that segregation will remain. We submit that a dual school system must be required to reorganize so that *every* black child is to be free from assignment to a racially identifiable "black" school, at every grade of his education. The only exception to this general rule would be where eliminating all black schools is absolutely unworkable.[22] The plan or-

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submissions. They would either have the Court adopt a "color blind" standard which would leave segregation intact (see note, 20, supra, and accompanying text) or a rule placing great emphasis on school board discretion (see note 19, supra, and accompanying text.)

[22] See the concurring opinion of Mr. Justice Harlan in *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 292 (1970).

See also the dissenting opinion of Judge Sobeloff below:

> Of course it goes without saying that school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished (1284a).

dered by the district court in this case accomplishes the goal[23] which we urge. And it works.[24]

IV.

The District Court Was Correct in Not Attempting to Declare a General Rule of Law to Govern the Multitude of Varied Circumstances of School Segregation in Other Cities and Other Parts of the United States.

The school board's brief suggests that Judge McMillan relied upon grounds to support his desegregation order which would apply to Chicago (or other large northern cities) as well as to Charlotte-Mecklenburg. The board thereby attempts to precipitate this Court into consideration of the enormously complicated problem that is sometimes termed "de facto" school segregation.[25] The Court is neither required nor able to consider that problem in this case.

Judge McMillan did not base his order on general principles applicable out of the context of classical school segregation under state segregation laws and practices—de jure segregation—nor, indeed, upon broad principles of

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[23] See Brief for Petitioner, *Davis* v. *Board of School Commissioners of Mobile County*, O. T. 1970, No. 436, pp. 63-49, for a full discussion of the general principle we ask this Court to announce.

[24] See Report, etc., which is printed as an Appendix to this Brief, 4a-9a (showing enrollment in the schools as of September 21, 1970).

[25] We think the labels "de facto" and "de jure" are somewhat unhelpful and confusing because the terminology tends to beg the question at issue, i.e., whether the government is responsible for the segregation to a sufficient extent that the Fourteenth Amendment prohibits its continuance. The terminology tends to assume that there is a distinction between the causes of segregated schools in the North as opposed to the South. That is a question which must in the final analysis be decided in the concrete circumstances of cases which present the issues.

ny sort applied out of the context of the particular school ystem of Charlotte. What Judge McMillan did, as he was legally and realistically obliged to do was to consider ll of the factors in the Charlotte situation that were relevant to determining whether the school board had fulfilled its obligations under *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and, if not, what steps were necessary to require it to fulfill those obligations.

That is also the only question before this Court. Nothing in this case obliges the Court to consider questions of so-called *de facto* segregation, for in this case we deal with an archetype of *de jure* segregation and a question of the proper remedies for it.

Prior to 1954, public schools in Charlotte-Mecklenburg were segregated pursuant to the state constitution and laws of North Carolina. Judge McMillan's opinion of August 3, 1970, attaches as an appendix the elaborate code of segregation laws adopted in North Carolina, including about sixty-five sections of the General Statutes and two sections of the Constitution. (This exhibit of the segregation laws has not been printed in the appendices, but is contained in the original record attached to the opinion of August 3, 1970.) Under this segregation code racial segregation of pupils and faculties and all aspects of the system was complete. A dual system of schools for whites and Negroes was maintained throughout the state under the compulsion of these laws. As Judge McMillan has noted many of these laws were still on the books in North Carolina when his April 23, 1969, opinion was written, although many were repealed thereafter by the 1969 General Assembly.

Although segregation in schools was unconstitutional from 1954 to 1970, as a practical and a legal matter, racial segregation has continued in the Charlotte-Mecklenburg

schools through the 1969-1970 school year. The board maintained until June 1969 a pupil assignment system based on geographic zones and freedom of transfer which was substantially the same as that held unconstitutional by this Court in *Monroe* v. *Board of Commissioners of Jackson, Tenn.*, 391 U.S. 450 (1968). Thus Judge McMillan found last year that the 9,216 pupils "in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision" (661a). Judge McMillan has been addressing a problem of how to desegregate all-black schools in Charlotte which remained in the pre-1954 pattern.

In determining whether the promise of *Brown I* that such segregation would be eliminated "root and branch" is applicable, Judge McMillan and this Court should properly give weight to the impact of all factors which operate within the school system of Charlotte-Mecklenburg to bring about its present condition or enable its change. It was for this reason that Judge McMillan considered—and we invite this Court to consider—such matters as housing demographic patterns effected by public housing, urban renewal, city zoning, racial restrictive covenants enforced by state laws, and by school planning decisions (school location, school size, grade structure, school attendance areas, etc.). All of these factors are related in determining the school system that Charlotte has today, and in appraising whether it meets the requirements of a desegregated system. Judge McMillan recognized, as this Court must, that the present system is the result of many factors. For example, decisions about whether to build schools, where to build schools, and the capacity of the schools to be built, shape neighborhood and demographic patterns over many years. Now that the schools have shaped the neighborhood, Judge McMillan reasonably took the view that a school system was not meeting its obligation to desegregate if it

now permitted the neighborhoods to shape the schools. The neighborhoods to which respondents advert as the basis of the "neighborhood school principle" are themselves the product of state planning and state action of many sorts, by the board of education and other state organs over many years. One can no more say that a neighborhood school principle in this setting achieves desegregation because it is "color blind" than one could sustain the operation of "color blind" Grandfather Clauses used by many states to perpetuate voting discrimination after this Court voided more obvious forms of denying black citizens the franchise. *Lane* v. *Wilson*, 307 U.S. 268 (1939).

But this does not mean that any of the factors considered by Judge McMillan here urged on this Court would have the same significance in another context, particularly with relation to a different question: for example, the question whether the City of Chicago has an unconstitutionally segregated school system in the first instance. This Court should be exceedingly cautious in indulging the assumption suggested by respondents that Chicago does pose the same —or indeed a different—problem than does Charlotte. We simply do not know, respondents do not know, and the Court does not know what problems Chicago may pose. One thing that the Court does know is that school desegregation problems are very complex, and arise against the full, complicated factual situations in different localities. What appears to be "de facto" in one context may be "de jure" in another. It is wholly inappropriate for the Court to decide this case in light of fears or concerns as to how problems in Chicago might be resolved, when there is not now a record before the Court suggesting either what the issues in Chicago might be or what the full set of complicated factual circumstances in Chicago, relevant to those issues, are.

V.

The Civil Rights Act of 1964 Does Not in Any Way Limit the Power of the Courts to Fashion Remedies for Unconstitutional Racial Segregation in Public Schools or Prohibit the Courts from Requiring Busing of Pupils to Disestablish Dual Segregated School Systems.

The school board and some of the *amicus curiae* have argued that two provisions of the Civil Rights Act of 1964—sections 401(b) and 407(a), codified as 42 U.S.C. §§2000c(b)[26] and 2000c-6(a)[27]—justify reversal of the dis-

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[26] §2000c. *Definitions*

As used in this subchapter—

* * *

(b) "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Pub.L. 88-352, Title IV, §401, July 2, 1964, 78 Stat. 246.

[27] §2000c-6. *Civil actions by the Attorney General—Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants*

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are

trict court's desegregation plan. The board's brief argues that the Civil Rights Act of 1964 "expressly prohibits a United States Court to order transportation to achieve racial balance in schools" (School Board brief herein, Argument I.-E-4). This audacious effort to convert the Civil Rights Act into a sword against school desegregation has been rejected by every court of appeals which has been confronted with the argument, including the decision below by Judge Butzner (A. 1274a). See petitioners' brief herein at pp. 65-66 and cases cited. Judge Butzner concluded for the court below:

> Those provisions are not limitations on the power of school boards or courts to remedy unconstitutional segregation. They were designed to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the question of whether

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unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

* * *

Pub.L. 88-352, Title IV, §407, July 2, 1964, 78 Stat. 248.

school boards were obligated to overcome *de facto* segregation (1274a).

The board's argument is entirely untenable because it is in conflict with the plain language of the Civil Rights Act and with the legislative purpose of the Congress.

The language of section 407(a) makes it clear that the relevant proviso was added merely to insure that the law was not interpreted to enlarge the powers of the federal courts. There is no language in the section which *prohibits* the courts from doing anything. Section 407 authorizes the attorney general to institute school segregation cases in the name of the United States in the federal courts upon receiving complaints of aggrieved citizens that they were "deprived by a school board of the equal protection of the laws." The section provides that the United States may sue "for such relief as may be appropriate" and that the appropriate district courts "shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section." Immediately after this grant of jurisdiction over suits brought by the attorney general, section 402 states the proviso that the board relies on, which says that nothing therein empowers any official or court of the United States "to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one such school district to another in order to achieve such racial balance, *or otherwise enlarge* the existing power of the court to insure compliance with constitutional standards" (emphasis added).

There is simply nothing in this language that prohibits the federal courts from doing anything. It certainly does not forbid anything the courts find necessary to "insure compliance with constitutional standards" (section 407).

The whole purpose of §407 is to enable the federal government to institute suits to "further the orderly achievement of desegregation in public education" by enforcing the Equal Protection Clause through suits in the federal courts.

The proviso applies only to suits instituted pursuant to the section—that is, where the federal courts exercise the jurisdiction conferred to entertain school desegregation cases instituted by the attorney general. The provision has no application whatsoever to this Charlotte school case which was not instituted by the attorney general but was filed by petitioners who invoked the district court's jurisdiction under 28 U.S.C. §1343 to enforce their rights under 42 U.S.C. §1983 and the Fourteenth Amendment. The United States is not even a party to this case. Section 409 of the Act (42 U.S.C. §2000c-8) provides that "Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education or in any facility covered by this title." Thus, the Congress made plain that any limitation placed on suits brought by the attorney general would not "adversely affect" suits brought by private litigants.

But even assuming arguendo that the section does apply to suits initiated by private citizens seeking desegregation, there is nothing in the language or in the legislative history which suggests that it was the purpose of the Congress to restrict the power of the federal courts in deciding constitutional issues in school desegregation controversies. On the contrary, Senator Humphrey, the manager of the bill in the Senate (where the provision originated), explained its purpose quite clearly. His statement dispels any possibility of ambiguity about the purposes of the proponents of the provision:

> Mr. Humphrey. Mr. President, this matter requires a statement. Therefore, I take this time to state, for

the proponents of the bill, that the language of title IV which provides that nothing in the title shall empower any Federal court or official to issue an order requiring the transportation of school children to correct racial imbalance in the schools has been the subject of considerable discussion. This provision of title IV recognizes that the problems of racial imbalance and school transportation are presently the subjects of considerable court consideration and local administrative action, as well as a great deal of discussion, often heated, among parents and educators. In some instances, courts have decided that racial imbalances may constitute a denial of equal protection of the laws. *Balaban* v. *Rubin,* 32 U.S. L.W. 2465; *Blocker* v. *Board of Education,* 32 U.S. L.W. 2465; *Jackson* v. *Pasadena School Board,* 382 F.2d 878. On the other hand, relief has been denied on the grounds that school racial imbalance resulting from de facto segregation is not per se unconstitutional. *Bell* v. *City of Gary,* 324 F.2d 309, certiorari denied, 32 U.S. L.W. 3384. Some communities are attempting to correct racial imbalances by the transporting of children; others refuse to do so. The purpose of the pending Dirksen-Mansfield-Humphrey-Kuchel substitute is to make clear that the resolution of these problems is to be left where it is now, namely, in the hands of local school officials and the courts. This bill is made neutral on the resolution of these problems by the language of title IV. It is to be used as the vehicle to require transportation to correct racial imbalances; it is not to be used as an excuse for local officials to refuse to carry out their obligations. Obviously this provision could not affect a court's determination concerning racial imbalance and possible corrective measures; this is dependent upon the court's interpretation of the 14th amendment.

As floor manager of this legislation, I wish to note
e intention of those who sought to deal with the vex-
g problem of de facto segregation through the lan-
uage contained in Dirksen substitute amendment.

s it is entirely clear that the Congress intended to
utral on the question whether racial imbalances vi-
l the Fourteenth Amendment and to leave that and
d questions about transportation for the courts to
e in interpreting the Constitution. We have studied
ntire legislative history of the provision, including all
natters cited by the board and the amici curiae, and
nd that quite simply there is nothing which indicates
the Congress sought to limit the power of the federal
ts to interpret the Constitution and apply the doctrine
rown v. *Board of Education*, 347 U.S. 483 (1954). The
artment of Justice reached the same conclusion in a
iled memorandum filed in November 1969 in fourteen
ol cases submitted before the Fifth Circuit sitting *en*
c. We quote at length from the Justice Department
ly of the legislative history in the margin below.[22]

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[22] See Memorandum of the United States filed in *Singleton* v. *kson Municipal Separate School District*, 5th Cir., No. 26285 d other en banc school cases), 419 F.2d 1211 (5th Cir. 1969), ersed as to desegregation delay *sub nom. Carter* v. *West Felici- Parish School Board*, 396 U.S. 290 (1970). The following mmary appears at pp. 5-8 of that Memorandum:

"Summary

"The meaning of the proviso in section 407(a) regarding transportation and of the qualifying language in section 401(b) depends upon the phrase 'racial imbalance.' The latter phrase was used, in a different context, in the original version of H.R. 7152, the bill which became the Civil Rights Act of 1964. The bill as introduced provided that the Commissioner of Education could award grants and render technical assistance to (1) school districts undergoing desegregation and (2) districts faced with problems of racial imbalance. The authority of the

Lengthy discussions in some of the amicus briefs about what Congress meant by the statutory term "racial balance" are essentially beside the point because—whatever that phrase may mean—Congress has not *prohibited* the courts from doing anything with respect to "racial balance."

There is even less reason to think that section 401(b) has anything to do with this case. The definition of "de-

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Attorney General to initiate lawsuits was limited to actions to achieve desegregation.

"During hearings on the bill before a House subcommittee, the term 'racial imbalance' was equated with de facto segregation, the situation existing in a city where, solely because of residential patterns, certain schools were attended largely by members of one race. Some members of the subcommittee expressed opposition to Federal action with regard to de facto segregation. The bill as reported by the House Judiciary Committee deleted the references to 'racial imbalance.' Thus, both the authority of Commissioner of Education to render assistance and the authority of the Attorney General to bring suit were limited to desegregation.

"Despite the removal of references to 'racial imbalance,' Congressman Cramer offered and the House adopted an amendment adding to the definition of 'desegregation' in section 401(b) the statement that '"desegregation" shall not mean the assignment of students . . . in order to overcome racial imbalance.' Congressman Cramer wished to make clear that Title IV was not to apply to de facto segregation. The purpose of Title IV was to implement the Fourteenth Amendment.

"In the Senate, as in the House, the proponents of the bill stated that Title IV was intended to reach unconstitutional state action and that it would not affect racial imbalance in schools which resulted exclusively from housing patterns. The compromise bill offered in the Senate, which was ultimately enacted, added to section 407(a) the proviso concerning 'racial balance.' The purpose of the change was to reemphasize that the Congress was not authorizing Federal intervention, e.g., requiring busing, with respect to school systems which were in compliance with the Fourteenth Amendment.

"Senator Humphrey, the floor manager for the bill, and other members of Congress expressly recognized that the provisions of Title IV would not affect judicial construction of the Fourteenth Amendment.

segregation" in section 401(b) provides a meaning for the term "as used in this title"—or in the code: "as used in this subchapter." The reference is to Title IV of the Act which, in addition to authorizing suits by the attorney general (as indicated above in the discussion of section 407), does nothing else except authorizing activities of the Commissioner of Education: to conduct a survey and make a report on the lack of educational opportunities (section 402), to grant technical assistance to school boards and other units implementing "desegregation" of public schools (section 403), to conduct training institutes (section 404), and to make financial grants to school boards for dealing with desegregation problems (section 405). Thus the definition of desegregation in Title IV has only to do with suits by the attorney general (and he is authorized to enforce the equal protection guarantee) and the activities of the Commissioner of Education. None of this has anything to do with this lawsuit by private citizens—pupils and parents—filed in a district court pursuant to the civil rights jurisdiction of the district courts to enforce their rights under the Fourteenth Amendment. There was no effort by the Congress to define the meaning of the Equal Protection Clause in section 401(b), and nothing in the Act indicates that any such thing was intended.[29]

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[29] Congressman Cramer, who sponsored an amendment adding the last clause in section 401(b), proposed the idea on the House floor on February 1, 1964 (110 Cong. Rec. 1598), stating he favored putting "something specific in it [the bill] saying that it is not the intention of Congress to include racial imbalance or de facto segregation. I think we should consider an amendment to that effect." The amendment was offered and agreed to February 6, 1964 (110 Cong. Rec. 2280), following Mr. Cramer's assertion that its purpose was merely "to strike 'racial imbalance' from the bill and from this title which I otherwise, in its present form, believe is still in the bill as I have said before many times." He said:

> "The purpose is to prevent any semblance of congressional acceptance or approval *of the concept of 'de facto' segregation* or to include in the definition of 'desegregation' any balancing of school attendance by moving students across school district

In addition, of course, there is no prohibitory language of any kind in section 401. It defines desegregation but does not attempt to limit—or even refer—the federal courts to that definition. There is nothing in Title IV (or elsewhere in the Act) indicating that the definition is to have any force at all in the courts. Nor is there any legislative history suggesting that the definition related to the courts' powers.

Respectfully submitted,

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lines to level off percentages where one race outweighs another" (110 Cong. Rec. 2280) (emphasis added).

Mr. Cramer's brief in this Court distorts this simple history by editing the above quoted remarks to delete—with ellipses—the matter which we have italicized in the last quoted speech. Amicus Curiae Brief of William C. Cramer, in this case, p. 13. Mr. Cramer's brief now asserts that his amendment was not concerned with the problem of racial balance in de facto areas but with his own constituency. Brief of Mr. Cramer, p. 22. It would seem that Mr. Cramer's style of argument is rather disingenuous, both on the House floor and in his brief in this Court.

APPENDIX

In the

United States District Court

For the Western District of North Carolina

Charlotte Division

Civil Action No. 1974

James E. Swann, *et al.*,

Plaintiffs,

vs.

Charlotte-Mecklenburg Board of Education, *et al.*,

Defendants.

Interim Report on Desegregation, September 23, 1970

In accordance with the prior filing by the defendants herein, the Charlotte-Mecklenburg Board of Education furnishes the following information to the Court:

1. Transportation has posed the greatest impediment to opening of schools on a full day schedule. The system has received from the State of North Carolina 185 buses, of which 35 have been renovated and now permit the system to operate a total of 398 school buses. In addition, 39 city transit and nine Trailways buses are operating so that 71 schools may operate on a full-day basis by staggering opening and closings and 32 schools are operating on a part-day schedule, two hours in the afternoon. School openings range from 7:30 a.m. to 1:00 p.m. The condition of the buses loaned through the offices of the State Board of Education are not in as good condition as represented, thereby impeding the ability of the system to put them into service.

Arrangements have been made for 17 buses to be repaired by other school districts.

By the end of this week, it is expected that 82 of the 103 schools will be on full-day schedules, though their opening and closing hours will be staggered. An additional 21 schools will await satisfactory transportation arrangements. Efforts are being made to involve parents in car pools so that these schools may open on a full-time basis.

2. The attachment designated Exhibit 1 reflects the anticipated membership, actual membership or enrollment and actual attendance by race on September 21, 1970, for junior and senior high schools.

3. The attachment designated Exhibit 2 reflects the anticipated membership, actual membership or enrollment and actual attendance by race on September 21, 1970, for elementary schools.

4. Attached marked Exhibit 3 is a report on the distribution of professional staff by school and race as of September 21, 1970.

5. With respect to elementary schools, it is noted that as a result of movement of residents, three elementary schools, Barringer, Berryhill and Amay James, now house a predominantly black student body. The Board of Education instructed the staff to review the racial condition of these schools and make recommendations. Attached marked Exhibit 4 is a copy of the report of the staff to the Board of Education. No action has been taken with reference to this report.

6. Attached marked Exhibit 5 the court will find an elementary attendance map on which the new housing developments have been located within the various attendance districts.

nterim Report on Desegregation, September 23, 1970

. The change of the residential neighborhood gives rise possible problems in the Spaugh Junior High School endance district because of rapid changes occuring with- the district. At the direction of the Board, the staff udied this condition and presented its report, a copy of hich is attached, marked Exhibit 6. No action has been ken with reference to this report.

Respectfully submitted this 23rd day of September, 1970.

/s/ William J. Waggoner
William J. Waggoner
Weinstein, Waggoner, Sturges,
Odom and Bigger
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/s/ Benjamin S. Horack
Benjamin S. Horack
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806 East Trade Street
Charlotte, North Carolina

Attorneys for Defendants

Exhibit 1 Attached to Interim Report

(See Opposite) ☞

CHARLOTTE - MECKLENBURG SECONDARY SCHOOLS

REPORT OF MEMBERSHIP AND ATTENDANCE

JUNIOR HIGH SCHOOLS

SCHOOL	ANTICIPATED MEMBERSHIP	ACTUAL MEMBERSHIP 9 - 21 - 70					ACTUAL ATTENDANCE 9 - 21 - 70				
		B	W	T	%	%B	B	W	T	%	%B
Albemarle Rd.	1134	330	762	1092	96.2	30.2	289	727	1016	89.5	29.3
Alexander	1041	317	720	1037	99.6	30.5	290	671	961	92.3	30.1
Carmel	634	186	464	650	102.5	28.6	158	439	597	94.1	26.4
Cochrane	1291	336	945	1281	99.2	26.2	300	915	1215	94.1	24.6
Coulwood	783	233	555	788	100.6	29.5	225	527	752	96.0	29.9
Eastway	1168	361	793	1154	98.8	31.2	327	764	1091	93.4	29.9
Alexander-Graham	1076	272	707	979	90.9	27.7	241	680	921	85.5	26.1
Hawthorne	988	339	563	902	91.2	37.5	312	498	810	81.9	38.5
Kennedy	842	206	545	751	89.1	27.4	199	481	680	80.7	29.2
McClintock	1326	316	964	1280	96.5	24.6	287	940	1227	92.5	23.3
Northeast	612	51	562	613	100.1	8.3	50	524	574	93.7	8.7
Northwest	1161	433	521	954	82.1	45.3	408	474	882	75.9	46.2
Piedmont	693	153	518	671	96.8	22.8	130	446	576	83.1	22.5
Quail Hollow	1481	383	1138	1521	102.7	25.1	343	1101	1444	97.5	23.7
Randolph	1023	253	731	984	96.1	25.7	242	700	942	92.0	25.6
Ranson	810	273	568	841	103.8	32.4	266	532	798	98.5	33.3
Sedgefield	1031	304	718	1022	99.1	29.7	265	668	933	90.4	28.4
Smith	1304	422	893	1315	100.8	32.0	385	862	1247	95.6	30.8
Spaugh	1110	440	715	1155	104.0	38.0	404	602	1006	90.6	40.1
Williams	1038	307	641	948	91.3	32.3	294	613	907	87.3	32.1
Wilson	854	320	611	931	109.0	34.3	281	583	864	101.1	32.5
TOTAL	21,400	6,235	14,634	20,869	97.5	29.8	5,696	13,747	19,443	90.8	29.2

SENIOR HIGH SCHOOLS

East Mecklenburg	2097	505	1603	2108	100.5	23.9	469	1512	1981	94.4	23.6
Garinger	2344	648	1716	2364	100.8	27.4	588	1585	2173	92.7	27.0
Harding	1107	343	710	1053	95.1	32.5	298	631	929	83.9	32.0
Independence	1672	345	1273	1618	96.7	21.3	265	1219	1484	88.7	17.8
Myers Park	2303	495	1782	2277	98.8	21.7	448	1705	2153	93.4	20.8
North Mecklenburg	1461	417	936	1353	92.6	30.8	378	867	1245	85.2	30.3
Olympic	1283	284	1021	1305	101.7	21.7	251	959	1210	94.3	20.7
South Mecklenburg	2200	493	1585	2078	94.4	23.7	434	1497	1931	87.7	22.4
West Charlotte	1769	606	845	1451	82.0	41.7	588	753	1341	75.8	43.8
West Mecklenburg	1529	467	1075	1542	100.8	30.2	423	984	1407	92.0	30.0
TOTAL	17,764	4,603	12,546	17,149	96.5	26.8	4,142	11,712	15,854	89.2	26.1

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Report of Membership and Attendance

School	Antic. Mem.	9-21-70 Actual Membership B	W	T	%	%B	9-21-70 Actual Attendance B	W	T	%	%B
Albemarle Road	486	154	358	512	105.3	30.1	135	323	458	94.2	29.5
Allenbrook	519	142	355	497	95.8	28.6	130	346	476	91.7	27.3
Ashley Park	571	228	359	587	102.8	38.8	221	358	579	101.4	38.2
Bain	780	22	733	755	96.8	2.9	22	699	721	92.4	3.05
Barringer	527	290	235	525	100.4	55.2	286	220	506	96.0	56.5
Berryhill	866	688	386	1074	80.6	64.1	640	352	992	114.5	64.5
Beverly Woods	605	172	413	585	96.7	29.4	151	400	551	91.1	27.4
Billingsville	383	125	289	414	108.1	30.2	123	268	391	102.1	31.5
Briarwood	670	219	450	669	99.9	32.7	202	426	628	93.7	32.2
Bruns Avenue	762	251	413	664	87.1	37.8	236	383	619	81.2	38.1
Chantilly	445	122	334	456	102.5	26.8	116	319	435	97.8	26.7
Clear Creek	306	66	269	335	109.5	19.7	64	255	319	104.2	20.1
Collinswood	717	321	421	742	103.5	43.3	312	407	719	100.3	43.4
Cornelius	442	154	304	458	103.6	33.6	149	291	440	99.5	33.9
Cotswold	522	124	417	541	103.6	22.9	123	404	527	100.9	23.3
Davidson	247	112	147	259	104.9	43.2	108	144	252	102.0	42.9
Marie Davis	668	189	422	611	91.5	30.9	177	403	580	86.8	30.5
Derita	813	157	640	797	98.0	19.7	150	612	762	93.7	19.7
Devonshire	853	259	607	866	101.5	29.9	247	571	818	95.9	30.2
Dilworth	447	160	369	529	118.3	30.2	153	347	500	111.8	30.6
Double Oaks	705	194	372	566	80.3	34.3	188	357	545	77.3	34.5
Druid Hills	444	150	265	415	93.5	36.1	146	257	403	90.8	36.2
Eastover	514	120	371	491	95.5	24.4	107	367	474	92.2	22.6
Elizabeth	627	181	394	575	91.7	31.4	173	374	547	87.2	31.6
Enderly Park	451	256	276	532	117.9	48.1	229	251	480	106.4	47.7

Report of Membership and Attendance

School	Antic. Mem.	9-21-70 Actual Membership B	W	T	%	%B	9-21-70 Actual Attendance B	W	T	%	%B
First Ward	778	226	435	661	84.9	34.1	187	402	589	75.7	31.7
Hickory Grove	560	203	356	559	99.8	36.3	191	337	528	94.3	36.2
Hidden Valley	928	271	617	888	95.6	30.5	258	603	861	106.4	29.96
Highland	426	138	291	429	100.7	32.1	127	278	405	95.1	31.4
Hoskins	263	113	165	278	105.7	40.6	108	160	268	96.5	40.3
Huntersville	687	150	521	671	97.6	22.3	147	501	648	94.3	22.7
Huntingtowne Farms	574	191	380	571	99.4	33.4	183	371	554	96.5	33.0
Idlewild	671	167	455	622	92.6	26.8	149	439	588	87.6	25.3
Amay James	320	449	99	548	171.2	81.9	416	80	496	155.0	83.9
Lakeview	400	114	253	367	91.7	31.0	103	238	341	85.3	30.2
Lansdowne	669	274	468	742	110.9	36.9	229	443	672	100.4	34.1
Lincoln Heights	727	189	402	591	81.2	31.9	183	382	565	77.7	32.4
Long Creek	821	325	505	830	101.0	39.1	320	481	801	97.6	39.95
Matthews	878	92	837	929	105.8	9.9	86	808	894	101.8	9.6
Merry Oaks	445	116	316	432	97.0	26.8	112	305	417	93.7	26.9
Midwood	558	103	431	534	95.6	19.2	98	399	497	89.0	19.7
Montclaire	603	164	421	585	97.0	28.0	164	421	585	97.0	28.0
Myers Park Elem.	538	144	378	522	97.0	27.5	128	367	495	92.0	25.6
Nations Ford	889	212	725	937	105.3	22.6	200	673	873	98.2	22.9
Newell	608	62	544	606	99.6	10.2	57	515	572	94.1	10.0
Oakdale	680	171	505	676	99.4	25.2	170	477	647	95.1	26.3
Oakhurst	698	253	537	790	113.1	32.0	194	516	710	101.7	27.3
Oaklawn	595	180	296	476	80.0	37.8	175	290	465	78.2	37.6
Olde Providence	540	91	365	456	84.4	19.5	85	353	438	81.1	19.4
Park Road	530	158	357	515	97.1	30.6	145	330	475	89.6	30.5

Report of Membership and Attendance

School	Antic. Mem.	9-21-70 Actual Membership B	W	T	%	%B	9-21-70 Actual Attendance B	W	T	%	%B
Paw Creek	578	104	362	466	80.6	22.3	95	352	447	77.3	21.2
Paw Creek Annex	345	97	220	317	91.8	30.5	95	216	311	90.1	30.5
Pineville	527	136	365	501	95.0	27.1	136	365	501	95.1	27.1
Pinewood	837	243	525	768	91.7	31.6	233	504	737	88.1	31.6
Plaza Road	521	142	359	501	96.1	28.3	136	329	465	89.3	29.2
Rama Road	746	277	490	767	102.8	36.1	277	483	760	101.9	36.4
Sedgefield Elem.	637	205	406	611	95.9	33.5	192	390	582	91.4	32.9
Selwyn	505	182	340	522	103.3	34.8	173	338	511	101.2	33.8
Shamrock Gardens	485	98	390	488	100.6	20.0	93	376	469	96.7	19.8
Sharon	295	96	186	282	95.5	34.0	91	180	271	91.9	33.5
Starmount	659	207	446	653	99.0	31.6	181	430	611	92.7	29.6
Statesville Road	691	180	496	676	97.8	26.6	176	473	649	93.9	21.7
Steele Creek	607	244	396	640	105.4	38.1	226	383	609	100.3	37.1
Thomasboro	664	176	478	654	98.4	26.9	163	466	629	94.7	25.9
Tryon Hills	510	244	286	530	103.9	46.0	226	268	494	96.9	45.7
Tuckaseegee	594	181	376	557	93.7	32.4	177	361	538	90.6	32.8
University Park	759	259	355	614	80.8	42.1	251	331	582	76.7	43.1
Villa Heights	751	234	476	710	94.5	32.9	196	444	640	85.2	30.6
Westerly Hills	644	235	401	636	98.7	36.9	220	389	609	94.6	36.1
Wilmore	398	197	213	410	103.0	48.0	186	198	384	96.5	48.4
Windsor Park	733	188	517	705	96.1	26.6	176	503	679	92.6	25.9
Winterfield	695	239	482	721	103.7	33.1	208	459	667	95.9	31.1
Total	42,937	13,576	28,823	42,399	98.7	32.0	12,710	27,541	40,251	93.7	31.8

DISTRIBUTION OF PROFESSIONAL STAFF
September 21, 1970

	Black	White	Total	Per Cent Black
Elementary Schools	482	1318	1800	26.7
Junior High Schools	229	707	936	24.4
Senior High Schools	190	684	874	21.7
TOTAL STAFFING FULLY ASSIGNED TO SCHOOLS GRADES 1-12	901	2709	3610	24.9

DISTRIBUTION OF PROFESSIONAL STAFF
September 21, 1970

Elementary School	Black	White	Total	Per Cent Black
Albemarle Road	5	16	21	23.8
Allenbrook	6	16	22	27.2
Ashley Park	5	19	24	20.8
Bain	8	24	32	25.0
Barringer	7	15	22	31.8
Berryhill	9	27	36	25.0
Beverly Woods	6	18	24	25.0
Billingsville	6	16	22	27.2
Briarwood	7	20	27	25.9
Bruns Avenue	10	20	30	33.3
Chantilly	5	15	20	25.0
Clear Creek	4	13	17	23.5
Collinswood	6	21	27	22.2
Cornelius	5	13	18	27.7
Cotswold	5	16	21	23.8
Davidson	3	9	12	25.0
Marie Davis	11	20	31	35.4
Derita	8	26	34	23.5
Devonshire	10	24	34	29.4
Dilworth	6	21	27	22.2
Double Oaks	8	17	25	32.0
Druid Hills	5	13	18	27.7
Eastover	7	18	25	28.0
Elizabeth	8	17	25	32.0

Elementary School	Black	White	Total	Per Cent Black
Enderly Park	5	15	20	25.0
First Ward	10	20	30	33.3
Hickory Grove	6	17	23	26.0
Hidden Valley	10	28	38	26.3
Highland	4	14	18	22.2
Hoskins	3	10	13	23.0
Huntersville	7	19	26	26.9
Huntingtowne Farms	5	18	23	21.7
Idlewild	7	22	29	24.1
Amay James	6	15	21	28.5
Lakeview	6	14	20	30.0
Lansdowne	7	22	29	24.1
Lincoln Heights	7	19	26	26.9
Long Creek	8	23	31	25.8
Matthews	10	28	38	26.3
Merry Oaks	5	13	18	27.7
Midwood	6	18	24	25.0
Montclaire	7	19	26	26.9
Myers Park	6	19	25	24.0
Nations Ford	8	25	33	24.2
Newell	6	20	26	23.0
Oakdale	7	20	27	25.9
Oakhurst	6	20	26	23.0
Oaklawn	8	17	25	32.0
Olde Providence	6	18	24	25.0

Elementary School	Black	White	Total	Per Cent Black
Park Road	6	18	24	25.0
Paw Creek	6	17	23	26.0
Paw Creek Annex	3	9	12	25.0
Pineville	6	17	23	26.0
Pinewood	10	23	33	30.3
Plaza Road	6	17	23	26.0
Rama Road	6	22	28	21.4
Sedgefield	7	20	27	25.9
Selwyn	5	17	22	22.7
Shamrock Gardens	5	14	19	26.3
Sharon	5	10	15	33.3
Starmount	7	20	27	25.9
Statesville Road	9	18	27	33.3
Steele Creek	6	19	25	24.0
Thomasboro	7	20	27	25.9
Tryon Hills	6	16	22	27.2
Tuckaseegee	6	19	25	24.0
University Park	10	16	26	38.4
Villa Heights	12	20	32	37.5
Westerly Hills	7	19	26	26.9
Wilmore	5	14	19	26.3
Windsor Park	9	23	32	28.1
Winterfield	7	23	30	23.3
Total	482	1318	1800	26.7

DISTRIBUTION OF PROFESSIONAL STAFF
September 21, 1970

Junior High School	Black	White	Total	Per Cent Black
Albemarle Road	12	41	53	22.6
Alexander	8	35	43	18.6
Carmel	8	20	28	28.5
Cochrane	14	43	57	24.5
Coulwood	7	28	35	20.0
Eastway	13	40	53	24.5
Alexander Graham	12	34	46	26.0
Hawthorne	12	30	42	28.5
Kennedy	9	29	38	23.6
McClintock	14	42	56	25.0
Northeast	7	22	29	24.1
Northwest	13	35	48	27.0
Piedmont	9	24	33	27.2
Quail Hollow	14	50	64	21.8
Randolph	11	35	46	23.9
Ranson	10	26	36	27.7
Sedgefield	11	33	44	25.0
Smith	13	41	54	24.0
Spaugh	11	36	47	23.4
Williams	12	33	45	26.6
Wilson	9	30	39	23.0
Total	229	707	936	24.4

DISTRIBUTION OF PROFESSIONAL STAFF
September 21, 1970

Senior High School	Black	White	Total	Per Cent Black
East Mecklenburg	20	82	102	19.6
Garinger	26	87	113	23.0
Harding	13	50.5	63.5	20.4
Independence	22	63	85	25.8
Myers Park	23	83	106	21.6
North Mecklenburg	15	56	71	21.1
Olympic	15	49.5	64.5	23.2
South Mecklenburg	20	81	101	19.8
West Charlotte	22	66	88	25.0
West Mecklenburg	14	66	80	17.5
Total	190	684	874	21.7

Exhibit 4 Attached to Interim Report

(See Opposite) ☞

Charlotte-Mecklenburg Elementary Schools

AN ANALYSIS OF ENROLLMENT AND HOUSING PROBLEMS

September 21, 1970

The Problem:

The enrollments of three elementary schools in the western section of the county are turning out to be majority black. There is a strong possibility that the schools will become totally black unless some preventive measures are taken. The anticipated enrollment for the three schools in question are as follows:

	Black	White	Total	Capacity	% Black
Barringer	296	262	558	513	53
Berryhill	640	441	1081	810	59
Amay James	458	133	591	405	77

The Cause:

Majority black enrollment in these three schools is the result of changing neighborhoods and the location of three public housing projects in the area. The projects are:

Dalton Village	1 Bedroom	40 Units
	2 Bedrooms	75 "
	3 "	93 "
	4 "	72 "
	5 "	20 "
		300 Units
Boulevard Homes	1 Bedroom	40 Units
	2 Bedrooms	74 "
	3 "	98 "
	4 "	68 "
	5 "	20 "
		300 Units
Little Rock Homes	1 Bedroom	15 Units
	2 Bedrooms	90 "
	3 "	95 "
	4 "	20 "
	5 "	20 "
		240 Units

Both Dalton Village and Boulevard Homes are completed. Both are 75% occupied now. One hundred percent occupancy is anticipated by November 1, 1970.

Ninety units of Little Rock Homes are scheduled to be completed by December 31, 1970. Completion date for the remaining 150 units is scheduled for February 1, 1971.

Dalton Village is located in the Amay James attendance area. As of September 16, 1970, 329 children had been enrolled at Amay James from the project. Enrollment by grade was: Grade 1 - 57, Grade 2 - 61, Grade 3 - 63, Grade 4 - 50, Grade 5 - 53, and Grade 6 - 45.

Boulevard Homes and Little Rock Homes are both located in the Berryhill district. As of September 16, 1970, 358 children had enrolled at Berryhill School from Boulevard Homes. None have been registered from Little Rock Homes. Enrollment by grades from Boulevard Homes was: Grade 1 - 74, Grade 2 - 72, Grade 3 - 53, Grade 4 - 59, Grade 5 - 56, and Grade 6 - 44.

In addition to the three public housing projects, a large private housing project is located in the area in the Steele Creek district. This development, named Roseland 1 and 2, contains 504 units, all of which are completed. The sizes of the 504 units are as follows: one bedroom - 176 units, two bedrooms - 224 units, three bedrooms - 104 units. A representative of the owner indicated that 50% of the units were occupied at this time. As of September 16, 1970, 81 had enrolled at Steele Creek from Roseland 1 and 2.

Several small private housing projects are located in the Barringer district. One such project, Keyway, located on Malden Street, has just been completed. The project contains 56 units. One hundred and three pupils from this project have enrolled at Barringer.

The Parker Heights housing project off Remount Road is located in the Ashley Park attendance area. Parker Heights contains 100 units. Thirty pupils from this project attend Ashley Park.

Information on Housing Projects
September 17, 1970

Project	School Attendance Area	No. Units	No. Completed 9-15-70	Completion Date	Per Cent Occupancy	No. Pupils
Dalton Village	Amay James	300	300		75	* 329
Boulevard Homes	Berryhill	300	300		75	* 358
Little Rock Homes	Berryhill	240	-0-	90-12/31/70 150-2/1/71	-0-	-0-
Roseland (1 & 2)	Steele Creek	504	504		50	81
Keyway	Barringer	56	56		100	*103
Parker Heights	Ashley Park	100	100		100	30

* Reports from school principals indicate by September 21 the almost totally occupied count of number of pupils:

Dalton Village	340
Boulevard Homes	419
Keyway	123

The Alternatives

If it is determined that preventive measures need to be taken in order to relieve the situation, several alternatives should be considered.

1a To relieve overcrowding at Berryhill, reassign elementary students as follows:

(a) 140 pupils from Thomasboro's downtown satellite district to Clear Creek.

(b) 240 pupils from Berryhill's Boulevard Homes district to Thomasboro.

(c) Another 179 pupils: 47 each to Allenbrook 1-5 and Tuckaseegee 1-5; 60 to Paw Creek (1-4) and 25 to Druid Hills (Gr 6).

As a result of these moves the following enrollment pattern would be established:

	W	B	T	%B
Clear Creek	246	203	449	45
Thomasboro	525	259	784	33
Allenbrook	379	206	584	35
Druid Hills	301	177	478	37
Paw Creek	434	194	628	31
Tuckaseegee	428	238	666	36
Berryhill	441	244	685	36

1b To relieve overcrowding at Amay James redraw the Nations Ford attendance line so as to include 280 of Dalton Village; and, satellite 60 pupils to Shamrock Gardens from the remainder of Dalton Village.

As a result of this move the following enrollment pattern would be established:

	W	B	T	%B
Shamrock Gardens	381	164	525	31
Nations Ford	674	495	1169	42
Amay James	133	118	251	47

This move would transfer an additional 280 pupils to Nations Ford. These pupils would be accommodated by using mobile units at Nations Ford or by using portions of Sterling Child Development Center. (8 rooms).

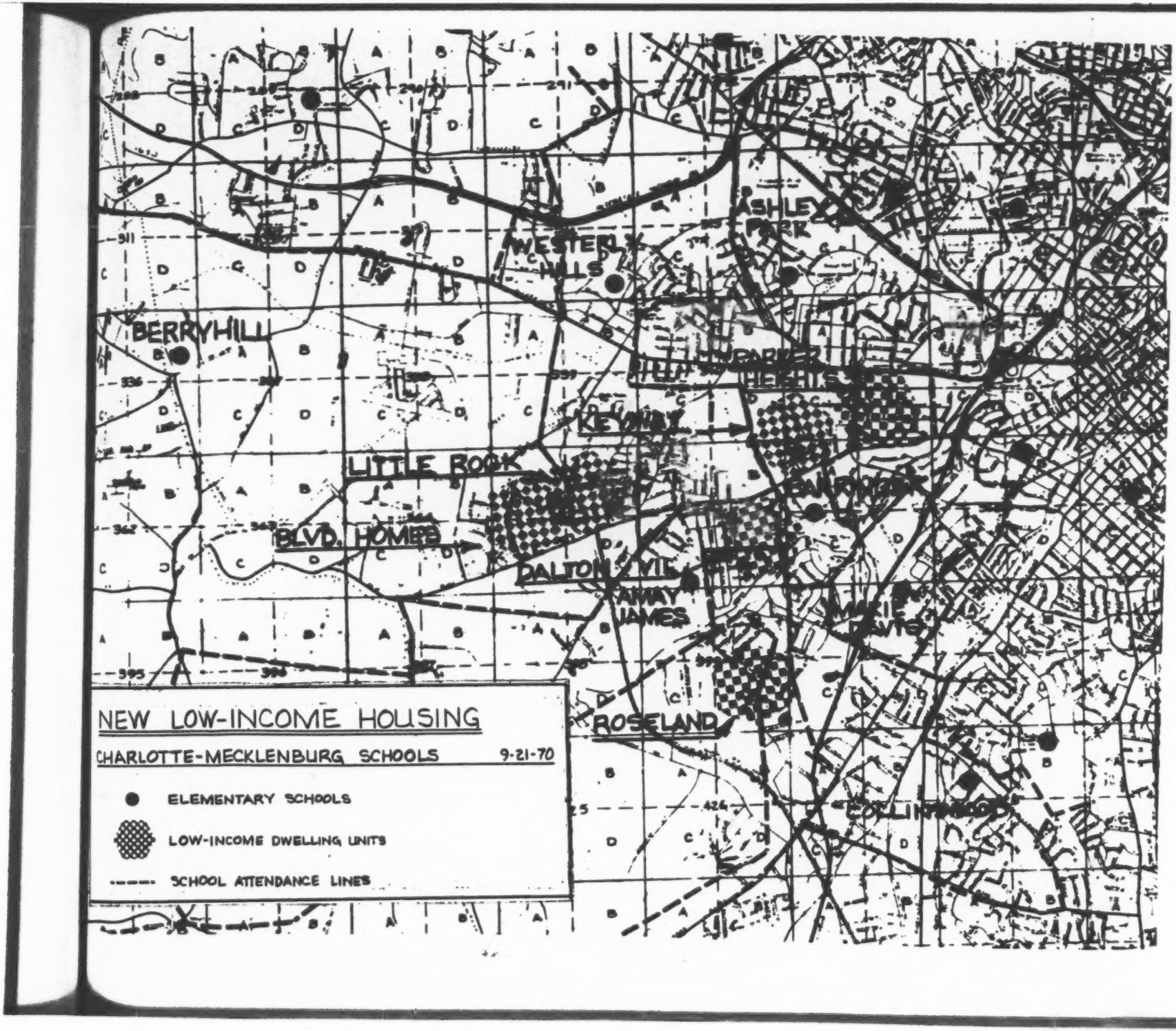
1c To relieve conditions at Barringer, send the 123 pupils from Keyway Apts:

(a) 140 pupils from Oakhurst's downtown satellite district to Bain.

(b) 123 pupils from Keyway to Oakhurst.

As a result of these moves the enrollment would be:

	W	B	T	%B
Bain	752	163	915	18
Barringer	262	173	435	40
Oakhurst	565	195	760	26


ASHLEY PARK
WESTERLY HILLS
BERRYHILL
LITTLE ROCK
BLVD. HOMES
DALTON AVE
AWAY JAMES
ROSELAND
NEW LOW-INCOME HOUSING
CHARLOTTE-MECKLENBURG SCHOOLS 9-21-70
ELEMENTARY SCHOOLS
LOW-INCOME DWELLING UNITS
SCHOOL ATTENDANCE LINES

ENROLLMENT PROBLEMS

September 22, 1970

1. The Problem:

The major enrollment problem in the secondary schools is in the Spaugh area. This problem is a result of the large number of public and private low rent housing in the western area. These projects are now distributed among the junior high school attendance areas as follows:

Quail Hollow----------Roseland

Smith----------Keyway

Wilson----------Dalton Village

Carmel----------Parker Heights

Spaugh----------Boulevard Homes and Little Rock Homes

The school in the greatest potential difficulty is Spaugh. The present racial ratio at Spaugh is 38.4% black. Little Rock Homes is not yet occupied. When this is occupied, together with other changes in the Spaugh area, Spaugh Junior High could become, before the end of this school year, a predominately black school.

2. Suggested Remedy:

a. The Independence High School satellite area is now served, primarily, by Wilson and Spaugh Junior High Schools. It would be desirable to relate this area to the junior high schools which serve Independence.

b. Northeast Junior High School, with a black ratio of 8.4% is an obvious imbalance. Elementary and senior high students are now being transported the same distance that would be necessary if a satellite area were created for Northeast.

c. It is suggested that the Wilson satellite (which serves the Independence area) in the Johnson C. Smith University area be transferred to McClintock and Albemarle Road Junior High School.

d. It is suggested that the part of the Spaugh attendance area which serves the Independence satellite be transferred to Northeast and Albemarle Road Junior High Schools.

e. It is suggested that the Little Rock Homes development be assigned to the Wilson Junior HIgh School attendance area.

The following chart shows the present data for these junior high schools and the anticipated data should these changes be adopted:

PRESENT MEMBERSHIP

School	Cap.	Anticipated Enrollment	Actual Membership 9/18/70 B	W	T	%B
McClintock	1100	1326	315	956	1271	24.7
Albemarle Rd.	1158	1134	306	749	1055	29.0
Northeast	670	612	51	552	603	8.4
Wilson	1255	854	326	586	912	35.7
Spaugh	1091	1110	440	704	1144	38.4

PROPOSED ADJUSTMENTS - Sept. 1970

School	Cap.	Anticipated Enrollment	Proposed Membership B	W	T	%B
McClintock	1100	1326	393	956	1349	29.1
Albemarle Rd.	1158	1158	350	749	1099	31.8
Northeast	670	612	129	552	681	18.9
Wilson	1255	854	248	586	834	29.7
Spaugh	1091	1110	318	704	1022	31.1

PROPOSED ADJUSTMENT - February 1971
(with full occupancy of Little Rock Homes)

School	Cap.	Anticipated Enrollment	Proposed Membership B	W	T	%B
Wilson	1255	854	333	586	919	36.2

Suggested Remedy #2

Assign the Little Rock Homes project (not now occupied) to Northeast Junior High School as a satellite. This would create a black population of approximately 19.5%. It would leave Spaugh Junior High at the 38.4 ratio. It has the advantage of not requiring any pupils to be moved at this time. It has the disadvantage of causing bussing of a greater distance than remedy #1. It does not relate junior high and senior high areas to the degree that plan #1 does. It does not offer a very permanent solution to the problem at Spaugh.

The following chart shows the effect of this plan on the schools involved:

PRESENT MEMBERSHIP

School	Cap	Anticipated Enrollment	Actual Membership 9/18/70 B	W	T	%B
Northeast	670	612	51	552	603	8.4

PROPOSED ADJUSTMENT

Northeast	670	612	136	552	688	19.8

Nos. 281, 349, 436

FILED
OCT 10 1970
E. ROBERT SEAVER, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

JAMES E. SWANN, *et al.*,
Petitioners, Cross-Respondents,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,
Respondents, Cross-Petitioners.

BIRDIE MAE DAVIS, *et al.*,
Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, *et al.*,

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

MOTION FOR LEAVE TO FILE AND PETITIONERS' REPLY TO BRIEF OF THE UNITED STATES

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MOTION FOR LEAVE TO FILE REPLY BRIEF

Petitioners respectfully request leave to file the attached reply to the brief of the United States. This reply is being filed less than three days before the time the case will be called for hearing. See Rule 41, Rules of the Supreme Court.

The brief of the United States was filed on October 6 and received by petitioners' counsel on October 7 and 8.

Accordingly, it was not possible to complete this reply and have it printed for filing until October 10. Special arrangements are being made to serve counsel who will be arguing the case, prior to the arguments.

Respectfully submitted,

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND FIFTH CIRCUITS

PETITIONERS' REPLY TO BRIEF OF THE UNITED STATES

Several arguments advanced by the United States in its brief amicus curiae occasioned this reply.

(1) At p. 17, the Government attributes to petitioners the position that the Constitution requires "the ratio of white to black students in each school [to be] . . . as near as possible to the ratio of white to black students in the system as a whole." This is not petitioners' position. Nothing in petitioners' briefs suggests this position, which

the Government elsewhere characterizes as "racial balance" (pp. 16, 18-21, 23).

Petitioners' plan for the desegregation of the Mobile public school system in No. 436 does not depend upon a theory of "racial balance." [1] Nor does Judge McMillan's plan for the desegregation of the Charlotte-Mecklenburg public school system in Nos. 281 and 349 depend upon a theory of "racial balance." [2] "Racial balance" is a whipping-boy that respondents and the Government find it convenient to belabor. But it has nothing to do with petitioners' contentions respecting the requirements of the Constitution.

(2) Petitioners' contentions do not depend upon "ratios." They would permit 50-50 schools to exist, for example, in a 70-30 school district where residential stability and other characteristics of the school population did not threaten resegregation, and the history of the school board per-

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[1] See Brief for Petitioners in No. 436, pp. 63-79.

[2] See the Government's quotation from Judge McMillan's opinion at p. 21. After the Charlotte-Mecklenburg school board had consistently failed to produce an acceptable desegregation plan, Judge McMillan was compelled to appoint an expert to devise a plan. He was thereby obviously required to instruct the expert concerning the *ideal* objectives of the plan—something that would not have been necessary if the board had developed anything approximating a satisfactory plan of its own. In this context only, Judge McMillan resorted to ideals defined by ratios—but with the clear recognition that substantial deviations from the ratios would be permitted where other practical and educational considerations called for them. And the ultimate plan approved by Judge McMillan does not in fact involve racial ratios in each school that reflect those of the district as a whole.

Judge McMillan expressly noted that his decision does not rest on a conclusion that "racial balances" are constitutionally required. He said:

> "This court has not ruled, and does not rule, that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before the court*" (emphasis in original) (Brief Appendix, p. 12).

formance did not require more exacting demands to guard against evasions. What petitioners *do* urge is simply that this Court should announce principles for the ultimate form of school desegregation plans which meet two requirements:

First, they fulfill the promise and the constitutional holding of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that no black child is to be assigned to a racially identifiable "black" school such as the all-black and virtually all-black schools which the Fifth Circuit has permitted to exist in Mobile and which the HEW plan would permit to exist in Charlotte-Mecklenburg.

Second, they announce this first requirement in terms that are sufficiently clear, unmistakable, and decisive so that the Court's opinion in these cases will not spawn 16 more years of litigation like the 16 years of litigation that followed *Brown*.

(3) The Government's position fails to meet either requirement. The Government urges that:

> An appropriate standard should give proper attention to a number of circumstances, such as the size of the school district, the number of schools, the relative distances between schools, the ease or hardships for the school children involved, the educational soundness of the assignment plan, and the resources of the school district. (P. 8)

If 16 years of litigation under *Brown* have demonstrated anything, it is that the enunciation of this "standard" by this Court in this year 1970 would be an unmitigated disaster. Under this standard, southern desegregation will remain an unresolved issue, and litigation of how many black children can be penned in all-black schools will still be going on, in 1986.

(4) The only justification that the Government offers for this unserviceable standard is the notion of deference to "the traditional neighborhood method of school assignment" (p. 9; see p. 24). But we are talking about desegregating schools that have never had a "traditional neighborhood method of school assignment." Time out of mind prior to *Brown*, both Mobile and Charlotte-Mecklenburg had school assignment systems that took black children out of their "neighborhoods" to black schools and white children out of their "neighborhoods" to white schools. After *Brown*, both used plans that were not "neighborhood" plans.[3] Recently, both developed "neighborhood school" schemes whose design and effect were to perpetuate segregation. If the neighborhood school system had any other "benefits" (p. 9), they had escaped local notice altogether during many years, and now continued to be subordinated to the interests of segregation for schools were located, their capacities designed, their grades structured, their zone lines drawn, and their "neighborhoods" thus shaped to achieve continued segregation of the races.

The Government admits that all of this is so as to Mobile and Charlotte-Mecklenburg (pp. 12-16), but seem to suggest that Mobile and Charlotte-Mecklenburg are aberrations. They are not aberrations. If one is to go outside these records, one will find that no school district which practiced the sort of racial discrimination condemned in *Brown* had a "traditional neighborhood" school system. They all sent blacks to black schools and whites to white schools without regard to "neighborhoods" or geographic proximity. These are the school systems that are at issue here.

But we do not think that the Court should go outside the record. If there are school districts which have truly

[3] Indeed, in No. 436, the Mobile School Board adamantly resisted the principle of neighborhood schools. See petitioners' brief in No. 436, p. 29, n. 26.

had "traditional neighborhood" school systems, they lie beyond the scope of this Court's post-*Brown* experience and doubtless differ in so many ways from Mobile and Charlotte-Mecklenburg that nothing the Court decides herein could affect them. To reason from the supposed nature and "benefits" of those systems without a record adequately describing them would be perilous enough even if such systems were in question. But the only systems in question here are those that have traditionally subordinated or shaped neighborhoods to race; and, as to them, the Government's "traditional neighborhood" school principle is manifestly hollow.

(5) The Government's reasoning from the "neighborhood" school premise is as faulty as the premise. We understand it to say that because various devices have been used by southern school boards to make the "neighborhood" school principle a serviceable tool of segregation—i.e., school location, school size manipulations, grade structure manipulation, zone line manipulation (pp. 12-16)—these same devices, but only these, may be used as "the focal point of a proper remedy . . . to disestablish the dual system and eliminate its vestiges (p. 16; see p. 25). Two things are wrong with this argument as a basis for concluding that "a system of pupil assignment on the basis of contiguous geographic (residence) zones . . . is constitutionally acceptable in desegregating urban school systems" (p. 24).

First, southern school boards—and these school boards—have used not merely manipulative practices within contiguous zones but also non-contiguous zones and busing to achieve segregation. If the measure of desegregation devices is to be determined by those devices previously used to segregate, then non-contiguous zones and busing are included.

Second, there is no doctrinal, logical or practical reason why the roster of desegregation devices should be measured by that of segregation devices. So far as we are aware, it has never been supposed that the remedial means of a court of equity were those used by a malefactor in creating the situation that requires remedying. . .

(6) It is not only, however, the Government's reasoning that troubles us, but the consequences to which it inevitably leads:

First, as we have said in paragraph (3), *supra,* the Government's vague and elastic "standards to be applied in fashioning remedies for state-imposed segregation" (p. 8) will unquestionably produce another desolating, wasteful and protracted era of school desegregation litigation. We had hoped that this Court's decision in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969); and *Carter* v. *West Feliciana Parish School Board,* 396 U.S. 290 (1970), were meant to end that sort of thing.

Second, standards of this sort cannot be fairly and uniformly administered. In practice, they boil down to the disposition of the school board, or local district judge, or the sitting panel of the court of appeals. Experience in the Fifth Circuit in the past year demonstrates the effect of standards such as the Government proposes. The Government's description of the Fifth Circuit jurisprudence at pp. 19-20, 25-26, suggests a sort of consistency that the cases entirely lack. In the Fifth Circuit, as we have shown in petitioners' brief in No. 436, the degree of desegregation ordered varies from panel to panel.

Third, in the last analysis, as the Government admits on p. 26, its "standards" amount to nothing more than a promise of judicial review of the "good faith" of school officials. Sixteen years of school desegregation litigation

since *Brown* teach the delusiveness, the utter futility of any such approach to desegregation.

(7) This Court should order that the schools be desegregated by declaring that each black child in Mobile and Charlotte-Mecklenburg must be assigned to a school which is not a racially identified "black" school. See para. (2), *supra*. Judge McMillan's order on Nos. 281 and 349 should be approved as a practicable plan found effective to achieve this result in Charlotte-Mecklenburg; and the judgment of the Court of Appeals for the Fifth Circuit in No. 436 should be reversed.

Respectfully submitted,

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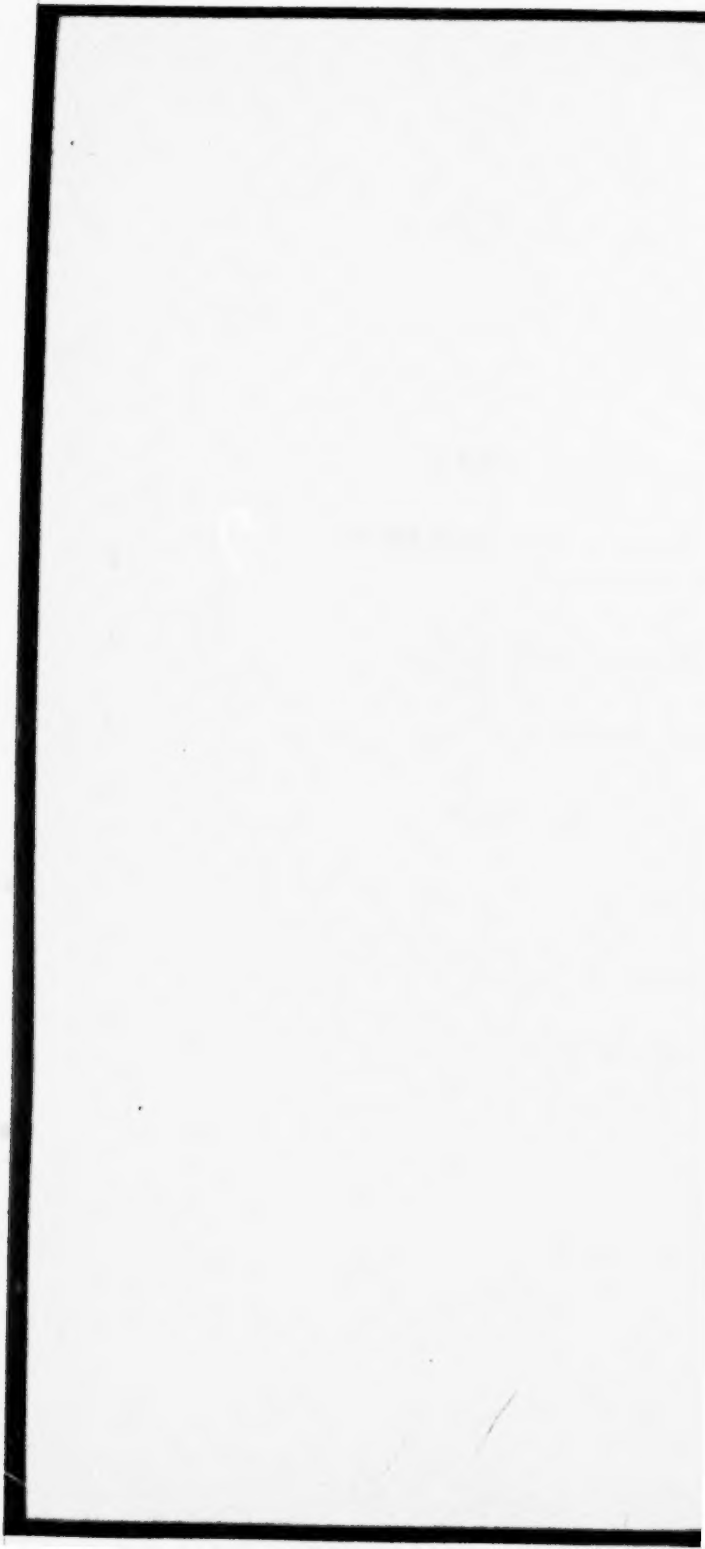
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No. 281

In The
Supreme Court of the United States

OCTOBER TERM, 1970

JAMES E. SWANN, ET AL., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF JACKSON CHAMBER OF COMMERCE, INC. AND JACKSON URBAN LEAGUE

NOW COMES Jackson Chamber of Commerce, Inc., a non-profit corporation organized and existing under and by virtue of the laws of the State of Mississippi, and Jackson Urban League, a non-profit corporation organized and existing under and by virtue of the laws of the State of Mississippi, both having their domicile in Jackson, Hinds County, Mississippi, by their attorney, and hereby respectfully move for leave to file the attached brief *amicus curiae*. The consent of the attorneys for the petitioners and the respondents has not been obtained.

These two entities, being both concerned with the welfare of the community within which they principally operate, and being particularly concerned with its economic growth and development, find themselves in common accord on one matter of particular and vital interest to their community, that is — the continued survival and health of the public

school system in the Jackson, Mississippi, area, and, therefore, are deeply concerned with the issues here presented.

The issues here have implications extending far beyond the particular situation now before the Court. Accordingly, these two entities desire the opportunity to present their views on this matter to the Court.

We feel that our contribution should assist the Court in setting the problems here presented in a broader context, thus ensuring a readier grasp of the grave import its decision may have for public school systems throughout the country.

For the foregoing reasons, the movants respectfully request that this motion be granted.

Respectfully submitted,

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No. 281

In The
Supreme Court of the United States

OCTOBER TERM, 1970

JAMES E. SWANN, ET AL., *Petitioners*
v.
CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF JACKSON CHAMBER OF COMMERCE, INC. AND JACKSON URBAN LEAGUE

QUESTIONS PRESENTED

This case presents questions which go to the very heart of the survival of the public school systems of this country. The questions presented necessarily include the following:

1. Must a school district adopt a plan of integration which demonstratively will result in resegregation?

THE INTEREST OF JACKSON CHAMBER OF COMMERCE, INC. AND JACKSON URBAN LEAGUE.

The interest of Jackson Chamber of Commerce, Inc. and Jackson Urban League, as *amicus curiae* is set forth on their motion for leave to file this brief *amicus*, to which motion this brief is annexed.

ARGUMENT

A. PRELIMINARY STATEMENT

These two entities, being both concerned with the welfare of the community within which they principally operate, and being particularly concerned with its economic growth and development, find themselves in common accord on one matter of particular and vital interest to their community, that is — the continued survival and health of the public school system in the Jackson, Mississippi area, and have agreed to submit to this Honorable Court certain principles which they believe if adhered to, would reverse the present destructive trends which are taking place not only in the Public School System of Jackson, Mississippi, but in all such systems in the Nation, and for that reason and in that spirit these two entities have come together for the sole purpose of presenting to this Honorable Court for its consideration the following facts and conclusions.

B. HISTORICAL REVIEW OF COURT DECISIONS

In September of 1969, one year ago, schools of this district opened under what was basically a "freedom of choice" plan. Enrollment showed 18,227 blacks and 20,966 whites. Today, one year and three court ordered plans later, enrollment is 18,396 black and 12,095 white, — a 42.4 per cent decrease in the number of whites. The first court order last fall ordered a desegregation of staff at the beginning of the second semester. On appeal by the NAACP Legal Defense Fund, counsel for the plaintiff, complete desegregation of pupils and staff was ordered at the beginning of the second semester. The District Judge ordered into effect an HEW plan for elementary schools and a plan of his own devising for secondary schools. Plaintiffs appealed this order

as to the secondary plan only. In May the Fifth Circuit Court of Appeals acted on this appeal, ordering into effect an HEW plan for secondary schools. Although there had been no appeal, the Fifth Circuit ordered the District Court to prepare a new elementary plan and ordered the appointment of a Bi-Racial Committee to help devise this plan. The Bi-Racial Committee did devise a plan and, after hearings, this plan was ordered into effect for September. Plaintiffs appealed this order and in their brief made this statement: — "the district court's controlling responsibility is to evaluate that plan, not in terms of its educational soundness, but in terms of its ability to achieve integration."

In August, acting on this appeal, the Fifth Circuit ordered into effect a plan which basically consisted of the pairing and grouping of approximately half the elementary schools. The court stated that this was to be temporary and the District Court was ordered to hold hearings and to prepare a new elementary plan for the second semester, making the fourth disruption in four semesters. The traditional six grade structure for elementary schools has been destroyed and we now have seven different grade-structured types of elementary schools. The traditional 3-3 secondary structure has been destroyed in favor of a 2-1-1-2 structure.

Under court plans presently in effect, 95% of the children in this district will attend six different schools from the first to the twelfth grade. In one extreme case, a small group of children will go to seven schools in twelve years. Or to look at it another way, it is possible for a family with seven children to have them in seven different schools.

Our superintendent, who came to us one year ago from a position as Assistant Superintendent in Atlanta, Georgia,

resigned a month ago, stating that his training, experience, and conscience would not permit him to be responsible for a system over which the court would allow him no control and one which he felt had been made educationally and administratively unsound. This man's imagination and dedication are demonstrated by the fact that this school system was the first in the country to submit a comprehensive plan of educational innovation and to receive a grant under the 75 million dollar emergency fund appropriated this summer. Under state law (dated prior to the *Brown* decision) and reinforced by an opinion from the Attorney General of Mississippi, the local school board has no authority (even if it had the money) to provide intra-city transportation.

C. RECENT STATISTICS

The following statistics demonstrate forcefully and without further argument precisely what is taking place in the Public School System of Jackson, Mississippi at the present time:

As of September 15, 1969, there were 18,227 black students and 20,966 white students in the Public School System of Jackson, Mississippi, or a total of 39,193 students The percentage ratio at that time was 47% black and 53% white.

On September 18, 1970, there were in the said school system 18,396 black students and 12,095 white students, or a total of 30,491 students. The percentage ratio at that time was 60% black students and 40% white students.

Thus, it can be seen that with the various court orders as set out in the historical review above, withdrawals of white students have occurred so that from September 15, 1969, to September 18, 1970, the number of white students attending said school system has dropped from 20,966 to 12,095, while over the same period the black students in said system have increased from 18,227 to 18,396. The percentage change over said period of approximately one year has been from 47% black students to 60% black students, and from 53% white students to 40% white students.

Thus, it is self-evident that from September 15, 1969, to September 18, 1970, a serious drift toward resegregation has taken place in the Jackson public school system.

D. ECONOMIC IMPACT

A major concern which bears directly on Jackson's education problems is the slowdown which has occurred in the city's economic development. During the past decade the increase in manufacturing employment has only been one half of what was needed.

A critical problem confronting Jackson's development efforts is the school situation. The present instability is preventing a major manufacturer from locating a badly needed large plant in the Jackson area. Neither this company nor many of the other firms which might otherwise come to Jackson can be expected to move into the area.

Paradoxically, Jackson's schools need to be strengthened before it will be possible to attract many of the companies

needed to accelerate the area's economic growth. The need for strengthening the schools was recognized by the School Board when they employed Dr. John Martin as superintendent; his capabilities in the curriculum development field were a major factor in his selection. And that strengthening cannot occur unless economic growth takes place which produces the revenues required. Nor can many of the social problems which confront the families in the lower economic brackets be solved unless more economic development takes place.

We come full circle then. The city's schools cannot be strengthened substantially without a doubling of the area's economic growth rate. The desired economic growth cannot take place without significant improvement in the quality of Jackson's schools. Neither improvement of the schools nor the desired economic development can take place unless the present instability is eliminated and the basic problems involved in the integration of the schools can be worked out.

The importance of this impact is not confined to economics alone. It is obvious that an adverse economic impact on any community brings with it increased social problems and burdens. This community at this time is making heroic efforts to solve social problems by providing better jobs, better housing, and better living conditions for its citizens who are in the lower economic echelons. This requires expenditures of capital. Anything, including the situation we are now concerned with, which adversely affects the economics of this community will adversely affect the efforts now being made to upgrade the living standards of those citizens in this community who are in the lower economic brackets.

E. CERTAIN PRINCIPLES

We are persuaded that from the experiences of this community, as well as the experiences of communities all over the Nation, certain basic principles have emerged which are worthy of serious consideration.

1.

Prior to the court orders which changed the same, the School System of Jackson, Mississippi, operated on what is known as 6-3-3 plan. That is, in the district the elementary schools consisted of the first six grades, the junior high schools consisted of grades seven, eight and nine, and the high schools consisted of grades ten, eleven and twelve. This system worked well and served the needs of the people in the community better than any other system which has ever been devised. There were demonstrable educational advantages, as the breaks which occurred between the three divisions of the system were natural breaks based on age and development of the children. There proved to be less disruption in the life of the individual child. The possibilities of major transportation problems were reduced. It is our firm belief that a return to the 6-3-3 concept is essential.

2.

It is our further conviction that if the integration which the courts, by their various decisions and orders have decreed, is to be achieved, it must be done in an orderly manner which will accomplish the courts' purposes without totally wrecking the public school system. In order to accomplish this, it is necessary that the outflow of whites from the public schools be reversed or resegregation is certain to result. It is probable that this trend can be reversed and

many whites who have fled the public schools will return if certain self-evident facts are recognized and are dealt with on a realistic basis.

Experience has shown that depending upon location of the area involved when the ratio of black pupils to white reaches a certain percentage, resegregation has resulted. For each community the resegregation point varies, depending upon the very nature of the community itself. Such consequences have been experienced in numerous American communities, including Washington, D. C., Philadelphia, Pennsylvania, Cleveland, Ohio, and many others. The Jackson statistics quoted above confirm the fact that this trend is presently being experienced in the Jackson Public Schools.

There are many and obvious deleterious by-products of this trend. Support of the public schools is being reduced. As an example, in November of 1969, a bond issue for capital expenditures for public schools in the City of Jackson was defeated by both black and white votes. It is doubtful if any public school bond issue could pass in this area at this time.

Frustration exists in the families of both the black and the white communities in the City, and this frustration is resulting in further polarization of the races.

Once the trend begins of the flight of whites from the public schools, it can normally be expected to accelerate. This statement is based on the experience of this community and others as set out above. In this community the private

schools which now exist, many of which have recently come into being, are overloaded and are expanding their facilities.

3.

Should the principles set out above be adhered to, it will then become incumbent upon this community to commit itself unreservedly to an innovative system of superior public education. The time gap which will exist between the frustrations and disruptions mentioned above and some eventual solution to this problem is all important. Steps must be taken immediately which will have the effect of compensating educationally for these frustrations and disruptions during this period.

This community has shown its commitment to these principles in the past. This commitment must continue. In fact, if the trend which is now taking place is to be reversed and the public school system of this area is to be saved, this commitment must be strengthened and the educational processes in the public school system must be enhanced at all levels. There are many things which can be done immediately and in the future to bring this about. We believe that with a reasonable, sensible and workable approach to the overall problem, this community will respond affirmatively in bringing about superior public education for its children. It is our firm conviction that this should be the primary consideration of all of the courts involved, and of all the entities and individuals who are in any wise affected by this overall problem.

CONCLUSION

We conclude that stability in the schools which will permit them to continue to survive can only be achieved if the principles set out herein are adhered to.

Respectfully submitted,

For The
JACKSON CHAMBER OF
COMMERCE, INC.

_____
President

_____
Executive Secretary

For The
JACKSON URBAN LEAGUE

_____
President

_____
Executive Secretary

_____
Board of Directors

_____
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October 9, 1970

CERTIFICATE OF SERVICE

I, Sherwood W. Wise, the attorney for Jackson Chamber of Commerce, Inc. and Jackson Urban League, *amicus curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the_____day of October, 1970, I served copies of the foregoing Motion For Leave To File Brief Amicus Curiae and Brief Amicus Curiae on the several parties thereto, as follows:

1. On the petitioners, James E. Swann, et al, by mailing three copies in a duly addressed envelope, with air mail postage prepaid, to their attorney, James Nabrit, III, 10 Columbus Circle, New York, New York 10019.
2. On the respondent, Charlotte-Mecklenburg Board of Education, et al, by mailing three copies in a duly addressed envelope, with air mail postage prepaid, to their attorneys, William J. Waggoner, Weinstein, Waggoner, Sturges & Odom, 1100 Barring Office Tower, Charlotte, North Carolina and Benjamin S. Horack, Ervin, Horack & McCartha, 806 East Trade Street, Charlotte, North Carolina.
3. On the United States of America, amicus curiae, by mailing three copies in a duly addressed envelope, with air mail postage prepaid, to its attorney, Erwin Griswold, Esquire, Solicitor General, Department of Justice, Washington, D. C.

It is further certified that all parties required to be served have been served.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 281

JAMES E. SWANN, et al., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., *Respondents*

NO. 349

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al., *Cross Petitioners*

v.

JAMES E. SWANN, et al., *Cross Respondents*

PETITION FOR REHEARING

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IN THE

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OCTOBER TERM, 1970

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v.

JAMES E. SWANN, et al., *Cross Respondents*

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents and Cross Petitioners, the Charlotte-Mecklenburg Board of Education, et al, present this petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

I.

The appeal in this cause was argued before this Court on the 12th day of October, 1970.

II.

On April 20, 1971, this Court rendered its decision in favor of the Petitioners and Cross Respondents and against the Respondents and Cross Petitioners. It held "the judgment of the Court of Appeals is affirmed as to those parts in which it affirmed the judgment of the District Court. The order of the District Court dated August 7, 1970, is also affirmed."

III.

The Respondents and Cross Petitioners seek a rehearing upon the following grounds:

A. The Opinion Of The Supreme Court, By Its Own Terms, Clearly Discloses That The Orders Of The District Court Were Unwarranted And Clearly In Excess Of The Powers Of The District Court.

In its opinion of April 20, 1971, this Court clearly held that a school system may operate free of judicial surveillance once it eliminates racial discrimination occasioned by official action, unless there is a showing that school authorities or some other state agency have "deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools . . ." (*Swann v. Charlotte-Mecklenburg Board of Education,* April 20, 1971, p. 28). School authorities are not constitutionally required, and federal courts are not permitted, to change the racial composition of a school system in which racial discrimination has been eliminated.

The cornerstone upon which the opinion of this Court rests is its unwarranted conclusion that the

Charlotte-Mecklenburg School Board conceded that it fell short of achieving a unitary school system in 1969:

". . . All parties now agree that in 1969, the system fell short of achieving a unitary school system that those cases require." *Swann*, supra., p. 3.[1]

and

"As the voluminous record in this case shows, the predicate for the District Court's use of the 71%-29% ratio was twofold; first, its express finding approved by the Court of Appeals and not challenged here, that a dual school system has been maintained by the school authorities at least until 1969; . . ." *Swann*, supra., p. 20.[2]

On the contrary, the Board has steadfastly maintained throughout the course of this litigation that its school system has been unitary and non-dual since 1965 when its plan for desegregation was approved by the District Court, *Swann v. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (1965), and by the Court of Appeals for the Fourth Circuit, 369 F. 2d. 29 (1966). The 1965 plan was held to be ". . . sufficient

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[1]Transcript of Oral Argument, October 12, 1970, p. 89. "Mr. Waggoner: I will say this. Before 1965, there were still some vestiges of the old state dual system." If the Court is attempting to impute such concessions to counsel, it should be observed that "distinct and formal admissions of facts made by counsel during the progress of a civil or criminal trial are binding on the client only *when made for the express purpose* of dispensing with formal proof." (Emphasis added) 7 Am. Jr. 2d. Attorneys at Law, §122. See also 7 CJS, Attorney and Clients, §100.

[2]See footnote No. 13 at p. 19 and argument, p. 43, Brief of Respondents and Cross Petitioners herein, in which the findings were challenged.

compliance with the duty imposed upon the Board by the Constitution."

Since 1965, the Charlotte-Mecklenburg system has been operating not under state direction, but under the express authorization and approval of the federal judiciary.

In its April 23, 1969, order, the District Court reviewed the performance of the Board under the 1965 plan, acknowledged that the Board had operated in good faith pursuant to "the general understanding of 1965 about the law regarding desegregation" and concluded:

> ". . . They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and *have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions.* The Charlotte-Mecklenburg schools in many respects are models for others." (Emphasis added) (311A).

In the same April 23, 1969, order, the District Court found there was no racial discrimination or inequality with reference to the use of federal funds for special aid to the disadvantaged, use of mobile classrooms, the quality of school buildings and equipment, coaching of athletics, parent-teacher association contributions and activities, school fees, school lunches, library books, elective courses, individual evaluation of students and gerrymandering (293A-302A).

These and similar findings of the District Court regarding the Board's operation of its schools under the 1965 court-approved plan negated any implication of a deliberate attempt "to fix or alter demographic patterns to affect the racial composition of the schools."

Absent such a showing, the Board's faithful adherence to the 1965 plan removed this school system from any justifiable surveillance and control of the federal court. When that plan was adopted and approved by the Court, racial discrimination through official state action was eliminated from the Charlotte-Mecklenburg system, which at that point ceased to be dual.

It is acknowledged that prior to 1965, Charlotte-Mecklenburg maintained a dual system. However, this acknowledgment does not support a conclusion that its schools were unlawfully segregated in 1969.[3]

The pertinent findings upon which all expressions of the District Court are based with respect to state action creating such segregation are not limited as to time. Instead, the findings are said to be based upon actions of school boards before and since 1954. To fall within the bounds of the opinion of the Supreme Court in this case, such findings must expressly relate to the post-1965 period of the operation of schools in this system. Neither the parties nor the appellate court can discern those facts upon which the District Court relied in finding "the resulting schools are not 'unitary' or 'desegregated.'" (662A). The actions which the District Court found unlawful extend over the entire history of the public school system, thereby presenting the appellate courts with findings that are not related to the critical post-1965 period.

The Charlotte-Mecklenburg school system complied with the Constitution in 1965. Its good faith implementation of the 1965 plan for desegregation

---

[3]The fact that the Board offered a far-reaching and sweeping plan to the District Court is not an acknowledgment that its system of schools in 1969 was one in which children were excluded from any school on account of race.

places this case beyond the power of the federal judiciary to intervene further. As declared by this Court:

> "... Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system ..." (*Swann*, supra., p. 27).

The Supreme Court's reliance upon its own erroneous conclusions regarding admissions of the parties as to the condition of the system in 1969 and reliance upon the unsupported and undefined findings of the District Court warrant reversal of the District Court and the Court of Appeals.

B. The Court Substantially Rejected Education As The Foundation Upon Which Its Decision Rested. Instead, It Erroneously Based Its Holding Primarily Upon Racial Quotas In Contravention Of The Equal Protection Clause Of The Fourteenth Amendment.

Concern for equal educational opportunity for all children was the foundation of this Court's opinions in *Brown I* and *II*, 347 U.S. 483; 349 U.S. 294. But in the *Swann* opinion, there is only one limited reference (at p. 26) to an awareness of the effect which desegregation plans of the District Court may have upon the educational process.

Now, social reform, rather than education, appears as the major thrust of the goal to be achieved. The emphasis is put on racial quotas, balancing, transportation, existence of predominantly black or white

schools and other "baggage" loaded upon the school wagon to prepare children to "live in a pluralistic society."

Due regard has not been given to the opinions and recommendations of education experts, the Superintendent and others (including some of the plaintiffs' own witnesses) with respect to the detrimental effects which the Court-ordered plan will have upon the school children of Charlotte-Mecklenburg. This includes the deprivations resulting from consequent financial burdens that seriously encumber other programs of the schools.

To condone desegregation arrangements that are administratively awkward, inconvenient and even bizarre relegates education to a subordinate role and ultimately will be self-defeating.

Racial assignments which result in impairment of the very educational process intended to be benefited clearly violate the rights of all children, black or white, under the Equal Protection Clause of the Fourteenth Amendment. Such constitutional violation and resulting impingement upon the educational process warrant reversal of the District Court orders. *Swann*, supra., p. 26.

C. The Implications Of The Opinion With Respect To The Power Of The Federal Courts To Order A Prescribed Racial Ratio Of Students At Each School Requires Clarification.

This Court addressed itself to the authority of a federal court to order each school to have a prescribed ratio of Negro to white students reflecting the proportion of the district as a whole.

At page 12 of its opinion, this Court stated:

". . . Absent a finding of constitutional violation, however, that (i.e. prescribing fixed ratios) would not be within the authority of the federal court. . ."

This assertion does not square with the implications of a later statement of the Court appearing on page 19 of the opinion, where the Court declared:

". . . If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. . ."

Although disavowed, the District Court's goal was to achieve a 71%-29% racial balance in each of Charlotte-Mecklenburg's schools to reflect as nearly as possible the racial ratios of the system at large. This objective was approved by this Court as being within the discretionary powers of the District Court to fashion an equitable remedy "for the particular circumstances." No guidelines and no limits are prescribed.

It would appear, therefore, that once a school system is found or presumed to be dual, the door is open for a trial judge subjectively to require racial balancing in whatever amount he may consider expedient.

Upon rehearing, this Court should define the circumstances justifying racial balancing and the extent to which it may be employed. Until this is done, neither the Charlotte-Mecklenburg, nor any other system, can prepare or present meaningful desegregation plans without recourse to fixed and disruptive mathematical ratios in all schools.

D. The Court, Having Raised The Difficult Problem Of School Location, Must Furnish To School Boards And District Courts Guidance In The Location And Construction Of Schools.

The Court carefully describes some of the problems of school construction and school location which lead to racial isolation. However, school boards are told that it is wrong to construct a school in a black area for the school will remain black. Similarly, they are advised they cannot build in white areas for the schools will remain white. They are further admonished that they should not build in border racial areas as such schools are likely to become black. Furthermore, school boards quickly receive the condemnation of the courts where the racial composition of a school changes to reflect the shift in the racial composition of the attendance district. The Charlotte-Mecklenburg Board, implementing the Court-approved plan for 1970-1971, has been condemned by the District Court for the shifts in population that have converted three schools from predominantly white to predominantly black. A number of other schools are similarly threatened.

In this highly mobile society, the mortals who serve on the school boards do not have the omniscience to foretell the changes in the racial complexion resulting from the movement of people.

Unless practical, rational and clearly understood guides are furnished to school boards and the district courts, compliance with the directive of this Court will be largely impossible. On rehearing, such guides should be established.

E. It Is Incumbent Upon The Court To Clearly Define A Unitary System So That School Boards May Know The Necessary Ingredients Comprising Such A System.

The Supreme Court has approved the sweeping desegregation order of the District Court. It accomplishes more racial balancing than has been achieved by any comparable school system. Yet, we find in the opinion that the plan is an "interim plan" and that at some point in the future the system should comply with *Brown I* and *Green v. New Kent County*, 391 U.S. 430 (1968).

Brown II directed that assignments should be non-racial. *Cooper v. Aaron*, 358 U.S. 1 (1958) suggested geographic attendance zones. *Goss v. Board of Education*, 373 U.S. 683 (1963) suggested freedom of choice. *Green v. New Kent County*, 391 U.S. 430 (1968) introduced the term "unitary system" which has not been clearly defined to this date by the Supreme Court. *Alexander v. Holmes*, 396 U.S. 19 (1969) attempted to define a unitary system as one "within which no person is to be effectively excluded from any school because of race or color." We are now told that the objective is "to see that school authorities exclude no pupil of a *racial minority* from any school, directly or indirectly, *on account of race*." (Emphasis added).

The racial assignments of the District Court's order obviously violate the principles of the non-racial assignments of *Brown II* and the prohibited exclusion of students on account of race as enunciated in *Alexander*, supra. The effect of the District Court's order so fully balances students and faculty and so fully satisfies the other criteria of *Green* that we are unable

to comprehend why a unitary system has not been achieved by the sweeping desegregation order.

It is incumbent upon the Court to furnish the solid guidance it professed to give. It will thereby permit this School Board to extricate itself and the citizens of Charlotte-Mecklenburg from the legal quagmire created by the conflicting and inconsistent statements regarding the law of the land with respect to the establishment and operation of a unitary school system. Rehearing of this case will afford this Court an opportunity to do so.

F. The Court's Concern For The Time Or Distance Of Travel, Particularly For Young Children, Is Overshadowed And Rendered A Nullity By Approval Of The District Court's Orders.

In school cases, courts should not utilize the worst features of a school system (such as transportation) as the tools for bringing about further desegregation. In this case, the action of this Court in approving the orders of the District Court reflects upon the viability of this Court's holding that "the limit of time of travel will vary with many factors, but probably with none more than the age of the students." *Swann*, supra., p. 27.

This application of the Court's pronouncement is further cast in doubt by its acknowledgment that four and five year olds travel the longest routes in the system. *Swann*, supra., p. 25. Obviously, the age of the child was of little concern to the District Court. We can only conclude that in Charlotte-Mecklenburg, students of any age may be subject to assignment to any school within the system.

The Supreme Court must give rational, practical and reasonable guidelines with respect to transportation of students. In its present posture, this pronouncement of the Court is meaningless to this school system.

G. The Opinion Of This Court Unfairly Discriminates. A Nationwide Standard Is Required.

The dual standard adopted by the Court for this school system is a clear violation of the rights and privileges guaranteed to its citizens. The stringent and apparently insurmountable burden it faces regarding predominantly black schools is not shared by school systems located in other areas of the country.

The Board on many occasions offered comparisons of desegregation in the Charlotte-Mecklenburg schools with that in other non-southern systems. The District Court, while observing that our system compared favorably, rejected such proffers. (663A). Actually, this system was more racially balanced on February 5, 1970, under its 1969-70 plan than any other large urban area in this nation. The exclusion of this evidence effectively prevented the Board from showing that it had eliminated the effects of the former state imposed dual system.

We further offered evidence which showed that seven of its schools had changed from predominantly white to predominantly black during the period 1965 through 1968—for reasons totally unrelated to School Board action. These changes took place while the 1965

Court-approved plan was in effect. Nevertheless, the District Court, while noting the plan was administered in good faith, made a broadside finding that all predominantly black schools in the system, including those seven schools, to be "illegally segregated." The Supreme Court, by approval of the District Court's orders, sustained this finding. This case offers clear evidence that southern school systems face an impossible burden of proof. As a result, the citizens of this area are subjected to invidious discrimination.

The decision goes further than the ancient practice of visiting the sins of the father upon the son and later generations. It visits punishment upon children for the recently discovered offenses of their forebears or the forebears of their neighbors. Racial assignments are imposed upon young citizens residing in this district. It is immaterial that a child is a newly arrived foreign national or a former citizen of a non-southern state or that he was born subsequent to 1954. By residing in Charlotte-Mecklenburg, under this opinion, upon identification of the color of the child's skin, the child will be assigned to school according to color. This is expressly prohibited by *Brown I* and *II*.

Unless a uniform reasonable standard, with national application, is established for a unitary school system, a southern school district such as our own will be saddled with the irrefutable presumption that schools substantially disproportionate in their racial composition are unconstitutional.

CONCLUSION

For the foregoing reasons, it is urged that this petition be granted.

This the 14th day of May, 1971.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

We hereby certify that the foregoing petition is submitted in good faith and not for purposes of delay.

/s/ WILLIAM J. WAGGONER

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/s/ BENJAMIN S. HORACK

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CERTIFICATE OF SERVICE

This is to certify that I have served three copies of the foregoing Petition for Rehearing upon the following persons at their addresses by depositing same in the United States mail, postage prepaid, first class, as follows:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

No. 436

BIRDIE MAE DAVIS, ET AL., *Petitioners*

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE, OUT OF TIME

and

BRIEF AMICI CURIAE

For the United Negro College Fund, Inc.; the National Urban Coalition; the League of Women Voters of the United States; the League of Women Voters of the State of North Carolina; the League of Women Voters of Charlotte-Mecklenburg, North Carolina; the Mississippi Educational Resources Center; the Center for Law and Education, Harvard University; and the Washington Research Project of the Southern Center for Studies in Public Policy.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE, OUT OF TIME

The following organizations—the United Negro College Fund, Inc.; the National Urban Coalition; the League of Women Voters of the United States; the League of Women Voters of the State of North Carolina; the League of Women Voters of Charlotte-Mecklenburg, North Carolina; the Mississippi Educational Recources Center; the Center

for Law and Education, Harvard University; and the Washington Research Project of the Southern Center for Studies in Public Policy—hereby move pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief amici curiae in the above-entitled cases.[1] Petitioners in both cases, the United States as a party to No. 436, and the Charlotte-Mecklenburg Board of Education as a respondent in No. 281, have consented to the filing.[2] The other respondents have not yet replied to our request for consent to file.

Under the briefing schedule established by this Court briefs amici curiae supporting the position of petitioners were due by September 16, 1970. Rule 42(2), Rules of Supreme Court. Movant organizations respectfully request that leave be granted to file the attached brief out of time. As set out below, movant organizations represent a broad and diverse spectrum of citizens, united by a common concern for quality integrated education. They desire to present to the Court a unified treatment of these two critical cases. The accelerated briefing schedule established by this Court, under which amici briefs supporting petitioners were due seventeen days after the Court's order, made it impossible for counsel to consult with all of them and agree on a common treatment of both cases, and to prepare a brief giving full and comparative attention to the *Mobile* as well as the *Charlotte* case, by September 16.

The United Negro College Fund, Inc., is an organization consisting of 36 member colleges, all but one of them in the South, which was established in 1943 to raise funds and provide other assistance to member colleges. The Fund and its members have an important and direct interest in assuring that elementary and secondary school students

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[1] Movant organizations earlier filed a brief amici curiae urging the grant of certiorari in No. 281, by leave of this Court granted pursuant to motion.

[2] The written consent of these parties has been filed with the Clerk.

are well prepared for college and thus have a continuing concern about the persistence of segregated public schools.

The National Urban Coalition is an organization whose purpose is to improve opportunities and conditions of life for citizens living in urban areas of the nation. Founded in 1967, it has 47 affiliated local coalitions and representation from corporations, unions, religious, and civil rights organizations. The improvement of educational opportunity is among its prime purposes and to that end it has sponsored educational research and participated as amicus curiae in a case involving the equal distribution of educational resources.

The League of Women Voters of the United States, the League of Women Voters of North Carolina, and the League of Women Voters of Charlotte-Mecklenburg, North Carolina, are three organizations with common aims and principles but with independent decision-making powers. Founded in 1920, the national League now has 156,000 members in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. As part of its overall program of encouraging informed and active participation of citizens in government, the national League has placed major emphasis upon the quality of public education and in 1970 reaffirmed its pledge to support efforts to end racial discrimination in education. The North Carolina and Charlotte-Mecklenburg Leagues have conducted studies of the quality of educational opportunity in their respective areas. Like the national League, they are committed to work for equality of opportunity in education.

The Mississippi Educational Resources Center is a private organization established in 1969 to represent professional, parent, and community groups throughout the State of Mississippi. Its membership is predominantly black. Its purpose is to assist communities and school districts in overcoming problems incident to the school desegregation process and to assure that desegregation takes place and in an orderly and positive manner.

The Center for Law and Education, Harvard University, is an educational institution established in 1969 by Harvard University and the United States Office of Economic Opportunity to "promote reform in American education by working in the area of social policy and law." To carry out its aims, the Center has sponsored and conducted research on various aspects of the educational process. It has also served as amicus curiae in several cases involving issues within the area of its expertise.

The Washington Research Project, established in 1968, is a research organization located in Washington, D. C., and affiliated with the Southern Center for Studies in Public Policy of Clark College in Atlanta, Georgia. The principal aim of the project is to assist in the establishment of equality of opportunity for all citizens through negotiation and monitoring of administrative agency programs and litigation. It is deeply concerned with educational issues, particularly with alleviating the continuing effects of racial discrimination in public schools. It has conducted a study of the impact of Federal aid to education programs on minority children and maintains a continuing effort to monitor such programs to ensure that they are conducted without discrimination.

Each of the movant organizations consists of black and white citizens. While their activities vary, all are bound together by a common commitment to strengthen public education in this country and to work for an end to racial segregation in the schools. All of the movant organizations, moreover, share a common commitment to the maintenance of the rule of law in this nation. They believe that the rule of law is threatened by continuing violations of the rights of Negro school children declared by this Court in 1954.

Movant organizations seek leave to enter these cases for the purpose of supporting fully the position of the petitioners. Movants believe, however, that—by virtue of

their breadth, their special interest in education and the scope of their activities in conducting and sponsoring research on issues of education and civil rights—they are well equipped to inform the Court with respect to the impact that the decisions of the courts below may have upon the process of school desegregation throughout the nation. Further, movants believe that a unified and comparative treatment of these two cases might helpfully supplement the separate treatment provided in the briefs for the petitioners.

Accordingly, movant organizations respectfully request that the Court grant leave to file the attached brief amici curiae.

Respectfully submitted,

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Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL., *Petitioners*

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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No. 436

BIRDIE MAE DAVIS, ET AL., *Petitioners*

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICI CURIAE

For the United Negro College Fund, Inc.; the National Urban Coalition; the League of Women Voters of the United States; the League of Women Voters of the State of North Carolina; the League of Women Voters of Charlotte-Mecklenburg, North Carolina; the Mississippi Educational Resources Center; the Center for Law and Education, Harvard University; and the Washington Research Project of the Southern Center for Studies in Public Policy.

INTEREST OF AMICI

Amici, as is more fully set forth in the Motion for Leave to File a Brief Amici Curiae, are all organizations with a deep interest in maintaining and improv-

ing the quality of education available to children of all races. As a part of this interest, they have all committed themselves to work for the elimination of racial segregation and other forms of discrimination in education.

Several amici have conducted or sponsored research on problems of establishing equal educational opportunity. Others have supported and appeared in litigation involving the public schools and discrimination. Still others have undertaken to work for the full and fair enforcement of civil rights laws by Executive departments and agencies of the Federal Government.

All have a commitment to the maintenance of the rule of law and a deep concern about the continuing denial of constitutional rights of black school children.

STATEMENT

A. No. 281, Swann v. Charlotte-Mecklenburg Board of Education

During the 1968-69 school year, the Charlotte-Mecklenburg school system served more than 84,000 pupils in 107 schools (293a-294a).[1] Approximately 71 per cent of the pupils were white and 29 per cent were black. During that year, nearly 17,000 of the more than 24,000 black pupils in the district attended predominantly black schools, under a geographic zoning plan allowing for free transfer (459a).

To remedy this situation, which all parties now agree fell short of achieving a unitary school system, the district court held numerous hearings and received voluminous evidence. As a result of this extensive liti-

[1] Record references in this form are to the printed Appendix filed in No. 281.

gation, the details of which are set out in the Brief for Petitioners in No. 281, the district court was presented in February of 1970 with two alternative pupil assignment plans.

The school board proposed a plan which was based exclusively upon the technique of "neighborhood" or contiguous attendance zoning (727a-728a). The board plan substantially integrated all the high schools, producing a white majority of at least 64 per cent in each school (829a). The plan desegregated most of the junior high schools, but left one of them 90 per cent black and several virtually all white (830a). With respect to the elementary schools, the board plan left more than half the black elementary school pupils in nine schools which were between 83 per cent and 100 per cent black and about half the white elementary pupils in schools 86 per cent to 100 per cent white (832a-834a).

An educational expert appointed by the court, Dr. John Finger, presented an alternative plan which desegregated every school in the Charlotte-Mecklenburg system. With one minor modification, not now in issue, his plan adopted the board's proposed zoning of high school attendance areas. With respect to the junior high schools and the elementary schools, the plan started with the contiguous attendance zones proposed by the board, but where those zones left schools racially identifiable by the makeup of their student bodies, it paired all-black or predominantly black schools with non-contiguous all-white or predominantly white schools so that all the students in the zones feeding both schools would attend the formerly white school for grades 1-4 and the formerly black school for grades 5-6 (1209a-1214a).

Before February 1970, the Charlotte-Mecklenburg school system had provided substantial bus service to its pupils. During the 1969-70 school year, the board operated 280 school buses transporting nearly 25,000 of its 84,000 students (619a), at a cost of about $475,000, or about $20 per child (1259a). The plan devised by the court-appointed expert required the additional transportation of 13,300 pupils—1,500 high school, 2,500 junior high school, and 9,300 elementary school. The additional operating cost of transporting these pupils was to be about $266,000 (1269a). It was originally thought that the new busing requirements would entail a capital outlay of about $745,000, but it now appears from the hearing held after this Court granted certiorari that the outlay will be much lower because of surplus buses the school board has on hand (Br. A18-A23).[2] The school budget for the Charlotte-Mecklenburg system for 1970-71 is about $66 million (Br. A21).

Under the court expert's plan, approximately 47 per cent of the pupils in the Charlotte-Mecklenburg system would be bused to school. In North Carolina as a whole, about 55 per cent of all pupils ride buses to school (1289a). The average one-way bus trip for pupils newly bused under the plan would be about 7 miles, taking about 35 minutes (1215a). In North Carolina as a whole, the average one-way bus trip is about 12 miles (1199a), and in Charlotte-Mecklenburg the average trip during the 1969-70 school year was about 15 miles, taking about an hour and a quarter (1204a).

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[2] Record references in this form are to the Appendix to the Brief for Petitioners in No. 281, wherein the district court proceedings following this Court's grant of certiorari are set out.

The district court ruled that the school board's plan fell short of constitutional requirements, while the plan proposed by the court-appointed expert did achieve a unitary system and was feasible; accordingly, he ordered the expert's plan into effect (819a). On appeal, the court of appeals agreed that the school board's plan failed to achieve a sufficient degree of pupil integration to qualify as a unitary plan, and accepted the district court assignment plans for junior and senior high schools, plans which involved some noncontiguous zoning and additional busing. However the court held that the assignment plan for elementary schools required an excessive amount of additional transportation, and set aside that part of the order. The court adopted what it called "the test of reasonableness"; it held "first, that not every school in a unitary system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction. . . ." (1267a). Judges Sobeloff and Winter, dissenting, would have affirmed the district court order in its entirety (1279a; 1295a); Judge Bryan, concurring specially, indicated his belief that the plan proposed by the school board met constitutional standards (1295a).

On remand, after this Court granted certiorari, the district court reaffirmed its original order. The school board failed to come forward with a new plan, and the district court found that no educationally sound plan falling short of the degree of desegregation achieved in its original order had been proposed (Br. A2, A27).

B. No. 436, Davis v. Board of School Commissioners of Mobile County[8]

The Mobile County school system served about 73,500 pupils during 1969-70 in 91 schools; about 58 per cent of the pupils were white and 42 per cent black. As in Charlotte, an extended course of litigation, summarized in the Brief for Petitioners in No. 436, led to a situation in January of 1970 in which the district court was required to select from alternative plans the one which would best comport with constitutional requirements.

The school board proposed a plan under which nearly 19,000 black children, about 60 per cent of the black students in the system, would be assigned to 21 all-black or virtually all-black schools. Educational experts from the Department of Health, Education and Welfare proposed two plans. The first was based entirely upon the technique of contiguous zoning, and required no additional transportation of students, but left nine all-black schools serving nearly 8,000 pupils. The second HEW plan used the additional technique of satellite or noncontiguous zoning, and paired the remaining all-black schools with predominantly white schools in the same way as did the plan ordered by the district court in Charlotte. It left no schools all-black.

Like the Charlotte-Mecklenburg system, the Mobile County system has in the past provided substantial bus service for its pupils. During the 1967-68 school year, 207 buses transported 22,094 pupils daily. Busing was not confined to the rural areas of the county; during the 1966-67 school year, 7,116 pupils were bused within metropolitan Mobile. Nor was busing confined to trans-

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[8] Because the printed Appendix in No. 436 was not available when this brief was prepared, our statement of the case necessarily lacks record references.

porting pupils to the nearest school; during the 1966-67 school year, 2,350 pupils were bused because of non-contiguous zone assignments. Much of the busing was provided in order to maintain segregation.

Because the district court did not hold evidentiary hearings on the proposed plan, the record in this case does not reflect the extent or cost of the additional transportation which would be required to implement the HEW alternative plan which eliminated the all-black schools in the Mobile system.

In the January 1970 district court proceedings, the petitioners urged the court to adopt the HEW plan which would eliminate the all-black schools; the United States, which is a party to the case, urged the adoption of the other HEW plan, which proposed no additional transportation but left several all-black schools; and the school board urged adoption of its own plan. The district court ordered the school board plan into effect. On appeal, the three parties maintained their respective positions. The court of appeals held that the school board plan did not provide a unitary system, but at the same time it rejected petitioner's HEW plan which would have eliminated the all-black schools. It accepted a modification of the HEW contiguous zoning proposal, which, after further modification, left six all-black elementary schools serving about 5,300 children—about 17 per cent of the black pupils in the whole Mobile County system, and about 50 per cent of the black elementary school pupils in metropolitan Mobile. There have been further subsequent minor modifications of the plan, but the record does not make clear how these modifications have affected the racial makeup of the schools.

The court of appeals proceeded under a legal stand
ard which it stated as follows:

> "We have examined each of the plans presente
> to the district court in an effort to determine whic
> would go further toward eliminating all Negro o
> virtually all Negro student body schools while a
> the same time maintaining the neighborhoo
> school concept of the school system."

C. A Comparison of the Two Cases

Both the Mobile and the Charlotte school systems op
erated full dual school systems based on race well int
the 1960's. In both, little pupil desegregation ha
been achieved by the end of the 1968-69 school yea
Both are large systems, serving a majority of urba
and a minority of rural school children. Both systen
have in the past transported substantial numbers o
children to school by bus and in both busing has bee
used to perpetuate the system of segregation.

In both systems, substantial residential segregatio
makes it impossible fully to desegregate each elemen
tary school if assignment is based solely on "neighbo
hood" or contiguous attendance zones. In both case
plans have been proposed which would use only co
tiguous zones, and in both cases these plans would leav
approximately half of the black elementary school chi
dren in all-black or virtually all-black schools. In bot
cases, alternative plans have been proposed whic
would desegregate every school's student body by pai
ing schools in black areas with schools in noncontiguou
white areas; in both of the cases, these plans would r
quire the school system to provide additional tran
portation to get children to school.

In the *Charlotte* case, district court findings sup
ported by substantial evidence indicate that the add

tional transportation required by the complete desegregation plan would cost the school less than one percent of its operating budget. The percentage of children bused under the plan, and the average length of the bus trip, would be well within the statewide average for North Carolina. Similar evidence and findings are not available in the *Mobile* case, in which the district court has not held evidentiary hearings on the proposed plans. However the record in the case indicates that both noncontiguous zoning and busing of students are familiar assignment techniques in the Mobile school system.

In both cases, the respective courts of appeals have rejected the proposed plan which would completely desegregate the school system. The rationales for the rejection differ somewhat: in the *Mobile* case the Fifth Circuit has refused to go beyond "neighborhood" or contiguous zoning to achieve desegregation; while in the *Charlotte* case, the Fourth Circuit has approved some noncontiguous zoning with accompanying additional transportation, but has disapproved more extensive use of the same technique as "unreasonable."

SUMMARY OF ARGUMENT

I. In *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954), this Court found that the system of official segregation of the schools, based as it was upon the assumption that black people were morally and intellectually inferior to whites, amounted to a massive government-sponsored racial insult to the black people subjected to it, and hence violated the equal protection clause. In *Green* v. *Board of School Commissioners of New Kent County,* 391 U.S. 430 (1968), the Court declared three basic principles to govern final implemen-

tation of *Brown*: 1) the system of segregation must be dismantled and its effects undone; 2) the goal of this process is the abolition of racially identifiable schools; and 3) officials must take all feasible steps to achieve this goal and bear a heavy burden of justification for any failure to do so.

In the context of the present cases, *Brown* and *Green* mean that in school districts which have officially segregated the races, schools with all-black or very disproportionately black student bodies cannot be tolerated where feasible alternative plans of pupil assignment exist. Such schools are racially identifiable "black schools." To both whites and blacks in the community they represent the perpetuation of the system of official segregation and the official assumption of black inferiority upon which that system rests. They inflict the same psychological harm on black children as was condemned in *Brown*, and they perpetuate tangibly second-rate education for the pupils assigned to them. These schools must be abolished wherever this is possible through known techniques of pupil assignment; no excuse short of complete technical unfeasibility can be allowed.

II. The issue in these cases is not whether as an abstract matter the Constitution commands a particular racial balance in public schools, or even whether the Constitution condemns all-black schools as such. It is rather what remedy is required to undo the particular historical system of school segregation existing in this country, founded as it has been on assumptions of racial inferiority. The instructive analogy is to faculty desegregation, where this Court has approved a requirement of full racial balance, not as a substantive constitutional requirement, but as a remedy to dis-

mantle a well-entrenched system and to undo, as far as possible, the effects of that system.

III. In the two present cases, the courts of appeals have tolerated the perpetuation of black schools on grounds short of the unfeasibility of abolishing them. In Charlotte, the district court ordered a plan of complete desegregation which the record makes clear is technically feasible. In Mobile, the district court's failure to hold hearings has prevented development of a similar record, but a plan of complete desegregation, never found unfeasible by any court, has been submitted by government educational experts.

The excuses put forward to justify continued segregated schools are constitutionally insufficient. The Fifth Circuit's "neighborhood school concept" represents only one among several competing systems of pupil assignment used in this country, one without constitutional status, and one which has not been used in the South generally or in Mobile in particular. The Fourth Circuit's vague "rule of reasonableness" appears to excuse continued segregation where integration would require "too much" incidental transportation with its accompanying cost. Cost as such, particularly the very limited costs of achieving full desegregation in these cases, is not a sufficient excuse for maintaining segregated schools. Busing is a familiar technique of getting children to school, often used for purposes other than desegregation. It, like all other standard educational techniques, must be used where needed to complete the process of disestablishing the dual school system.

ARGUMENT

I. DISESTABLISHMENT OF A DUAL SCHOOL SYSTEM REQUIRES THAT, UNLESS DEMONSTRABLY UNFEASIBLE, PUPILS BE ASSIGNED SO THAT NO SCHOOL HAS A STUDENT BODY WHICH IS ALL-BLACK OR SO DISPROPORTIONATELY BLACK AS TO MAKE THE SCHOOL IDENTIFIABLE AS A "BLACK SCHOOL".

These cases raise the question whether school officials who have been operating separate systems of schools based upon race can be said to have disestablished those systems when they continue to assign pupils so as to maintain schools with all-black or disproportionately black student bodies. We submit that the answer is "No"—at least where there exist feasible alternative methods of assignment which would desegregate those schools.

The issue is not whether as an abstract matter the Constitution requires any particular racial balance in public schools generally, or even whether the Constitution generally forbids all-black or predominantly black schools whatever their historical background. Rather the issue is the narrower one of what remedy is required to eliminate the last vestiges of a particular historical practice, long since judged to be unconstitutional, namely the official and mandatory assignment of black children to separate schools set aside for their race.

The underlying rationale of *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) (*Brown I*) and the specific principles pronounced in *Green* v. *Board of School Commissioners of New Kent County,* 391 U.S. 430 (1968), require the abolition of schools identifiable as black by the makeup of their student bodies, wherever this can be accomplished by feasible techniques of student assignment. The grounds stated by

the Fourth and Fifth Circuit Courts of Appeals for approving plans which fall short of this requirement in the present cases are insufficient as a matter of established law.

A. The Rationale of Brown I.

In the first *Brown* decision, this Court held that racial segregation of the public schools violated the equal protection rights of black children. In the American historical context, the system of segregation was no less than a massive government-sponsored racial insult to the black people subjected to it, based on assumptions of their intellectual and moral inferiority to white people. The system of segregation, and the official insult it carried with it, was most damaging as applied in the schools, for there it was directed at children of unformed minds and developing personalities, in the public institutions most crucial to their growth. The system was unconstitutional because the history of the Fourteenth Amendment made clear that the framers meant to forbid all official action which injured or degraded black people because they were black.[4]

Thus *Brown I* rested firmly on the finding of the Kansas district court: "Segregation of white and colored children has a detrimental effect upon colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro groups." 347 U.S. at 494. That was sufficient to establish the constitutional violation; official segregation meant official imputation of racial inferiority, and hence official injury to black people because of their race.

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[4] See generally Black, *The Lawfulness of the Desegregation Decisions*, 69 Yale L.J. 421 (1960).

B. The Principles Declared in Green.

In *Brown I* the Court declared the basic principle; in *Brown* v. *Board of Education of Topeka,* 349 U.S. 294 (1955) (*Brown II*), the job of implementing the principle was returned to the district courts. In *Green, supra,* the Court addressed itself in detail to the standards governing that implementation, and laid down three essential guidelines which govern these cases.

First, the Court stated that the constitutional goal was "the abolition of the system of segregation and its effects." 391 U.S. at 440.[5] The Court, in referring to the *system* of segregation and its *effects,* recognized that the dual school system constituted and supported a set of social practices, practices which by their existence and maintenance conveyed and continued the racial insult condemned in *Brown I.* The job of the courts in remedying the wrong of segregation was not merely to undo the formal legal arrangements of the dual system, but also more broadly to dismantle the institutions in which those arrangements found fruition.[6]

Second, the Court specified what a unitary system was: it was one "without a 'white' school and a 'Negro' school, but just schools." 391 U.S. at 442. Here the Court dispelled any notion that a system might somehow be desegregated while its schools retained their former racial identification.

Third, the Court placed upon officials who had operated dual school systems "the affirmative duty to

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[5] The Court in *Green* traced the obligation to abolish and dismantle the entire system of segregation back to *Brown II* and its command, 349 U.S. at 301, "to effectuate a transition to a racially nondiscriminatory school system." 391 U.S. at 435.

[6] See *Green,* 391 U.S. at 437: "*Brown II* was a call for the dismantling of well-entrenched dual systems . . . ."

take *whatever steps might be necessary* to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-438 (emphasis added). When school officials claimed to be operating unitary systems, the district courts were to "weigh that claim in light of the facts at hand and in light of *any alternatives which may be shown as feasible* and more promising in their effectiveness. . . ." 391 U.S. 439 (emphasis added). Thus no excuse would be heard that the means required might be too onerous; the school officials were to take "whatever steps might be necessary," to adopt "any alternatives which may be shown to be feasible." Along with the "affirmative duty" to achieve complete desegregation went *"a heavy burden upon the board* to explain its preference" for anything less than the most effective feasible plan of desegregation. *Ibid.* (emphasis added).

Thus *Green* held : 1) that the system of segregation must be dismantled and its effects undone; 2) that the goal of this process was the abolition of racially identifiable schools; and 3) that boards must take all feasible steps to achieve this goal and bear a heavy burden of justification for any failure to do so.

C. Schools With Black Student Bodies Which Could by Feasible Assignment Techniques Be Desegregated Are Remnants of the System of Discrimination Condemned in Brown I.

Where a school in a dual system is attended exclusively or very largely by black children, and where school officials maintain this attendance pattern in the face of feasible alternatives which would produce an integrated student body, that school is as a practical matter the equivalent to the "colored school" of the pre-*Brown* system of segregation. The very difficulty

of persuading southern school officials, southern judges, and even federal bureaucrats to do the job of integrating these schools is the best evidence for this fact. White school officials and parents feel a peculiar horror at the idea of assigning white children to these schools, as the records in these cases attest.

In Charlotte, when the school board was finally forced to the point of achieving some substantial desegregation in the summer of 1969, it proposed to move substantial numbers of black children to white schools, and to use school buses to get them there (481a-482a). Several black schools were closed, and the children whom they had served were bussed into white neighborhoods. There were no accompanying transfers of white students into the black central city schools (590a). Judge McMillan pointed out that this one-way integration plan was "an affront to the dignity and pride of the black citizens" in his August 15, 1969, order, but felt compelled to accept the plan for the 1969-70 school year by the exigencies of time (586a, 589a-590a).

In Mobile, when educational experts from the Department of Health, Education and Welfare were asked to prepare a plan for desegregation in the summer of 1969, their response also was to close black schools and bus the children who had attended them into white areas of town. But, where closing of a black school could not be justified, the student body of that school was left all-black; no white-to-black transfers were proposed. When the experts were asked about this obvious discrepancy, their response—that "cross-busing" did not have "financial" or "community" support—amounted to a concession that the notion of actually desegregating "black schools" by assigning white stu-

dents to them was too radical to contemplate even in the year 1969. They purported to rely on alleged legal difficulties with ordering busing of students to achieve desegregation, but as the plan they submitted clearly shows their chief concern was with *cross-busing*—the busing of white as well as black children.

In general, school desegregation to date has been a one-way process. Black children have been allowed into the white schools, but there have been few corresponding transfers of white children to black schools. Instead, large numbers of those black schools have been closed or reassigned to subsidiary uses such as vocational or special education classes even where they were newer and better equipped than the white schools which remained open, and even at the cost of running the newly integrated white schools on double shifts. Where black schools could not be closed, they have largely remained all black.[7]

Thus the black schools of today, identified by their all-black or predominantly black student bodies and by their location in black neighborhoods, retain for the white community which seeks so hard to avoid them the stigma originally conferred by the underlying segregationist assumption that they are for inferior chil-

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[7] On one-way integration and black school closings, see Judge McMillan's order in the *Charlotte* case, text, *supra;* see also *Felder* v. *Harnett County Board of Education,* 409 F.2d 1070, 1074 (C.A. 4, 1969); *Haney* v. *County Board of Education of Sevier County,* C.A. 8, No. 19,899, June 29, 1970 (slip opinion at 11-13); *Andrews* v. *City of Monroe,* C.A. 5, No. 29358, April 23, 1970 (slip opinion at 8); *Wright* v. *Board of Public Instruction of Alachua County,* C.A. 5, No. 29999, August 4, 1970 (slip opinion at 5); *Allen* v. *Board of Public Instruction of Broward County,* C.A. 5, No. 30032, August 18, 1970 (slip opinion at 7).

dren.[8] But if they still bear that stigma for the white community, so do they for the black community and for the black children who attend them. This being so, assignment to these schools must have for these black children the same ineradicable effects upon their hearts and minds which this Court condemned as the central vice of state-imposed segregation in *Brown I*.[9]

Black schools are inferior not only because of the racist assumptions upon which they are founded and the consequent psychological harm they do, but also in a more tangible sense. These schools receive less of the resources available for education than do schools attended by the children of the dominant white community, and provide correspondingly inferior facilities and services. For example, the Civil Rights Commission found that, in a sixteen-county area of Alabama,

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[8] One of the findings of the Civil Rights Commission, based upon its analysis of the extensive Coleman data on race and education was that:

> "Predominantly Negro schools generally are regarded by the community as inferior institutions. Negro students in such schools are sensitive to such views and often come to share them. Teachers and administrative staff frequently recognize or share the community's view and communicate it to the students. This stigma affects the achievement and attitudes of Negro students." U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 204 (1967).

[9] A district judge with long experience in the struggle to disestablish the official dual school system put the point well:

> "The entire community, white and black, whose own attitude toward Negro schools is what stigmatizes those schools as inferior, must be disabused of any assumption that the schools are still officially segregated, an assumption it might cling to if after supposed 'desegregation' the schools remained segregated in fact." *Hobson* v. *Hansen*, 269 F. Supp. 401, 495 (D.D.C. 1967).

white-attended school buildings and their contents were worth an average of $981 per pupil, compared with an average of $283 per pupil at black-attended schools.[10] Test scores reveal the stark results of this kind of disparity—black twelfth grade pupils in the urban South score 3.5 grade levels behind their white counterparts on standard reading comprehension tests.[11]

It is a fact of political life in the South that the power and influence needed to improve the quality of schools resides in the white community. That community would not long tolerate for its children the kind of education which has typically been supplied to black children in their separate schools. Only when there are no more black schools as such, when the children of the white community attend every school, will every school receive its fair share of available educational resources.

In *Green,* this Court, recognizing both the continuing psychological harm and the continuing inferior education inherent in the black schools surviving from the pre-*Brown* system of segregation, named the racial identifiability of schools as the essential evil to be abolished by the desegregation process. 391 U.S. at 442. When school officials maintain schools with student bodies all-black or black in gross disproportion to the racial makeup of their districts as a whole, even in the face of feasible alternatives, they are maintaining

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[10] Transcript of Hearing held before the U.S. Commission on Civil Rights, Montgomery, Alabama (1968), Exhibit No. 26 at 863.

[11] United States Office of Education, *Equality of Educational Opportunity* (1966), at 274.

racially identifiable black schools.[12] *Green* thus requires these officials to take "whatever steps might be necessary" to abolish their black schools.[13]

In the context of these cases, this means that school officials must adopt any *feasible* plan of pupil assignment which promises to leave no school's student body identifiably black. As Judge Sobeloff has said, "school boards are not obligated to do the impossible. Federal courts do not joust at windmills. Thus it is proper to ask whether a plan is feasible, whether it can be accomplished." (1284a). For example, there are all-black or virtually all-black school districts, which obviously cannot within their own boundaries abolish black schools. Though we would not discount the pos-

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[12] In one of the companion cases to Green, *Monroe* v. *Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968), the Court held that a geographic zoning plan with a provision for free transfers was proved ineffective, and hence insufficient to meet constitutional requirements, by the survival of a junior high school and three elementary school attended only by black students. This rendered them "Negro" schools within the meaning of *Green*. 391 U.S. at 457.

[13] Of course in *Green* the Court condemned the maintenance of "white" as well as "black" schools. We have focused in these cases on the requirement of eliminating the black schools, because it is through them that the insult of official discrimination condemned in *Brown I* is most concretely imposed upon black people. This is not to slight the importance of the goal of eliminating white schools as well. Where all-white schools are allowed to continue, they provide a safe haven for whites attempting to avoid desegregation, and thus constitute a threat to the stability of a desegregated school system. As Judge McMillan stated in the *Charlotte* case, elimination of all-white schools:

> "would tend to eliminate shopping around for schools; all the schools, in the *New Kent County* language, would be 'just schools'; it would make all schools equally 'desirable' or 'undesirable' depending on the point of view; it would equalize the benefits and burdens of desegregation over the whole county . . . ." (310a-311a).

sibility of restructuring school district lines to achieve some degree of practical desegregation in such cases, it may be that in some instances geographic factors make this a practical impossibility. In these few cases, the law obviously does not require abolition of the black schools.

The limitation of feasibility is meant only to deal with these few isolated situations where existing techniques do not make full desegregation a practical possibility. It is meant to exclude all other excuses for the continued maintenance of black schools in dual systems. These other excuses are often put forward under the rubric that complete desegregation would be "impractical," but they do not mean that it cannot be achieved by known techniques. Rather as in these cases, they mean that it is not a sufficiently important goal to justify the use of techniques already familiar to educators—such as placing children on buses for a half-hour or an hour in order to get them to school. In this sense, the "impracticality" of desegregation means added inconvenience for administrators, or resistance to the reallocation of resources from other programs, or other political opposition to desegregation from the white community.

If excuses of this sort could justify failure to abolish all remnants of the dual system, this Court's command in *Green* that school officials take "whatever steps might be necessary" would be rendered a nullity. Only last Term, this Court made it clear that no such nullifying interpretation was intended; against all objections of cost, inconvenience, impracticality, even "chaos"—objections made not only by school officials but by the national administration—it unanimously ordered that plans promising an end to the dual system be put into effect *now,* in mid-school-year if that was necessary.

Alexander v. *Holmes County Board of Education*, 396 U.S. 19 (1969).[14]

II. ELIMINATION OF "BLACK SCHOOLS," WHERE FEASIBLE, IS REQUIRED AS A REMEDY FOR THE WRONG OF OFFICIAL SEGREGATION WHICH PRODUCED THOSE SCHOOLS.

We have not argued that every school with an all-black or predominantly black student body represents a violation of the equal protection clause. Such an argument could be made; there is substantial evidence that isolation of black children in schools wherever and for whatever reason it occurs, correlates highly with inferior education. United States Commission on Civil Rights, *Racial Isolation in the Public Schools* 202-204 (1967). However, no such substantive constitutional doctrine need be advanced in order to decide these cases according to the rule we have argued for.[15]

We deal, in Charlotte and Mobile, not just with *any* concentrations of black children in separate schools, but with concentrations surviving from a system which segregated these children as part of an official policy based on their assumed inferiority. We ask the Court to declare, not that the Constitution condemns

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[14] Compare *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 296 (1970) (Harlan, J., concurring): "If Department recommendations are already available the school districts are to bear the burden of demonstrating beyond question, after a hearing, the unworkability of the proposals . . . ."

[15] "*De facto*" racial segregation of the schools has been held unconstitutional in several federal cases, among them *Hobson* v. *Hansen*, *supra* Note 9, and *Blocker* v. *Board of Education*, 226 F. Supp. 208 (E.D.N.Y. 1964).

We do not disclaim the arguments put forward in these cases and elsewhere that the Constitution condemns adventitious racial segregation; we merely point out that no such argument need be accepted in order to require the abolition of black schools as part of the process of dismantling official segregation.

black schools as such, but that federal courts of equity in abolishing the discriminatory dual school system must abolish the black schools which continue as a remnant of that system.

Thus it is not necessary in these cases for the Court to confront the question of the legal status of black schools in states which did not maintain formal statutory systems of school segregation. It may be that some school districts which have not maintained full dual systems have nonetheless brought about the existence of black schools through official action. In those cases, both the principle of *Brown I* and the remedial standards of *Green* would logically apply. Cf. *United States* v. *School District 151 of Cook County,* 404 F2d 1125 (C.A.7, 1968) What we stress here is that the abolition of black schools is required as a remedy to undo the effects of past unconstitutional discrimination.

The concept of a *remedial* standard is well illustrated by the way in which this Court and the lower federal courts have handled the dismantling of another aspect of the dual school system, the institution of faculty segregation. In *United States* v. *Montgomery County,* 395 U.S. 225 (1969), this Court granted certiorari to review a district court decree ordering a school board to assign faculty so that the ratio of black to white teachers in each school was substantially equal to the ratio in the system as a whole. In arguing for reinstatement of the district court decree, which had been set aside by the court of appeals, the United States relied on the same notion of a remedial standard, imposed to measure the achievement of a constitutional goal, as we urge here.

The government pointed out that general directions by the courts to "desegregate" or "abolish the dual

system" had not proved effective; more precise instructions were needed to accomplish the constitutional end. "The standard approved . . . by the district court in this case is an appropriate and workable means of measuring faculty desegregation under judicial supervision." Brief for U.S., No. 798 October Term 1968, at 12. Similarly here, the requirement of no all-black student bodies where a workable alternative exists is a relatively precise standard by which to measure the elimination of the racial identifiability of the schools in a dual system, a standard which would be more effective and less productive of delay and confusion than the vague tests now employed by the Fourth and Fifth Circuits.

In the *Montgomery County* case, the government also argued that the numerical ratio required by the district court was "designed as a *remedy for* past racial assignment which, as a result of respondent's deliberate actions, has produced racially identifiable faculties." The government added: "There is no suggestion in the district court's opinion, nor is there intended to be any in our submission here, that proportional allocation of faculty on the basis of race is a constitutional requirement." Brief for United States, No. 798 October Term 1968, at 13. Similarly here, we urge conscious racial assignment of students to eliminate the all-black schools which were produced by and survive from the system of conscious assignment on the basis of race formerly employed by the respondents here; we do not rely on any constitutional prohibition against all-black schools as such.[16]

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[16] Compare *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965):

> "We bear in mind that the court has not only the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

This Court unanimously sustained the government's argument in *Montgomery County*. The aftermath of that decision is instructive. Within months after this Court had approved the proportional racial allocation rule as ordered by the district court, both the Fourth and Fifth Circuit had adopted the same strict rule to govern faculty assignment in *all* desegregating school districts under their jurisdictions. *Nesbit* v. *Statesville City Board of Education,* 418 F.2d 1040 (C.A. 4, 1969); *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211, (C.A. 5, 1969). The President in his March 24, 1970 statement, giving the Administration's view of existing school law, adopted the same rule for nationwide enforcement by the executive branch.[17] In short, as soon as this Court approved a simple and easily applied rule, even a very strict one, to measure the achievement of a unitary system in the area of faculty desegregation, the courts and the executive branch united to apply it generally. The result has been that the issue of faculty desegregation, once as divisive in the schools and time-consuming in the courts as the issue of student desegregation is today, has virtually disappeared as a source of delay and confusion in the process of converting to unitary school systems throughout the South.

In our view, adoption of the rule we propose here for student desegregation would have much the same result in the area of pupil assignment. Southern school officials would turn from struggling to maintain the greatest degree of pupil segregation which could be wrested from the courts to quick and final abolition of the dual system and then to their basic job of education.

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[17] Statement of the President on School Desegregation, March 24, 1970, at 13.

With the establishment of a relatively simple and easily administrable rule, the protests of unhappy white constituents, now spurred by hopes of success for such slogans as "neighborhood schools" and "no busing" could be turned aside by the unanswerable response that the courts have finally spoken, the law is now clear, the job now finally must be done.

III. THE COURTS OF APPEALS IN THESE TWO CASES IMPERMISSIBLY APPROVED THE CONTINUED EXISTENCE OF BLACK SCHOOLS ON GROUNDS FALLING SHORT OF THE UNFEASIBILITY OF DESEGREGATING THEM.

In each of these cases, a plan, drawn up by educational experts, which would have achieved the desegregation of the student body of each and every school, was submitted to the district court. In each case a plan which fell short of achieving this goal was approved by the court of appeals. In neither case was the plan which would have achieved complete desegregation shown to be unfeasible. Indeed in the *Charlotte* case, the record made in the district court and the court's findings supported by that record incontravertibly establish that the complete desegregation plan was feasible within any definition of that term. In the *Mobile* case, the complete desegregation plan closely resembled the plan accepted by the district court in Charlotte, based as it was upon the same technique of limited noncontiguous pairing of white and black schools. Only the failure of the district court in Mobile to hold a hearing on the proposed plans prevented the development of a record which could have conclusively established the feasibility of this plan. There is nothing in the record, however, to suggest that the plan is less than fully feasible; and in any event, the school board has in no way met its burden of proving it impossible to

implement. Cf. *Carter* v. *West Feliciana Parish School Board, supra,* 396 U.S. at 296 (Harlan, J., concurring).

The courts of appeals did not purport to find either of the complete desegregation plans unfeasible. Rather the courts rejected them on other grounds: the Fifth Circuit in the *Mobile* case because the plan went beyond "neighborhood" zoning, the Fourth Circuit in the *Charlotte* case because the plan required an "unreasonable" amount of busing. Neither of these grounds provides a constitutionally sufficient excuse for maintaining all-black schools as remnants of the system of segregation.

A. The Mobile Case and the "Neighborhood School Concept".

In the *Mobile* case below, this Fifth Circuit panel[18] announced its intention to accept that plan "which would go further toward eliminating all Negro or virtually all Negro student body schools while at the same

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[18] The "neighborhood school" rule followed in this case is by no means a uniform standard for defining achievement of a unitary school system within the Fifth Circuit. In *Adams* v. *Mathews,* 403 F.2d 181, 188 (1968), that court held:

> "If in a school district there are still all-Negro schools, or only a small fraction of Negroes enrolled in white schools, or no substantial integration of faculties and school activities then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green.*"

In *Henry* v. *Clarksdale Municipal Separate School District,* 409 F.2d 682 (1969), the Fifth Circuit rejected a geographic zoning or "neighborhood" attendance plan for Clarksdale, Miss., because it failed to achieve sufficient pupil integration. The court said:

> "A school board's zoning policy may appear to be neutral but in fact tend to retard desegregation because it binds pupils to custom-segregated neighborhoods. In this situation, the board's failure to take corrective action amounts to the State's giving official sanction to continue school

time maintaining the neighborhood school concept of the school system." In other words, it erected the maintenance of "neighborhood schools" into an absolute which overrides the constitutional obligation to disestablish the dual school system.

We submit that the "neighborhood school concept" has no such constitutional status. It is rather one among several concepts used in this country as a basis for assigning students to schools. Whether or not it should be adopted by a particular school district is a matter of educational policy, to be decided by school officials within the constraint of the constitutional requirement of complete disestablishment of the dual school system. That is the proper order of priorities—not, as the court below would have it, that courts are to meet constitutional requirements within the constraint of a particular educational theory of pupil assignment.

One need look no further than Mobile, Alabama, to see that the "neighborhood" system of pupil assignment is not uniformly in use throughout this country. Mobile has never had a neighborhood school system. Until very recently, it has had a racial system of assignment, under which black and white children both rode on buses past nearby schools designated for the other race on the way to their own "black" or "white" school. More recently, under pressure from the courts

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segregation . . . ." 409 F.2d at 689. And see *United States* v. *Indianola Municipal Separate School District*, 410 F.2d 626 (1969).

Only recently, the Fifth Circuit's second decision in the *Clarksdale* case reiterated the holding that geographic zoning which left all-black schools did not meet constitutional standards. *Henry* v. *Clarksdale Municipal Separate School District*, No. 29165, August 12, 1970 (slip opinion at 3).

to desegregate, Mobile school officials have adopted a crazy-quilt of assignment policies, detailed in the Appendix to the Brief for Petitioner in No. 436, all designed to achieve maximum segregation rather than contiguity of child's home to child's school.

Alternatives to neighborhood school assignment have been adopted for many reasons other than to avoid desegregation. The largest part of the history of rural schools in America during this century has been the movement from the one-room "neighborhood" school to which each child could walk, to the larger consolidated school which requires a system of bus transportation—a movement promoted by the search for better education through the economies of scale possible in larger schools. Similarly in many of our larger cities, the "neighborhood concept" is violated every day as thousands of children with special abilities or special problems attend far-away schools with specialized programs designed to meet their needs.

This is not to say there are no values in having schools close to home. There are of course the values of convenience and of minimizing time and money spent in transportation. There are the values of linking the school to a community, and of giving parents ready geographical access to their children's school, though these are often exaggerated in present day conditions.[19] (In urban areas today, few "neighborhood"

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[19] To the extent that there are values in having children attend school close to home, one of the issues in both the *Charlotte* and the *Mobile* cases is whether black children have a right to share in these values equally with white children. Acceptance of a half-way approach to pupil integration has usually meant that black children are "integrated" into white schools in white neighborhoods, while there is no corresponding transportation of white children to black schools in black neighborhoods. See Note 7, *supra*, and accompanying text.

schools really serve anything remotely like a real community; and once the school is removed beyond walking distance from the home, as it often is even in our cities, the distance a parent must drive or take public transportation to reach his child's school becomes only a matter of degree.)

The rule which the Fifth Circuit has built upon the concept of the neighborhood school does not even have the exactness and precision which appears at first glance to be its chief virtue. Once this Fifth Circuit panel departs from the strict mathematical model of the "neighborhood school" which it constructed in *Ellis* v. *Board of Public Instruction of Orange County*, 423 F.2d 203 (1970)—and as far as we know, that model has been applied *only* in that single case—it becomes most unclear exactly what the "neighborhood school concept" is. It does not bar the pairing of schools, for instance; the court of appeals ordered schools paired in this very case, observing only that the pairings were "well within any reasonable definition of a neighborhood school system."

Ultimately, the "neighborhood school" rule must be rejected because it excuses the continuation of black schools in districts with dual systems for reasons short of the complete unfeasibility of total desegregation, reasons which are too easily and too often used to mask opposition to desegregation itself. This Court has in the past dealt unequivocally with apparently neutral slogans which effectively produce continued segregation—with "political impossibility," *Cooper* v. *Aaron*, 358 U.S. 1 (1968), with "freedom of choice," *Green*, supra, with "administrative chaos," *Alexander*, supra. "Neighborhood schools" is, in the context of this case, merely another of these slogans behind which continued

segregation can take shelter, and should be dealt with the same way.[20]

B. The Charlotte Case and the "Rule of Reasonableness".

The rule laid down by the Fourth Circuit in the *Charlotte* case—that school boards operating dual systems must make "all reasonable efforts to integrate every school" (1277a)—has the single advantage over the Fifth Circuit's "neighborhood school" rule that it does not bar the use of the legitimate and accepted technique of noncontiguous or satellite zoning as a tool for eliminating the effects of official segregation. In every other respect, however, the Fourth Circuit's "reasonableness" doctrine as applied in this case is a wholly unacceptable standard by which to measure compliance with the constitutional mandate.

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[20] In this case, the court of appeals held that the wrong inherent in the maintenance of black schools "can be further alleviated through a majority to minority transfer policy and through the functioning of a bi-racial committee." Similarly in the *Charlotte* case, the Fourth Circuit noted factors which would ameliorate the existence of black schools: majority to minority transfers, integrated special classes and out of school activities, and the requirement that each student must at some point in his career attend an integrated school.

These devices, taken by themselves, are all half-way measures, so long as black children continue to attend black schools in the face of feasible alternatives. In particular, the majority to minority transfer device puts upon black children the burden of desegregating the schools, whereas the *Green* case firmly declares accomplishment of that task to be the affirmative duty of the school board. And the notion that an integrated education for part of a child's career excuses assigning him to an all-black school for the remainder is reminiscent of the "grade a year" and other gradualist approaches to desegregation common during the era of "all deliberate speed."

First, the "reasonableness" test is scarcely a standard at all, in the sense of a meaningful guide for the school officials and district courts who must administer the process of desegregation. The test allows as an excuse for failing to achieve the goal of complete integration the "unreasonableness" of the steps needed to accomplish the task. "Unreasonableness", as the Fourth Circuit sees it, is a conclusory term through which judges can express a subjective judgment that the difficulties of achieving complete desegregation are simply too much for school officials to have to put up with. Promulgation of a "standard" like this is a guarantee of years of continued litigation and strife, with inconsistency even in the end as the promised result.[21]

Second, the "reasonableness" test impermissibly tolerates the perpetuation of remnants of the system of segregation which could feasibly be eradicated. This case makes clear that for the Fourth Circuit, "unreasonable" does not mean unfeasible or unworkable in practice. It has never been seriously argued that the plan ordered by Judge McMillan could not be put into effect consistently with the continued effective operation of the Charlotte-Mecklenburg school system—indeed, that system is today operating under that plan.

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[21] As Judge Sobeloff has said, dissenting below:

> "Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a school board's claim that its segregated system is not 'reasonably' eradicable." (1290a).

There is no plausible argument that harm or injury to the children invalidates the district court plan, for the record contains no evidence of such harm. Under the district court's plan a lower proportion of children will be bused to school in Charlotte than are bused in the state as a whole. The average length of the bus trip for those newly bused under the district court plan is less than the average length both for the state as a whole, and for the children previously bused within the Charlotte-Mecklenburg system.

The court of appeals' objections to the district court plan seem to be based on its monetary cost alone. That objection is insufficient on its face. The operating cost of the elementary school busing ordered by the district court was found by the court to be about $186,000, this in a school system with a projected operating budget of about $66 million. The capital cost of the new buses is not precisely known, but all of the evidence indicates that it will surely be far below the original estimate of $745,000 for the district court's entire busing plan. As the district court found in its hearings after this Court granted certiorari, surplus buses owned by the Charlotte-Mecklenburg system, and extra buses available through loan from the state, have brought about a situation where "[n]o capital outlay will be needed to supply buses for the 1970-71 school year." Appendix to Brief for Petitioner, Br. A23.

As a general matter, the fact that it costs money to desegregate the schools is no excuse for failure to do the job. *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964). Whatever may be the outer limits of that principle—whether, in some hypothetical case, the monetary cost of desegregating

each school in a system might be so great as to disable the operation of that system and hence render achievement of the goal "unfeasible"—those outer limits are not even approached in this case.

In this case, Judge McMillan has shown that the process of desegregation can be completed, and a wholly unitary system can be achieved in an urban southern school district with substantial residential segregation. He has in fact done the job which this Court entrusted to the federal district judges of the South in *Brown II*, and he has done it with patience, sensitivity and skill. That good work should not be undone by the court of appeals' vague and constitutionally insufficient "rule of reasonableness." [22]

C. The Question of Busing.

In the popular press and in the political arena, these cases are generally thought to be primarily concerned with the question whether the busing of children to school is required as part of the process of desegregation. As we see the cases, this is at most a peripheral issue. The process of disestablishing dual school systems requires a *result*—the abolition of the black

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[22] Judge McMillan made extensive findings to the effect that residential segregation in Charlotte was in large part the result of state action (297a-298a, 455a-456a, 1229a). These findings were summarized and affirmed by the court of appeals (1264a). While these findings compound the constitutional wrong of using geographic zoning to impose segregated housing patterns on the schools, we do not rely upon them here. Our view is rather that school officials are required to take all feasible steps, including transportation of pupils, to eliminate racially identifiable schools, whatever the cause of residential segregation may be. Cf. *Brewer v. School Board of the City of Norfolk*, 397 F.2d 37, 41-42 (C.A. 4, 1968).

schools which were part of that system. The means to be used to accomplish this end are limited solely by technical feasibility. Busing of children to schools is merely one among many tools which can be used to bring about the required result.

As the Fourth Circuit itself noted in the *Charlotte* case, "[b]ussing is neither new nor unusual. It has been used for years to transport pupils to consolidated schools in both racially dual and unitary school systems. Figures compiled by the National Education Association show that nationally the number of pupils bussed increased from 12 million in the 1958-59 school year to 17 million a decade later." Today about 40 percent of the nation's school children ride a bus to school. As the Center for Urban Education has put it, "Riding the yellow school bus is as much a symbol of American education in 1970 as the little red schoolhouse was in 1900." Center for Urban Education, "On the Matter of Busing" at 1 (Staff Memorandum, February 1970).

Busing has in the past been used for numerous purposes, some worthy, though none perhaps so important as helping to overcome decades of unconstitutional discrimination. It has been used to get rural children to the larger and more efficient consolidated schools which replaced their one-room schoolhouse. In the suburbs, it has been used to transport children over large areas to the excellent schools which those communities often provide. In cities, it has been used to overcome the safety and health hazards of children walking to school through city streets or taking public transportation. In each of these instances busing has cost money and has coincided with children attending school far from their homes, but not until it was used to achieve desegregation did it become an issue of public controversy.

The school officials and parents who so vigorously object to busing for purposes of desegregation raised no similar outcry in past years against the extensive busing required to maintain the system of racially segregated schools. Today, white parents who remove their children from public schools to avoid integration typically put the same children on buses for long rides to segregated private schools, and pay heavily for the privilege. A recent survey conducted by the Southern Regional Council indicated that a random sample of recently established white private schools bused an average of 62 percent of their pupils (as opposed to 49 percent of public school pupils in eight southern states) an average distance of 17.7 miles (as opposed to 10.1 miles for public school pupils in these states) each day to school. Levine and Griffith, *The Busing Myth*, South Today, Vol. 1, No. 10, at 7 (May 1970).

There is no evidence that busing is in any way harmful to children. As the district court found in the *Charlotte* case, "[s]chool bus transportation is safer than any other form of transportation for school children." Appendix to Brief for Petitioners, No. 281, at Br. A16. The only study we have found of the psychological effects of busing for purposes of desegregation, made by a distinguished child psychiatrist, found that children being bused in the Boston public school system experienced "no significant medical or psychiatric 'harm' or 'injury' as a result of the travel or change." Coles, *Northern Children Under Desegregation*, 31 Psychiatry 1, 14 (1968).

In short, busing of children to school is simply a technique which can be used for good or for ill in the administration of a school system. The facts about

busing, its extent and its past acceptance, suggest that the recent outcry against it is merely the 1970 version of the sixteen year old campaign to undermine the *Brown* decision.

CONCLUSION

The importance of these cases to the vindication of the constitutional rights of black children—rights which have been long denied—cannot be overestimated. If the decisions of the courts of appeals below are allowed to stand, the answer to the question "What has Brown accomplished?" will be forever an equivocal one. Much of the formal structure and some of the concrete manifestations of the system of segregation will be gone. But thousands of black children will spend years of their educational careers—most often the earliest, formative, years—in schools indistinguishable as a practical matter from the black schools established by the system of segregation. After all the years of turmoil and tragedy around the lives of these black children, it simply cannot be that they will be forced to settle for formal or half-way equality. The system of segregation and its effects must be abolished—all of it.

Accordingly, we ask that the judgments of the courts of appeals be reversed, and the cases remanded for

further proceedings consistent with principles urged in this brief.

Respectfully submitted,

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No. 281

amicus curiae brief of Tenn. Federation for Constitutional Govn. et al filed on Oct. 7, 1970 (not printed)

No. 281

Amicus curiae brief of H. W. Cullen, et al., filed on Oct. 6, 1970. (not printed)

Brief, amicus curiae, Board of Education of Memphis City Schools filed on Oct 10, 1970 (not printed)

Motion and Brief of Congress of Racial Equality for leave to file brief, as amicus curiae filed. (Motion filed Oct. 13, 1970) (Brief filed Oct 19, 1970) (not printed)

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In The
Supreme Court of the United States

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND ACCOMPANYING BRIEF AS AMICUS CURIAE OF CHARLES E. BENNETT, M.C.

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TO: The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States

COMES NOW Charles E. Bennett, Member of Congress, and respectively moves this Honorable Court for the entry of an Order granting him leave to file a brief as amicus curiae in this cause, which brief is incorporated herein and tendered herewith, and in support thereof would show unto this Court as follows:

1. This motion and accompanying brief is filed pursuant to the provisions of Rule 42 of the Revised Rules of the Supreme Court of the United States adopted June 15, 1970, effective July 1, 1970.

2. The undersigned Charles E. Bennett, is a Member of

Congress, representing the Third Congressional District of the State of Florida, which district encompasses almost all of the Consolidated City of Jacksonville, Florida. Said City has a geographical area of 840.1 square miles, which makes it one of the largest cities in the United States in area. The boundaries of said Consolidated City of Jacksonville, Florida, are coterminous with the physical boundaries of Duval County, Florida, whose school system is the thirteenth largest school system in the United States. Said school system for the 1970-1971 School Year is projected to serve 122,549 pupils in a total of 137 schools.

3. Of the total pupil population of 122,549, there is a projected black pupil population of 35,287 and a white pupil population of 87,262. This gives an approximate ratio of white to black of 70-30%.

4. The Consolidated City of Jacksonville in the "Inner Core City" includes a "ghetto" area, which encompasses 26 black or substantially all-black schools by pupil population.

The pupil attendance in said school system is based upon a neighborhood plan with zoned boundaries established on objective non-racial grounds utilizing the criteria of (a) capacity of the subject school, and (b) proximity to the school.

5. The school system of the Consolidated City of Jacksonville is currently involved in an integration suit under the style of *Daly N. Braxton, et al, Plaintiffs, vs. The Board of Public Instruction of Duval County, Florida, et al, Defendants,* United States District Court, Middle District of Florida, Jacksonville Division, No. 4598-Civ-J (Hon. William A. McRae, Jr., presiding Judge).

6. On August 6, 1970, in open court, the United States District Judge William A. McRae, Jr. announced as the "law

of the case" a constitutional duty upon the Duval County School Board to racially integrate all or substantially all of the remaining all-black or substantially all-black schools in the ghetto area of the City of Jacksonville, without however making any finding that the zone boundaries of the neighborhood schools established by the Duval County School Board were in any way gerrymandered or other than objectively drawn on a non-racial basis. (See Exhibit "A" to the Brief tendered herewith)

7. On August 6, 1970, the same District Judge entered an Order requiring (as the first step towards compliance with the aforesaid "law of the case",) that for the School Year 1970-1971 the Duval County School Board arbitrarily pair, cluster, and gerrymander certain of the former black or all-black schools in the ghetto which lay on the periphery of said ghetto with white or substantially all-white schools laying just outside of the periphery of the ghetto (see Exhibit "B" to the *amicus curiae* brief incorporated and tendered herewith).

8. The aforementioned August 6, 1970 Order is obviously merely the first step in effectuating what the U. S. District Court conceived to be the final constitutional mandate imposed upon the Duval County School Board in its statement of the "law of the case" at the hearing held on August 4, 1970.

9. As a direct and proximate result of the aforesaid August 6, 1970 U. S. District Court Order, the school system of the City of Jacksonville has been forced to acquire an additional 36 school buses at a cost of $190,000.00, because of the additional "busing" requirements mandated by the Order of the court with respect to the pairing, clustering and gerrymandering of certain zoned boundaries by the Court Order.

10. The action of the Court and the required pairing, clustering, gerrymandering and busing of schools and school children, respectively, has caused tremendous emotional impact upon the people of the Consolidated City of Jacksonville, both black and white. The undersigned Charles E. Bennett respectfully submits that the August 6, 1970 Order of the U. S. District Court is merely the forerunner of far more sweeping Orders from that Court or from the United States Court of Appeals for the Fifth Circuit where the *Braxton* case, *supra*, is currently pending on appeal under the style of *Daly N. Braxton and Sharon Braxton, etc., et al, Plaintiffs-Appellees, vs. The Board of Public Instruction of Duval County, Florida, etc., et al, Defendants-Appellants*, Case No. 30418, if the aforesaid "law of the case" is upheld and maintained.

11. The undersigned Charles E. Bennett, Member of Congress, would respectfully show unto this Court that the situation in the school system in his District is similar to the situation faced by the Charlotte-Mecklenburg Board of Education in the above-entitled cause.

12. The August 6, 1970 Order of the U. S. District Court directed to the school district in the City of Jacksonville, as well as pronouncement of the "law of the case" in open Court on August 4, 1970, is a pronouncement by the Court that the City of Jacksonville, Florida, is required to bus pupils or students from one school to another for the sole purpose of racially balancing student bodies, although Section 407(a) of Title IV of the Civil Rights Act of 1964, enacted by the Congress of the United States, specifically prohibits such orders.

13. The decision by this Court in the present case with reference to Question No. 1 presented herein as set forth on Page 3 of the Petition for Writ of Certiorari will have an immediate, direct and material bearing upon the pronounce-

ment of the "law of the case" of the United States District Court in the above-cited *Braxton* case, *supra*, as to any such constitutional duty imposed upon metropolitan school districts to arbitrarily integrate, for integration sake alone, any black or substantially all-black ghetto schools in the absence of any finding that the neighborhood boundaries of said schools, together with the remaining schools throughout the district, are drawn on an other than objective non-racial basis.

WHEREFORE, the premises considered as stated above, the undersigned Charles E. Bennett, as Member of Congress, respectfully moves this Court for the entry of an Order authorizing him to file the accompanying brief tendered herewith as *amicus curiae* in the above-entitled cause.

AND your movant will ever pray.

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In The
Supreme Court of the United States

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD
OF EDUCATION, ET AL.,

Respondents.

AMICUS CURIAE BRIEF OF CHARLES E. BENNETT, M.C.

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In The
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AMICUS CURIAE BRIEF OF CHARLES E. BENNETT, M.C.

QUESTIONS ADDRESSED

1. Is there a constitutional duty imposed upon a metropolitan school district to racially integrate the student bodies of black or substantially all-black schools located within a metropolitan ghetto area by requiring such metropolitan school districts to assign particular children, black and white, to a particular school solely because of their race and to exclude said children from schools they would otherwise attend solely because of their race where the attendance of said children, black and white, at their former schools was not the result of any official policy or practice by the school district of restoring or reinstituting a former dual school system on a segregated basis and where zoned attendance boundaries of said former schools were and are based upon

bona fide non-racial and objective criteria of a neighborhood school plan utilizing the factors of (a) capacity and (b) distance from each school for the establishment of such boundaries.

2. Are Courts of the United States "empowered" to issue orders to bus pupils or students from one school to another or from one school district to another to racially balance student bdies although Section 407(a) of Title IV of the Civil Rights Act of 1964 specifically prohibits such orders?

3. Does the requirement of arbitrarily or artificially integrating for integration sake alone the student population of black ghetto schools in a metropolitan school district result in the establishment of *de jure* quotas by the Courts and does not such establishment constitute the assignment of students to public schools in order to overcome racial imbalance in violation of Section 401(b) of Title IV of the Civil Rights Act of 1964?

ARGUMENT

PRELIMINARY STATEMENT

This *amicus curiae* does not wish to overburden the record of the above-entitled cause or the cases consolidated for disposition therewith by reiterating the very thorough and succinct argument and authorities set forth in the *amicus curiae* brief of William C. Cramer, Member of Congress.

The undersigned *amicus curiae* completely concurs in the argument made and the authorities cited in the *amicus curiae* brief of the said William C. Cramer, Member of Congress, and incorporates same by reference herein.

The main purpose of this *amicus curiae* brief is *factual* in nature.

We seek to set out an example of what happens to a large metropolitan school district when the courts impose a doctrinaire and arbitrary duty to integrate for integration sake alone student populations of all or substantially all of the black or substantially all-black neighborhood schools located within a metropolitan "ghetto." The situation in the City of Jacksonville, Florida, is akin and analogous to that of the City of Charlotte, North Carolina. It is similar and analogous to every city having a greater or lesser degree of "ghettoization" by race, whether the ghetto occurs in Atlanta, Miami, Jacksonville, Chicago, Boston, Philadelphia, Cleveland, etc. It is a nationwide problem.

The purpose of this brief is to succinctly bring to the attention of this Court another illustration in addition to that of Charlotte, North Carolina, of exactly what happens when the arbitrary "integration for integration sake alone" rule is imposed upon a metropolitan school district.

BASIC FACTS CONCERNING THE DUVAL COUNTY PUBLIC SCHOOL SYSTEM

Pursuant to authorization of Section 9 of Article VIII of the Constitution of 1885 of the State of Florida, the Florida State Legislature, in 1967, enacted Chapter 67-1320, as amended by Chapter 67-1310, Laws of Florida of 1967, which authorized a referendum of the citizens of the City of Jacksonville and the former political entity known as Duval County, Florida, a political subdivision of the State of Florida, to determine whether or not they desired a consolidation of the former City of Jacksonville with the former county government.

The referendum was successful by a vote of 2 to 1.

On October 1, 1968, consolidation of the former City of Jacksonville and the former Duval County was accomplished as a matter of law. Since that date, the Duval County School Board is an independent agency of the Consolidated City of Jacksonville.

The Duval County School System encompasses the entire Consolidated City of Jacksonville, which city is now by operation of law, coterminous with the physical boundaries of Duval County, with an area of 840.1 square miles.

The School System is the thirteenth largest school system in the United States.

The total population in the City according to the latest preliminary Federal census figures is in excess of 513,000.

There is an approximate ratio of 70 white to 30 black in the population as a whole as well as in the student population of the school system.

For the 1970-1971 School Year, the projected student population in the 137 schools scattered throughout the 840.1 square miles of the school system is a total of 122,549 students, breaking down to 87,262 white and 35,287 black students.

Of the 137 schools in the entire system, 26 schools are located in or on the edge of the black "ghetto" area and have a student population of all-black or substantially all-black, i.e., less than 10%, white pupil admixture.

Reference is made to the analysis map which is attached hereto as Exhibit "C". This map reveals a realistic analysis of the City of Jacksonville's school attendance areas. They have been divided arbitrarily into seven (7) different areas purely for analysis purposes.

The boundaries of these analysis areas are the Intracoastal Canal, the St. Johns River, the interstate highways, and the Atlantic Ocean.

All students who live more than 1.5 miles away from their subject school are transported to the school by school transportation buses as a matter of School Board policy (Florida School Law requires transportation when a student lives in excess of 2 miles from the school he is attending, but authorizes school boards to shorten this distance, as has been done by the Duval County School Board). School Board budgeted figure for pupil transportation costs for 1970-1971 is $1,132,934.00.[1]

Of this transportation cost amount, approximately 50% is derived from state revenue designated for pupil transportation and 50% from other sources.

The school attendance plan established by the subject school district in Jacksonville, Florida, is a "neighborhood school plan" whereby the basic criteria used in establishing said boundaries are (a) the size and capacity of the subject school in handling the number of students and (b) the proximity of the student with relationship to his residence to the school.[2]

An examination of Exhibit "C" (the analysis map) reveals that for the School Year 1970-1971:

(a) *Area I* (the Jacksonville Beaches) is completely and practically integrated. The Plaintiffs in the *Braxton* case or

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1. As a result of the U. S. District Court Order of August 6, 1970 (see Exhibit "B" attached hereto) this figure has had to be increased by an amount in excess of $190,000.00.

2. Of course, it is obviously necessary on occasion to take into account artificial and natural barriers, such as the St. Johns River itself, the existence of multi-lane limited access interstate highways, etc., in establishing said boundaries.

the Miami Desegregation Center in its latest report in the *Braxton* case do not allege otherwise.

(b) *Area II* (Arlington). In this entire area, there is a total projected black pupil population of only 127 as compared to 6,229 white pupils. The black population is scattered throughout the Arlington area. There is only one school (Lake Lucina) where there are no black pupils within the neighborhood attendance area. All pupils attend school in their attendance area. Neither the Plaintiffs nor the Desegregation Center in the *Braxton* case, *supra*, charged that any of the boundary lines in Area II were "gerrymandered" to maintain or perpetuate segregation. Black pupils within the Area will feed through the two junior high schools and into Terry Parker Senior High. Thus, black pupils within Area II will attend throughout their academic careers predominantly white schools.

(c) *Area III* (Southside). In this area, the School Board recently altered certain boundary lines to provide for better use of facilities in this area. There are 880 black elementary students and 9,807 white elementary students. The black pupil population is scattered throughout the elementary schools with the one exception being School 159 (Pine Forest) which would have had 92 white pupils attending for the first time a formerly all-black school. In each of the three junior high schools, black pupils at this stage of their academic careers are attending predominantly white schools and the same is true, of course, in the two senior high schools in this area.

Neither Plaintiffs nor the Desegregation Center contend that any of the neighborhood zone boundaries are gerrymandered.

(d) *Area IV* (Southwest). In this area, the black stu-

dents are to a certain degree scattered throughout the elementary school attendance areas. In each case where black students attend school, they attend predominantly white schools. There are no schools which have no white pupils attending and there are only five schools, e.g., Ortega Elementary, which are all-white.

Neither Plaintiffs nor the Desegregation Center have seen fit to charge the School Board with improperly drawn boundary lines of any of the schools in question. Here again, in each of the junior high schools, black students will be in attendance with the majority of white students. The same is true of the three senior high schools located in this area. It is also obvious that the attendance of the senior high schools of black students will increase due to the operation of the neighborhood feeder system of the junior high schools for the following School Year 1971-1972.

(e) *Area V* (West—between Interstate 10 and U.S. #1). This area is adjacent to the ghetto area with the majority of the elementary black students residing in the attendance area for Forest Park, A. L. Lewis and West Jacksonville, together with S. P. Livingston. The remainder of the black pupils live in elementary school attendance areas which are to some extent integrated, being on the border of the ghetto. Here again, neither the Plaintiffs nor the Desegregation Center has challenged the propriety of any attendance zone boundary.

(f) *Area VI* (I-95 East to the St. Johns River). Area VI, together with Area VII, hereinafter discussed, constitute approximately 75% of the black population of the Consolidated City of Jacksonville and together constitute or encompass the ghetto area. This is reflected in the attendance figures for the elementary school with pupils attending schools in their

respective school attendance areas. Schools 3, 6, 70, 106, 135 and 148 reveal only slight integration in the neighborhood attendance area and in the case of School 135 and School 148, there is apparently solid black attendance neighborhoods.

Neither the Plaintiffs nor the Desegregation Center has charged the School Board with improperly drawing any of these school attendance boundary lines.

(g) *Area VII* (Northwest–West of I-95 to U.S. #1). This area represents the other half of the ghetto area encompassed by this area and Area VI, together with adjacent neighborhoods that are to a certain degree integrated. Schools 14, 124, 128, 154, 157, 158, 162, 163, 164 and 166 in the elementary school level indicate a complete and solid black neighborhood residential segregation. The remaining schools indicate a varied pattern of integration from completely all-white, e.g., Schools 37 and 59, to incipient integration in School 14. Here, as in the other areas, pupils attend schools in their neighborhood attendance area. The number of black pupils and white pupils which are transported are almost equal.

Prior to the entry of the August 6, 1970 Order, the School System had 27 schools that were either all-black or were comprised of predominantly black student bodies with the white percentage of student participation being less than 10%.

A glance at the map will readily disclose the existence of a large ghetto area encompassed by Areas VI and VII primarily, but also including a portion of Area V along the periphery thereof.

Within this ghetto area there are 26 black or substantially all-black schools as far as the ratio composition of the stu-

dent body is concerned.[3]

On the attached Exhibit "C" (the analysis map), we have circled those schools which have been ordered to be paired or clustered on the edge or periphery of the ghetto and "x"ed out the high schools within the ghetto which have been closed as senior high schools and whose attendance boundaries have been gerrymandered by the August 6, 1970 Order of the District Court.

Placing the first and second grade in one school of the cluster; the third and fourth grades in another school; and the fifth and sixth grades in the third school of the cluster has produced in many, many cases the need for an elementary child to be transported by bus more than the 1.5 miles normally established by School Board policy.

The result which has often occurred is that in a family, for example, having three children of elementary school age, who formerly all attended a school within a few hundred yards of their front door, (both black and white) said children are now required to get on a bus to be transported back and forth to their respective grades assigned in the paired or clustered schools.

It is respectfully submitted that this result is not only incongruous but has a slight "Alice in Wonderland" effect about it all.

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3. Parenthetically, it should be noted that the Duval County School Board, pursuant to a U. S. District Court Order entered on December 30, 1969, has transferred some 1300 black and white teachers throughout the system to establish the black-to-white teacher ratio of 70-30% in each school of the system as mandated by *Singleton v. Jackson Municipal Separate School District* (5th Cir. 1965), 348 F.2d 729 (*Singleton* I); *Singleton v. Jackson Municipal Separate School District* (5th Cir. 1966), 355 F.2d 865 (*Singleton II*); *Singleton v. Jackson Municipal Separate School District* (5th Cir. 1969), 419 F.2d 1211 (No. 26285, December 1, 1969), reversed in part, sub nom., *Carter v. West Feliciana Parish School Board* (1970), ___ U.S. ____, 90 S.Ct. ____, 24 L.Ed 2d 477 (*Singleton* III); and *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

We pass over the fact that such clusterings and pairings of course completely destroy the benefits derived by younger children from attending school with older children and learning by imitation as to mores and manners.

Local support for neighborhood schools in the matter of Dads' Clubs, P.T.A.s, etc. is, in most cases, destroyed.

Two things are graphically shown on Exhibit "C".

First, it is obvious that the U. S. District Court Order of August 6, 1970 is the "first bite of the apple". It is an attempt to proceed around the periphery of the ghetto and to pair or cluster the all-black or substantially all-black schools with corresponding all-white or substantially all-white schools just outside of the ghetto.

Secondly, there is left remaining within the ghetto, however, as shown by the "circles" at each numbered school site, some 18 all-black or substantially all-black schools which lie within the heart of the ghetto even after the pairings or clusterings of the periphery schools are accomplished.

There are, therefore, some 18,586 black students deep within the heart of the ghetto who are still attending 18 all-black schools (12 elementary; 4 junior high; and 2 senior high), *even after the provisions of the Order have been complied with.*[4]

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4. In order that the record may be made clear, let it be understood that even though this Order of the U. S. District Court was promptly appaled to the United States Court of Appeals for the Fifth Circuit where it is now pending, and even though the Defendant School Board sought but was not granted an appropriate Stay Order by the U. S. District Court, the United States Court of Appeals for the Fifth Circuit, and the Hon. Hugo L. Black, Associate Justice, respectively, the School Board proceeded in good faith to comply with the Order of the Court at the opening of school on September 8, 1970, despite the tremendous emotional upheaval on the part of the patrons and students alike, both black and white, and the tremendous logistic problems involved in compliance with such Order.

That the August 6, 1970 Order of the U. S. District Court is the "first bite of the apple" is shown by the pronouncement of the "law of the case" from the bench by the U. S. District Court at the hearing held on August 4, 1970 (Exhibit "A" attached hereto).

It is thus obvious that if the District Court's decision as to the constitutional duty imposed upon a metropolitan school district, such as that of the Consolidated City of Jacksonville, to integrate the black student bodies for integration sake alone, of all of the remaining 18 black schools in the ghetto is correct, the following alternatives exist:

(a) The School Board will very promptly be required, (either by subsequent Order of the U. S. District Court or by the United States Court of Appeals for the Fifth Circuit in the appeal now pending), *to bus all of the black students in the remaining 18 black ghetto schools out of the ghetto to other schools in the system, thus requiring these other schools to go on double sessions, or,*

(b) *to bus all of the black students remaining in the 18 black ghetto schools out of the ghetto and bus an equivalent number of white students from other parts of the school district into the ghetto to fill up the vacant ghetto schools which would be emptied by the busing of the black students out of the ghetto.*

Either of the foregoing alternatives would require a massive additional busing operation that would cost the local School Board an additional expenditure in excess of one million dollars annually.

A moment's comprehension of what is obviously involved in either of the foregoing alternatives reveals that they are somewhat incredible.

And yet these are the only practical alternatives to carrying out the doctrinaire "law of the case" as laid down by the U. S. District Court in the *Braxton* case and apparently is in harmony with the decision of the United States Court of Appeals for the Fifth Circuit in the case of *Bradley v. Board of Public Instruction of Pinellas County*, No. 28639, Fifth Circuit, filed July 29, 1970, ... F.2d ..... where a similar type of massive busing of children in and out of the ghetto was mandated by the U. S. Court of Appeals for the Fifth Circuit with reference to the ghetto schools located in the City of Tampa, Florida.

It should be recognized that nowhere in the Court Order of August 6, 1970 is there any finding that the Duval County School Board is, or was, responsible for the maintenance of the ghetto area in the City of Jacksonville or was there any finding that the neighborhood school zone boundaries as amended by prior Order of the Court and by voluntary action of the present School Board and its Superintendent, were established on anything other than an objective non-racial basis.

Consideration of the U. S. District Court Order when taken into conjunction with its ruling on the "law of the case" at the hearing on August 4, 1970, reveals a simple fiat to the effect that even though neighborhood school boundaries may be objectively established on a non-racial criteria, black or substantially all-black student-populated schools must "go" and we therefore have a clear mandate to arbitrarily commence the racial integration of the student populations of the subject ghetto schools with integrated schools in other areas of the community solely for the purpose of playing a "numbers game", i.e., solely for the purpose of reducing the number of said black or substantially all-black schools in the ghetto.

If the Constitution requires integration of all of the 26 ghetto schools, either all of the students in the ghetto schools must be bused out of the ghetto into double sessions in their newly assigned schools, or the School Board would have to bus the black students out of the ghetto schools and bus an equal number of white students into the ghetto schools.

Is not such a doctrinaire requirement of busing children out of the ghetto or into the ghetto nothing more than the exclusion of said children solely because of race from attendance at a particular school which they would otherwise attend based upon non-racial objective criteria?

Is not such action, therefore, in direct violation of the mandate of this Court in *Brown v. Board of Education* (1954), 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed 873 (*Brown* I); *Brown v. Board of Education* (1955), 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed 1083 (*Brown* II); and *Alexander v. Holmes County Board of Education, supra,* in which latter case this Court held that no child was to be excluded from a particular school because of race?

The constitutional "knife" of *Alexander v. Holmes County Board of Education, supra,* should cut both ways.

If, in pre-*Brown* I days, it was unconstitutional to arbitrarily bus black school children miles from their home to attend *de jure* all-black schools, then it would seem inevitable that it is just as unconstitutional today to artificially "bus" black and white children solely because of their race to a particular school other than the one to which they would normally attend as based upon objective non-racial and uniform criteria.

The only possible justification attributable to the U. S. District Court action and to the action of the other U. S. District Courts in the South this summer in imposing similar doctrinaire requirements of integration for integration sake alone

of ghetto schools lies ultimately in the case of *United States v. Jefferson County Board of Education*, 372 F.2d 836 (C.A. 5, 1966), commonly referred to as *Jefferson* I, affirmed and adopted en banc with minor clarifications, 380 F.2d 385 (*Jefferson* II).

In *Jefferson* I, supra, a three-judge panel of the United States Court of Appeals for the Fifth Circuit considered the provisions of the Civil Rights Act of 1964, with reference to school desegregation cases in the Southern Circuit.

After giving lip service to the fact that the Congress of the United States "speaks as the voice of the nation":

> "More clearly and effectively than either of the other two coordinate branches of the government, Congress speaks as the voice of the nation."[5]

And:

> "We shall not permit the courts to be used to destroy or dilute the effectiveness of the congressional policy . . . "[6]

This three-judge panel of the United States Court of Appeals for the Fifth Circuit then proceeded to do just the opposite. They promulgated the intellectual distinction of "de facto - de jure" forms of segregation. In essence, as noted very succinctly by William C. Cramer, M.C., in his *amicus curiae* brief on Page 20 thereof:

> "Adopting the 'ingenious though illogical distinction' between so-called *de facto* and *de jure* segregation, it concluded that Congress had intended that the 'equal

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5. Id. at page 850.

6. Id. at page 859.

protection clause' was to be applied unequally and that, in effect, every manifestation of racial isolation in the South constituted *de jure* segregation. * * * For the Court to have imputed such an intention was to thwart congressional will and, in the process, raise the spectre of a Second Reconstruction in America – one effected by judicial ukase."

"The Court's rationale for this divisive rendering of the Union of States was this: Since the South was the area of the Nation which had maintained dual systems of education imposed by law prior to *Brown* I, the South required special rules for rehabilitation and reform – by implication, in perpetuity."

In *Jefferson* I, the Court concluded:

"Adequate redress . . . called for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state system of *de jure* school segregation *and the organized undoing of the effects of past segregation.*"[7]

The Jefferson I Court cited with approval, Fiss, *Racial Imbalance in the Public Schools:* The Constitutional Concepts, 78 Harvard Law Review, 564 (1965); and Wright, *Public School Desegregation,* 40 N.Y.L.R. 285 (1965), for the following exercise in conceptual reasoning.

(a) The *Jefferson* I Court assumed as did Professor Fiss and Judge Wright, that residential segregation in ghettoes in the South were caused *solely* as a result of past *de jure* action e.g., "Jim Crow" laws and/or local ordinances.

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7. *Jefferson* I at 866.

(b) That racial segregation in the North, East or West was caused solely by entirely different reason, i.e., economic factors.

(c) Therefore doing away with the "Jim Crow" laws in Southern states was not enough – that school boards being agencies of the "state" should proceed affirmatively in a ". . . organized undoing of the effects of past segregation."

Implicit in this "reasoning" is the belief that if there had been no "Jim Crow" laws, that there would have been no residential racial segregation in metropolitan Southern cities.

This is naive.

Racial segregation is caused in *all* metropolitan areas by three basic factors: (a) density of population, (b) poverty of the vast majority of the ethnic group in the ghetto, and (c) personal, racial and/or religious prejudice of both the ethnic minority group and the predominant majority group outside of the ghetto.

These three factors are the basic factors that cause ghettoes of Irish Catholics in Boston; Italian Catholics in New York; Protestant Blacks in Chicago, as well as the black ghettoes of Atlanta, Dallas and Jacksonville, merely to name a few.[8]

The truth of the matter is that if there had been no "Jim Crow" laws in the State of Florida, but if all other factors had been historically equal, i.e., population density, poverty

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8. We, of course, are aware of the fact that where "Jim Crow" laws exist, they have an additional oppressive factor in *maintaining* th ghetto. To say that they caused the creation of the ghetto is an entirely different matter. We note for the record that the Supreme Court of Florida, the Florida State Legislature, the new Florida Constitution, and the Council of the City of Jacksonville, have all taken affirmative action since *Brown* I and *Brown* II to abolish, repeal or overrule all of the former vestiges of "Jim Crow" laws and ordinances existing.

of blacks, and racial prejudice, there would still be a ghetto in the City of Jacksonville as there is in every other large metropolitan area in the South, North, East and West.

It is interesting to note that many other circuits in the United States have rejected the concept of *Jefferson* I and *Jefferson* II, e.g., *Deal v. Cincinnati Board of Education* (6 Cir. 1966), 369 F.2d 55 (*Deal* I), cert. denied ..... U.S. 847, 88 S.Ct. 39, 19 L.Ed 2d 114, wherein it was held:

> "We hold that there is no constitutional duty on the part of the board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose."

See also, *Annotation*, "De Facto Segregation of Races in Public Schools", 11 A.L.R. 3rd 780, for cases from other circuits holding to the same import.

It would seem that not even the United States Court of Appeals for the Fourth Circuit in the instant case has adopted such a doctrinaire position as expressed by the *Jefferson* I and *Jefferson* II Court, *supra*. See, for example, Page 10 of the Opinion of the United States Court of Appeals for the Fourth Circuit in *James E. Swann, et al, v. Charlotte-Mecklenburg Board of Education, et al*, Nos. 14,517, 14,518, which is the subject of this present certiorari proceeding:

> "We adopted the test of reasonableness – instead of one that calls for absolutes – because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides the test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns and small

> cities and rural areas generally can be integrated by pairing, zoning, clustering or consolidating schools and transporting pupils. *Some cities, in contrast, have black ghettoes so large that integration of every school is an improbable, if not an unobtainable goal.* Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary preliminary plan for the creation of a unitary school system. *Ellis v. Board of Public Instruction of Orange County,* No. 29124, Feb. 17, 1970, ... F.2d ..... (5th Cir.)." (Emphasis supplied)

However, it is interesting to note that closer examination of the *Ellis* case, *supra,* cited by the Fourth Circuit Court of Appeals in the *Swann* opinion, reads as follows:

> "There are a number of all-white student body schools in the Orange County system. This is due to the preponderant white student population (88%) *and to residential patterns. The three all-Negro student body schools which will remain, if the neighborhood assignment system is properly invoked, are also the result of residential patterns.* The majority-minority transfer provision under the leadership of the bi-racial committee is a tool to alleviate these conditions now. Site location, also under the guidance of the bi-racial committee, will guarantee elimination in the future. In addition, open housing, Title VIII, Civil Rights Act of 1968, 42 U.S.C.A., Sec. 3601, et seq., *Jones v. Mayer,* 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed 2d 1189, will serve to prevent neighborhood entrapment."
>
> (Emphasis supplied)

The black or substantially all-black schools in the Jacksonville ghetto obviously are the result of residential patterns as they are, and were, in Orange County, Florida, and are, and were, in all of the other metropolitan ghettoes, not only in the South but also throughout the United States.

It is interesting to note that nothing is said in the *Ellis* case, *supra*, about any constitutional duty upon the Orange County School Board to racially integrate the remaining all-black schools in Orange County by the use of such devices as pairings, clusterings, gerrymandering of zone boundaries, etc. This panel of the Fifth Circuit, in *Ellis*, recognized that the attendance boundaries were drawn on objective non-racial criteria and that any racial segregation resulting in all-black or substantially all-black or all-white schools was due to the obvious fact of *de facto* residential segregation.

Parenthetically, one might ask that if this is the rule that was applied in Orange County, Florida, why is it not the rule to be applied in Duval County, Florida, and in every other metropolitan school district which is under orders from the Fifth Circuit to arbitrarily integrate their black ghetto schools, e.g., *Bradley v. Board of Public Instruction of Pinellas County, Florida, supra*? ....

As Judge Bell, the author of the opinion in the *Ellis* case, *supra*, stated in his succinct dissent in *Jefferson* II, supra, at Page 417:

> "... The Supreme Court has not said that every school must have children from each race in its student body, or that every school room must contain children from each race in its student body, or that every school room must contain children from each race, or that there must be a racial balance or a near racial balance, or

> that there must be assignments of children based on race to accomplish a result of substantial integration. The Constitution does not require such. We would do well to 'stick to our last' so as to carry out the Supreme Court's present direction. It is no time for new notions of what a free society embraces. *Integration is not an end in itself; a fair chance to attain personal dignity through equal educational opportunity is the goal . . .*"
>
> (Emphasis supplied)

If Judge Bell (and other Federal Judges who have pronounced the same opinions) is correct in his reasoning that "integration is not an end in itself", then we respectfully submit that this Court should take this occasion to overrule or modify the reasoning of *Jefferson* I and *Jefferson* II, and to bring the majority of the Judges of the United States Court of Appeals for the Fifth Circuit in line with the reasoning of the many other circuits in the United States that have dealt with this question.

If Judge Bell's reasoning is wrong, then we respectfully submit that this Court should also, *in such event*, promulgate a rule that "integration is an end in itself" but that it should apply to *all* school systems in the United States, e.g., that there is a constitutional duly upon the Cook County, Illinois School Board to integrate all of the black ghetto schools in Chicago; that a similar duty rests upon the New York City School System; the Philadelphia School System; the San Francisco School System; and not just merely the school systems of Tampa, Jacksonville, Miami, and Charlotte, North Carolina.

It is respectfully submitted that school integration cases are not the proper vehicle to launch an educational or sociological "experiment" in reshaping a "brave new world" to

effectuate ". . . new notions of what a free society embraces."

As noted by a three-Judge panel of the United States Court of Appeals for the Fifth Circuit in *Ellis, supra,* the remedy for correcting ghetto areas lies in the field of open housing legislation, such as Title VIII, Civil Rights Act of 1968, 42 U.S.C.A., Sec. 3601, et seq.

What was attacked in *Brown* I and II, *supra,* was the operation of an official dual school system.

This had to be the case because it is axiomatic that the Fourteenth Amendment to the United States Constitution reaches only official action and not to any separation or discrimination as between the races caused by individual prejudices or desires.

We submit the test is, and should be, whether a school district, either North or South, is operating a school system in that all of its official policies and actual practices are applied district-wide without regard to race.

Responsibility for the poverty, density of population, personal prejudice, apathy, etc., or whatever other non-official reasons which exist in maintaining the ghetto, not only in the City of Jacksonville, but in every other metropolitan area in the United States cannot logically be visited upon present-day school boards.

School integration cases should not be the vehicle to either enforce Fair Housing Laws; to judicially correct the acts of personal prejudice or the result of economic poverty; or to advance a sociological or educational theory of what is "good" or "bad" from an academic point of view in "integration for integration sake alone."

We should remember that our late colleague and friend, Justice Oliver Wendell Holmes, when speaking in an eco-

nomic context, once reminded us: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."[9]

Neither should the Fourteenth Amendment enshrine any particular sociological or educational philosophy, either pro or contra, concerning integration as an end in itself.

Constitutional rights carry their own justification. They do not need excess baggage to support their validity.

A child, black or white, is entitled to attend a school system which is operated on objective non-racial lines in the assignment of teachers, assignment of pupils, distribution of maintenance and building supplies, etc. without regard to the race of the student concerned.

Where attendance boundaries of existing schools are adopted upon the obvious common sense plan of a neighborhood school program and where the boundaries are established objectively and on the non-racial basis of capacity and proximity of home to school, the fact that the student population of the schools reflects the residential segregation patterns of the city as a whole would seem to be no reason to require an affirmative, arbitrary and doctrinaire constitutional duty to "integrate as an end in itself."

And yet this is exactly what the United States District Court has done in the Consolidated City of Jacksonville; this is what many of the three-judge panels of the United States Court of Appeals for the Fifth Circuit have required, e.g., *Bradley v. Board of Public Instruction of Pinellas County, Florida, supra;* but this, however, is not what the other circuits in the United States have decided.

---

9. Dissent in *Lochner v. New York*, 198 U.S. 45, 75, 76 (1905).

CONCLUSION

It is respectfully submitted that the time has now come for this Court to grapple with the problem which is presented to it within the framework of Question No. 1 as stated in the Petition for Certiorari in the subject case arising in Charlotte, North Carolina. Either:

(a) That there is a constitutional duty to integrate for integration sake alone. If this is so, then that duty should apply throughout the entire United States and this Court should say so.

(b) That there is no duty imposed by the Constitution to integrate for integration sake alone. If that is true, then this Court should say so.

We earnestly and respectfully submit to this Court that the hour for decision has now arrived.

Respectfully submitted,

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In The
Supreme Court of the United States

No. 281

JAMES E. SWANN, ET AL.,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,

Respondents.

EXHIBITS TO AMICUS CURIAE BRIEF OF CHARLES E. BENNETT, M.C.

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Exh. 1

EXHIBIT "A"

"MR. BUCKMAN:

Your Honor, may I state, on behalf of my client – both clients – the Board and Dr. Hardesty – that we certainly subscribe to the view that this matter should be settled locally. It seems to me, *as I understand Your Honor's ruling this morning, is the 27 all-black schools must go.* For all practical purposes, that - - -

"THE COURT:

I don't say all.

"MR. BUCKMAN:

Well, substantially.

"THE COURT:

I mean substantially. I mean, you can't justify that.

"MR. BUCKMAN:

I understand, Your Honor. But I would point out - - -

"THE COURT:

And you are familiar with these cases - - -

"MR. BUCKMAN:

I am, too, sir. But I - - -

"THE COURT:

And it just won't hold up.

"MR. BUCKMAN:

I understand that, Your Honor. But I merely point out, most respectively, *that this is the first time*

in this case that we have been told that substantially all of the ghetto schools must go. Now, that is, therefore, the law of the case, as far as I'm concerned, and we can go forward - - -

"THE COURT:

That's the law of the case, so far as I'm concerned; yes"[1]

1. Verbatim transcript of hearing held in open Court, August 4, 1970.

Exh. 3

EXHIBIT "B"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4598-Civ-J

DALY N. BRAXTON and SHARON BRAXTON, etc., et al.,

Plaintiffs,

v.

THE BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, etc., et al.,

Defendants.

(Filed August 6, 1970)

ORDER

Upon consideration of the briefs filed pursuant to this Court's order of July 7, 1970, and after hearings on July 28 and August 4, 1970, this Court finds that the projections of the school board regarding the 1970-1971 school year meet the requirements of a unitary system, as set forth in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968) in the areas of teacher assignment, transportation, facilities, and extracurricular activities.[1/]

For the 1970-1971 school year, the system is projected to serve 122,549 pupils in 137 schools. Of that number of pupils, 26,080, or 73.9% of the 35,287 Negro pupils, would attend twenty all-Negro and seven virtually all-Negro schools under

the board's estimate. Such an assignment pattern is inconsistent with recent decisions of the Fifth Circuit Court of Appeals dealing with urban situations. *E.g., Bradley v. Board of Public Instruction* of Pinellas County, No. 28639 (5th Cir., filed July 29, 1970, and July 1, 1970) (reducing percentage of Negroes attending virtually all-Negro schools from 64% to 14.2%); *Mannings v. Board of Public Instruction of Hillsborough County,* No. 28643 (5th Cir., filed May 11, 1970) (reducing percentage of Negroes attending virtually all-Negro schools from 60% to 21%). *See also Ellis v. Board of Public Instruction of Orange County,* 423 F.2d 203 (5th Cir. 1970) (reducing percentage of Negroes attending virtually all-Negro schools from 51% to 16%); *Davis v. Board of School Commissioners of Mobile County,* No. 29332 (5th Cir., filed June 8, 1970) (reducing percentage of Negroes attending virtually all-Negro schools from 60% to 28%).

The school board, and the school superintendent working with it, have not proposed an alternative plan that is legally sufficient, and so the Court must enter the following plan of its own formulation for the 1970-1971 school year.

As stated in *United States v. Board of Education of the City of Bessemer,* 396 F.2d 44 (5th Cir. 1968):

> The question is and must always remain: Is the constitutional imperative being met? That duty is not on plaintiffs, nor on the [federal] government, nor on school children. It is squarely on the back on the State and here, the State's Agents, the School Boards. *Id.* at 48.
>
> We do not seek the burden or responsibility of school operation. We ought not to have it. . . . Now it should be up to school boards either alone in taking the initiative so obviously called for, or in conjunction with

> cooperative (it is hoped) efforts of parent, race, or similar groups to achieve the goal of race-less public schools. To be sure, this puts burdens on all sides, but this too, is part of constitutional democracy. The Judiciary is not, cannot be, the universal salvor. *Id.* at 52.

The Court notes several significant aspects of the present order:

1. The order affirmatively desegregates twelve schools which would otherwise have been entirely or virtually all-Negro in the 1970-1971 school year.

2. The order adopts the school board's own elementary attendance zone boundaries.

3. Special programs at Beal (#11), and Axson (#8), are not disturbed by the order.

4. The order effectively desegregates every Negro elementary school adjacent to a predominately white school without busing children from their residential attendance zone, as modified.

5. Although increases in transportation will be required by the order, the distances involved are small and are confined to the student's residential attendanrce zone. Those residential attendance zones are made larger to include two or more schools under pairing or clustering, but that result does not, and has been held not to, violate the "neighborhood school concept." *Mannings v. Board of Public Instruction of Hillsborough County, supra.* No busing to a non-contiguous zone is required under the order. The board, in carrying out necessary increases in transportation, is authorized to make use of facilities that meet federal standards.

6. Of the seven geographical areas of the county delineated by the school board in its July 20, 1970 study, complete desegregation of all schools is achieved in four areas. The order desegregates the all-Negro elementary schools in the remaining three areas that are not entirly surrounded by other all-Negro schools./2 This plan for pupil attendance has been achieved in a manner that does not materially disturb 108 schools in the system. Six other schools will be only slightly affected by marginal zone boundary adjustments.

7. The order does not violate the integrity of the junior and senior high school grade divisions and thereby avoids vast adjustments in the various educational offerings, athletic programs, and equipment and facilities. All secondary schools under the plan are rezoned rather than paired, clustered, closed, or redesignated as certain grade centers.

8. Most important of all, the plan seeks to prevent the disruption and chaos that would surely occur if the appellate courts were to be froced to rule in the middle of the school year. It further provides some protection from mistakes that might be made by courts, ruling from a distance, which are unfamiliar with the problems existing in the Duval County school system. This Court feels impelled by its sincere concern for the children of our community to shoulder the burden of formulating a plan that seeks to comply with the appellate decisions and, at the same time, protects the welfare of the pupils.

The Court is keenly mindful of the stress this order will put upon the parents, the children, the school board, the teachers, and the community. It is an order required by appellate decisions and by the Constitution, and as such it deserves, and the Court is confident that it will receive, obedience and respect. But as an order affecting the welfare

of many of our children it deserves more than this: it deserves the full cooperation and best efforts of all concerned to ensure that it works with the least possible disruption to sound education in our community. By working together, this plan will succeed in accordance with the law, and will further the best interests of our children.

In accordance with the cited cases, the recommendations of the Florida School Desegregation Consulting Center, filed March 15, 1970, the suggestions of plaintiffs filed July 31, 1970, and the independent consideration given to the case by the Court, it is

ORDERED:

1. Elementary schools Forest Park (#104) shall be paired with Lackawanna (#10); East Jacksonville (#3), with Fairfield (#9); Harbor View (#220), with Hull (#169); North Shore (#70), with Long Branch (#106); and West Jacksonville (#143), with Annie Morgan (#21). Grade centers shall be designated between the paired schools in the discretion of the school board.

4. Elementary schools M. V. Rutherford (#6), Scott (#24), John Love (#73), and Brown (#148), shall be clustered, with grade centers to be designated in the discretion of the school board.

5. Matthew-Gilbert Senior High School (#146) is to be closed as a senior high school, and senior high school pupils presently assigned to it shall attend Andrew Jackson Senior High School (#35). Excess pupil capacity in Matthew-Gilbert Junior High School (#146), resulting from the above reassignments, shall be filled by rezoning pupils from Kirby-Smith Junior High School (#25), which may thereby permit closing of the Kirby-Smith Annex. All re-

zoning shall be directed toward fulfilling the duty of the school board affirmatively to desegregate the affected schools. Thus, wherever possible, without creating a non-contiguous zone, lines should be drawn to transfer to the recipient school the maximum number of students in the minority race there.3/

6. Eugene Butler Senior High School (#168) is to be closed as a senior high school, and senior high schools pupils presently assigned to it shall be rezoned to the adjacent high schools, namely New Stanton Senior High School (#153), Paxon Senior High School (#75), and Robert E. Lee Senior High School (#33). Certain students from Lee (#33) may be rezoned to attend N. B. Forrest Senior High School (#241). The school board is directed to rezone pupils accordingly. Excess pupil capacity in Eugene Butler Junior High School (#168), may be filled by rezoning pupils from adjacent junior high schools, which at present are overcrowded. All rezoning shall be directed toward fulfilling the board's duty affirmatively to desegregate the affected schools. Thus, wherever possible, without creating a non-contiguous zone, zone lines should be drawn to transfer to the recipient school the maximum number of students in the minority race at the recipient school.

7. Plaintiffs' requests for modifications at Raines High School (#165), and Ribault High School (#96), are denied because the changing demographic composition of that area and the projected composition of the respective feeder schools make such changes useless to fulfill the affirmative duty to desegregate imposed by the appellate courts and the Constitution.

8. Transfers from residence attendance zones shall be permitted only as defined in this Court's orders of January 24, 1967, and August 22, 1967, namely, transfer for special needs,

hardship transfers, transfers ordered by Duval County Juvenile Court, and majority to minority transfers. Strict adherence to this provision will tend to desegregate schools not affected by the above order.

9. This Court, on its own motion, hereby orders added as necessary parties under Rule 19, Federal Rules of Civil Procedure, the Honorable Hans G. Tanzler, as Mayor of the Consolidated City of Jacksonville, and the members of the City Council of the Consolidated City of Jacksonville.

10. Plaintiffs' attorney, Earl M. Johnson, Esquire, is requested to make a designation of substitute local counsel in light of the above joinder of additional parties. *See* rule 3(D)(2), Local Rules (M.D. Fla., 1968 Rev.).

11. Jurisdiction is retained in this cause for such further action as may be necessary.

DONE AND ENTERED this 6th day of August, 1970.

/s/ WM. A. McRAE, JR.
Judge

Copies to counsel

FOOTNOTES

1/ To the extent this order affects these areas, the school board shall attempt to make adjustments to comply with the Singleton requirements set forth in this Court's order of December 30, 1969, especially in the area of teacher assignment. Some permissible deviation from the precise compliance for teacher assignments (reflected in the July 20, 1970 study) may occur when the respective teachers are reassigned with the students transferred by this order.

2/ Two exceptions to this statement are Beal (#11), which has a special federal program, and Picket (#205), which is separated from two larger all-Negro schools by two separate railroads and an interstate highway.

3/ To the objection that such affirmative rezoning is unconstitutional "gerrymandering" that uses for purposes of desegregation a technique impermissibly used in the past to segregate, the Fifth Circuit Court of Appeals stated sevral years ago the following:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetrated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. *United States v. Jefferson County*, 372 F.2d 836, 876 (5th Cir. 1966).

Two weeks ago, in making reference to the above quotation, the Fifth Circuit stated: "At this point, and perhaps for a long time, true non-discrimination may be attained, paradoxically, only by taking color into consideration." *Youngblood v. Board of Public Instruction of Bay County*, Florida, No. 29369 (5th Cir., filed July 24, 1970).

CERTIFICATE OF SERVICE

I CERTIFY that copies of the foregoing Motion for Leave to File Brief as Amicus Curiae and Brief as Amicus Curiae were served by U. S. Mail upon:

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this 7th day of October, A. D. 1970.

/s/ CHARLES E. BENNETT
ATTORNEY

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APPENDIX A-1

IN THE

Supreme Court of the United States

October Term, 1969

No. ———

JAMES E. SWANN, et al.,

Petitioners and Cross Respondents

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.,

Respondents and Cross Petitioners

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Cross petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled case on May 26, 1970.

OPINIONS BELOW

The opinions of the courts below directly preceding this petition culminating in the judgment of the Court of Appeals dated May 26, 1970, (226a) are set forth in petitioners' petition for writ of certiorari filed on June 19, 1970.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 26, 1970, (226a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals join in the error of the trial court in rejecting the desegregation plan offered by the Board of Education where 68% of the black students would attend schools in which their race was in the minority and where the remaining 32% of the black students would attend schools having white ratios of 17% to 1% and these black students would be taught by a predominantly white faculty and further where such black students were offered more generous freedom of transfer than that offered by the customary majority to minority transfers?

2. Did the Court of Appeals join in the error of the trial court in rejecting the plan for desegregation of the 76 elementary schools prepared and offered by the Board of Education, where the plan left no all-black schools, though nine of 76 schools had white ratios of 1% to 17% and black students attending those schools would have an untrammeled right to transfer to any one of the 67 remaining elementary schools, and upon departure from elementary schools would be assured of a desegregated education during the remainder of their schooling?

3. Did the Court of Appeals join in the error of the trial court in rejecting (by the trial court's offering the Board a "Hobson's choice") the Board plan for desegregation of junior high schools where only one of 21 junior high schools would have more than a 39% black student ratio and the remaining predominantly black school would house 758 black and 84 white students and have a predominantly white faculty by imposing a requirement on the Board to create nine black satellite districts containing approximately 2700 black students and assigning them to predominantly white suburban junior high schools?

4. Did the Court of Appeals join in error of the trial court in rejecting the Board plan for desegregation of senior

high schools where the plan provided that no school would have more than a 36% black ratio and a predominantly white faculty by imposing a further requirement upon the Board that 300 black students residing in four designated grids would be bused a substantial distance from the northwestern part of the city to a high school serving the extreme southeastern portion of the county?

5. Did the Court of Appeals join in the error of the trial court in imposing racial balances in junior and senior high schools in contravention of Title 42 U.S.C. 2000c(b) and 6(a)(2) (Sections 401(b) and 407(a)(2)) of the Civil Rights Act of 1964 and North Carolina General Statute 115-176.1?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, Section 401(b) and 407(a)(2) of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b) and 6(a)(2)); (230a) and Title 28 U.S.C. 2281 et seq. (1964) (233a).

STATEMENT

This school desegregation action was instituted in 1965 and, after hearing, the District Court held this school system to be in compliance with the Constitution. *Swann v. Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (1965), which holding was affirmed by the Court of Appeals for the Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education*, 369 F. 2d 29 (1966).

Following the Supreme Court decision in *Green v. New Kent County*, 391 U.S. 430, 88 S. Ct. 1689 (1968), and companion cases, the plaintiffs filed a motion for further relief alleging discrimination in teacher salaries, school

plants, facilities and numerous other areas, and in addition, sought further desegregation. Following hearing on April 23, 1969, the United States District Court for the Western District of North Carolina found:

"Some Board actions found not to be discriminatory.

No racial discrimination or inequality is found in the following disputed matters:

. . . The use of federal funds for special aid to the disadvantaged. . . . Use of mobile classrooms. . . . the quality of school buildings and equipment. . . . Coaching of athletics. . . . Parent-Teacher association contributions and activities. . . . School fees. . . . School lunches. . . . Library books. . . . Elective courses. . . . Individual evaluation of students. . . . Gerrymandering. . . ." (14a-18a)

". . . Location of schools in Charlotte has followed the local pattern of residential development, including its *de facto* patterns of segregation. . . ." (21a)

"The percentage racial mix. Counsel for plaintiffs say that since the ratio of white to black students is about 70/30, the School Board should assign the children on a basis of 70% white and 30% black and bus them to all the schools. *The Court does not feel that it has the power to make such a specific order.*" (Emphasis supplied) (26a)

The District Court found with respect to the motives and judgment of the School Board as follows:

"A word about the School Board—The observations in this opinion are not intended to reflect upon the motives or the judgment of the School Board members. They have operated for four years under a court order which reflected the general understanding of 1965 about the

law regarding desegregation. *They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been reviewed in the appellate court decisions.* The Charlotte-Mecklenburg schools in many respects are *models for others* . . . The difference between 1965 and 1969 is simply the difference between *Brown* of 1965 and *Green v. New Kent County* of 1968. The rules of the game have changed and the *methods and philosophies which in good faith the Board has followed are no longer adequate* to complete the job which the courts now say must be done 'now.' " (Emphasis supplied) (27a)

Concluding additional affirmative action was required of the Board, the Court then ordered the Board of Education to submit a plan for the complete desegregation of teachers to be effective for the 1969-1970 school year and to submit a plan and time table for the desegration of pupils to be predominantly effective in the fall of 1969 and completed by the fall of 1970. (30a and 31a)

In order that the Court may be advertent to the arduous problem facing the Board of Education, the following information is offered. The Charlotte-Mecklenburg School System is the largest school system in the Carolinas, ranking 43rd largest in the United States and serving 84,500 students, 29% of which are black and 71% of which are white. The present transportation system carries approximately 23,000 students daily on buses. Each bus averages 1.8 trips each way, each day. The City of Charlotte comprises 64 square miles, making it larger than the District of Columbia, and the total county comprises 550 square miles, having an east-west span of 22 miles and a north-south span of 36 miles. (9a). Ninety-

five percent (95%) of the 24,000 black students, or 23,000, reside in the northwestern inner-city quadrant of the City or on the fringes thereof. (14a).

Following submission of the Board's first plan for further desegregation, the Court entered its order of June 20, 1969, (46a) which found the plan inadequate with reference to pupil and faculty desegregation. The Board was directed to submit a plan by August 4, 1969, in accordance with the April 23, 1969, order.

During the interim, *United States v. Montgomery*, 395 U. S. 225, 89 S. Ct. 1670 (1969) was decided which for the first time indicated that racial ratios in facutly be imposed. In accordance with *Montgomery, supra.*, the Board of Education proposed a plan for desegregation which would produce substantial faculty and student desegregation for the school year 1969-70 and proposed a comprehensive computer-assisted study for the purpose of restructuring attendance lines for the school years 1970-1971. It was estimated that the study would require approximately six months to complete and would be available for presentation on or about February 1, 1970.

On August 15, 1969, the Court entered an order (58a) approving the policy statement of the Board, the faculty desegregation program, the closing of seven all-black inner-city schools, the re-assignment of students from overcrowded black schools and local assignment of students between two schools. In addition, the Court approved in principle the proposed restructuring of attendance lines and other factors, but rejected them for lack of specific detail and time table. The Board was accordingly directed to present by November 17, 1969, a plan for complete faculty desegregation and student desegregation for the school year 1970-1971 (70a). In view of the fact that it was im-

possible to complete the computer-assisted restructuring of attendance lines within the time limited, which would attain maximum desegregation possible by rezoning, motion was made by the Board for additional time in which to present its plan for desegegation, which was denied. (81a). The District Court gratuitously and without benefit of further evidentiary hearings reversed his previous findings that segregation in Charlotte was *de facto* as follows:

> ". . . There is so much state action imbedded in and shaping these events that the resulting segregation is not innocent or *'de facto'* and the resulting schools are not 'unitary' or 'desegregated.' " (87a)

In view of the rejection of the motion for the extension of time, the Board was compelled to present an admittedly incomplete plan for desegregation on November 17, 1969, and sought direction from the Court with respect to the meaning of a "unitary system" and related terms. Thereafter, on December 1, 1969, the District Court disapproved the Board's plan for further desegregation and directed the desegregation of faculties on a three-to-one ratio effective not later than September 1, 1970, and indicated that a Court consultant would be appointed. (109a). On December 2, 1969, the Court appointed Dr. John Finger, who had formerly testified as an expert witness on behalf of plaintiffs as consultant. In the December 1 order, the Board was invited to continue working on its plan by the District Court.

On February 2, 1970, the Board of Education submitted a plan utilizing computers to achieve a maximum racial mix of 71% white and 29% black in each school where possible by restructuring attendance lines. One hundred (100) of the 103 schools would have a racial mix, leaving

only three all-white schools. Sixty-eight percent (68%) of the black students would attend schools having less than 40% black population. Thirty-two percent (32%) of the black students would attend nine elementary and one junior high schools which would have black ratios of 83% to 99% black under the Board plan. (123a, 124a, 126a-128a).

The plan for desegregation submitted by the School Board on February 2, 1970, included imposition of faculty ratios of approximately three to one, white predominating, in each school and proposed implementation of its plan for the school year 1970-1971 in accordance with the various court orders. The Board plan would require the in-district transportation to approximately 5,000 additional students, who would qualify for such transportation under state law.

The Court consultant's plan was submitted contemporaneously with that of the Board on February 2, 1970, which effectively adopted in many respects the Board's geographic zoning plan and engrafted upon it the features of pairing of distant elementary schools and creation of satellite districts in predominantly black inner-city areas who were assigned to distant predominantly white outlying secondary schools.

On February 2, 1970, the Court conducted a hearing limited to the question of the time required for implementation and refused to hear any evidence with reference to the merits of the two plans before the Court. On February 4, 1970, the Board made a motion for hearing on its plan and for the opportunity to examine the Court consultant who resides in Rhode Island and beyond the process available to the Board. In response thereto, the Court permitted a short hearing severely limited as to time on the following day and did not direct the consultant to be present for examination.

On the same day, February 5, 1970, the Court entered its order in which the Court found in part as follows:

> "The Board plan, prepared by the school staff, relies almost entirely on geographic attendance zones, and is tailored to the Board's limiting specifications. It leaves many schools segregated. The Finger plan incorporates most of those parts of the Board plan which achieve desegregation in particular districts by rezoning; however, the Finger plan goes further and produces desegregation of all the schools in the system.
>
> Taken together, the plans provide adequate supplements to a final desegregation order." (113a)

Although the Court stated, "The order which follows is not based upon any requirement of 'racial balance' . . ." (115a), the Court then adopted the entire plan of the Court consultant and thereby directed racial balancing with reference to the various schools:

A. The Board's pupil assignment plan for senior high schools was approved with the condition that the 300 black students residing in four grids suggested by the Court consultant would attend Independence High School. Therefore, the Court consultant's sole recommendation with reference to high schools was approved although no high school under the Board plan would house more than a 36% black ratio.

B. With respect to junior high schools, the Board plan was approved upon condition that the only junior high school out of 21 which would remain predominantly black would be desegregated by giving the Board a "Hobson's choice" of furnishing transportation and increasing blacks in attendance at several outlying schools and in default of rezoning (which had been fully explored), two-way transportation of students (which is cross-busing to which the

Board is opposed) or closing the junior high school (whose classrooms are desperately needed to minimize the already serious overcrowding which exists at the junior high level), the Board was directed to implement the Court consultant's plan, which provided for establishing nine satellite attendance districts (containing 2,760 students) in inner-city black areas for attendance at nine distant predominantly white suburban schools.

C. With respect to elementary schools, the Court adopted the Court consultant's plan which utilized the Board's rezoning and engrafted upon it the feature of cross-assignment with resulting cross-busing of inner-city blacks in attendance at nine schools with distant suburban whites attending 24 schools. Approximately 10,200 students would be involved in the elementary cross-assignment.

The Board plan contemplated furnishing transportation only to those students eligible for transportation under state law and would result in furnishing additional transportation to approximately 5,000 students. The order of desegregation imposed substantial additional transportation requirements upon the school system which were compiled by the transportation office of the school system as follows:

FINGER PLAN

Additional Students	*Number of Buses*	*First-Year Cost*
23,000	526	$4,199,439.00

BOARD PLAN

Additional Students	*Number of Buses*	*First-Year Cost*
4,935	104	$ 864,767.00

Upon the amendment of the February 5 order, dated March 3, the Board submitted estimates that additional

transportation required by the amended order was as follows:

Additional Students	*Number of Buses*	*First-Year Cost*
19,285	422	$3,406,687.00

Supplementary findings of the Court dated March 21, 1970, (155a and 157a) reflect a finding that transportation would be required as follows:

Additional Students	*Number of Buses*	*First-Year Cost*
13,300	138	$1,011,200.00

Extensive objections and exceptions were filed by the Board with reference to the findings of the Court dated March 21, 1970, and the Court of Appeals noted that it was difficult to furnish reliable predictions with respect to transportation estimates. (193a and 194a)

The Board filed notice of appeal to the Court of Appeals for the Fourth Circuit on February 25, 1970.

On March 5, 1970, the Court of Appeals stayed implementation of that portion of the order directing cross-busing of students and on application to the Supreme Court of the United States by the petitioners, this Court declined to disturb the stay order of the Court of Appeals.

The Court of Appeals directed the District Court to conduct evidentiary hearings with reference to the general issue of busing and related considerations which resulted in the supplemental findings of fact dated March 21, 1970 (136a) to which, as noted above, the respondents filed numerous exceptions.

The District Court stayed implementation of the remaining portions of its February 5 order until September 1, 1970.

Thereafter, on May 26, 1970, the Court of Appeals for the Fourth Circuit approved the provisions of the order of the District Court with reference to assignment of faculty and assignment of students to secondary schools and reversed and remanded for further consideration the assignment of pupils attending elementary schools. (184a).

From this holding, the petitioners and respondents have applied for writs of certiorari.

REASONS FOR GRANTING WRIT

Introduction

This Court should accept this case for review. It involves fundamental issues which confront not only Charlotte-Mecklenburg, but school systems throughout the nation in their efforts to establish and maintain the unitary system that the Constitution requires. A review of this case will bring clearly into focus the practical problems which in *Northcross v. Board of Education*, 397 U. S. 232 (1970), the Chief Justice said ought to be resolved by this Court.

Charlotte-Mecklenburg is typical of school systems, particularly those involving complex densely populated urban areas that have been seeking conscientiously to acquit their affirmative duty to eradicate the vestiges of previously established dual systems.

For sixteen years, school boards, plaintiffs and the courts have struggled with the elusive question, "What constitutes a unitary system?" School boards have been roundly, and often unjustifiably, condemned for not solving the demands of *Brown II*, 349 U. S. 294 (1955). It has been a difficult struggle. A companion case to *Brown II*, *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955), held that although there was a duty on school boards not to discriminate, there was no duty to integrate. Although numerous opportunities were presented, this dictum was never repudiated by

the appellate courts until the late 1960's by the Fifth Circuit and finally by the Fourth Circuit in *Nesbitt v. Statesville*, 418 F. 2d. 1040 (4th Cir. 1969).[1] *Brown II*, supra., was, therefore, for a long time believed to stand for the proposition that all schools should be opened to minority groups and that the overlapping dual zoning be eliminated.

In *Cooper v. Aaron*, 358 U. S. 1 (1958), interference by state authorities was put to rest.

After some lethargy, school districts began eliminating the dual attendance zones which generally resulted in moderate desegregation by reason of segregated residential patterns. Desegregation efforts were thwarted by minority to majority transfers which permitted the races to resegregate. This device was held unconstitutional in *Goss v. Knoxville*, 373 U. S. 683 (1963). There, the Supreme Court gave a new indication of the means to accomplishing a unitary system by expressing the view that although minority to majority transfers were condemned, a completely open freedom of choice might satisfy constitutional demands. The Department of Health, Education and Welfare under the *Civil Rights Act of 1964* and the Fifth Circuit in its famous Jefferson decree, *United States v. Jefferson County*, 380 F. 2d. 385 (1967), embraced freedom of choice as their answer to the elusive unitary system question.

In 1968, this Court in *Green, supra*, dealing with a small two-school rural system, held freedom of choice was not constitutionally prohibited but it was not the answer to the unitary school system question. The scope of *Green*, has been limited to Southern school systems without regard

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[1]Although it may now be recognized that *Green v. New Kent County*, 391 U. S. 430 (1968) nullified this dictum, it was not expressly repudiated so as to be clearly understood.

to whether or not desegregation exceeds that of other areas of the country. Since *Green*, the desegregation progress of an enlightened community has been of no concern to the courts, where the school systems are located in states formerly imposing a dual system by law. The destruction of state-enforced dual systems by *Brown II* has not in sixteen years resulted in substantial mixing of the races in schools, North or South, East or West. It has not resulted in substantial mixing of the races in New York in a span of 32 years after repeal of its dual school laws or in many other states where such laws have been repealed for many more years. Segregation in public schools rests more strongly on factors other than state laws. It is time for the courts to give recognition to this incontrovertible fact and apply uniform national standards based upon a rule of reason containing clearly understood parameters embracing solid eduction values. After all, the foundation of all successful desegregation rests upon improvements of education for minority groups.

Recent pronouncements of the court, *Alexander v. Holmes*, 396 U. S. 19 (1969) and *Carter v. West Feliciana*, 396 U. S. 290 (1970) have been generally addressed to the question of time. The term "effectively excluded" has received various interpretations by the courts and requires immediate clarification.

In its February 2, 1970 plan, the School Board declared the major thrust of its policy as follows:

> "* * * (The) Board of Education firmly believes further desegregation of students and professional staff will contribute to the education and social development of all children."

This was *not a new policy*—but a reaffirmation of the School Board's long standing commitment to the proposi-

tion that every child in the system—black, white, rich or poor—is entitled in full measure to a quality education unimpaired by any restraints or restrictions upon his constitutional rights or upon his opportunity to develop to the full extent of his capabilities.

Charlotte-Mecklenburg has a pretty good "track record" in connection with its desegregation efforts. Under the plan in operation last year (1969-1970), the Charlotte-Mecklenburg system achieved a degree of desegregation which exceeds that attained by most other major systems.[2]

The plan for desegregation offered by the Board and rejected by the District Court and the Court of Appeals provided for attendance of 68% of the blacks at predominantly white schools, which far surpasses the desegregation offered by any major school system in this nation. We are confident that this statement can be made without fear of contradiction. It therefore appears punitive for a court to impose a racial balance upon a system which has produced such an exemplary plan that far exceeds the performance of the school systems noted above.

In *Swann v. Charlotte-Mecklenburg*, 369 F. 2d 29 (4th Cir. 1966), the Court of Appeals approved the new attendance zones adopted by the School Board. In its April 23,

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[2]In Charlotte-Mecklenburg, 65% of the blacks during the school year 1969-70, attended predominantly black schools (165a). Comparable information derived from HEW figures reflects the following percentage of the black students at predominantly black schools: New York City, 86%; Los Angeles, 96%; Detroit, 91%; Philadelphia, 90%; Milwaukee, 88%; San Francisco, 54%; Boston, 77%; and Cincinnati, 78%.

The percentage of black students attending schools housing 95% to 100% black students in other cities is as follows: Baltimore, 76%; Cleveland, 80%; Washington, 89%; St. Louis, 86%; Newark, 75%; Buffalo, 61%; Gary, Indiana, 80%. In Chicago, 76% of the blacks attend schools less than 2% white. Source, United Press International Release, May 17, 1970.

1970 order, the District Court acknowledged that Charlotte-Mecklenburg had been a leader in facing up to the responsibility of providing quality education on a desegregated basis for all children—white and black—but advised the Board that since *Green*, "the rules of the game have changed, and the methods and philosophies which in good faith the Board has followed are no longer adequate." (27a and 28a).[3]

As this case progressed in the District Court during the intervening months between April, 1969, and February, 1970, it become increasingly evident that there were some fundamental conceptual differences between the plaintiffs and the trial court on the one hand and the School Board on the other with respect to the identity and definition of the necessary ingredients of the "unitary school system" that the mandate of the Constitution requires.

The School Board earnestly was seeking to know and understand what was required of it. In its plan submitted November 17, 1969, the Board sought clear-cut directions from the trial court by asking it to answer various basic practical questions that were perplexing the Board regarding the nature and composition of a "unitary school system" and the necessary or permissible ingredients of an acceptable plan.

The School Board was not alone in its quandry; other courts expressed their concern regarding the resolution of the practical problems involved in evaluating the efficacy of desegregation plans and the need for standards that define the steps required of local school districts in order to acquit their affirmative duty to establish unitary sys-

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[3]A pertinent historical observation: In 1958, the Charlotte City School Board on its own initiative was the first in the South to pioneer integration — albeit on a token basis.

tems.[4] Our own trial court did not share the doubts or uncertainties expressed by these other courts. Boiled down to its simplest terms, it was the trial court's view that a school system is not a unitary one if it has a single black or predominantly black school. Local conditions, practical problems, cost, educational considerations, natural boundaries or the size and complexity of the system were regarded as irrelevant by the trial court.

On appeal, the Court of Appeals, contrary to the trial court, has held in this case that not every school in a unitary system must be integrated and adopted "a test of reasonableness—instead of one that calls for absolutes." (189a).

On review, this case will present a clear-cut opportunity for this Court to determine whether the Constitutional mandate regarding the abolition of dual school systems and the establishment of unitary ones permits the application of a "Rule of Reason" or whether the Constitution requires the shifting of children "by the numbers" irrespective of the size and complexity of the system, costs, disruptions, educational considerations, and the host of other practical matters with which the school boards and administrators must cope in fashioning an effective school system and the day-to-day operations of their schools.

On June 24, 1970, the cross petitioners filed with this Court a response to the petitioners "Motion to Advance", in which the cross petitioners joined in a request that this Court grant certiorari and render its decision prior to the

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[4]For example, see *Bivins v. Bibb County*, — F. Supp. — (N. D. Ga. Jan. 21, 1970); *United States v. State of Georgia*, — F. Supp. — (N. D. Ga. Dec. 17, 1969); *Beckett v. School Board of the City of Norfolk*, 308 F. Supp. 1274 (E. D. Va. Dec. 20, 1969); *Thornie v. Houston County*, — F. Supp. — (M. D. Ga. Jan. 21, 1970); *Hilson v. Washington County*, — F. Supp. — (M. D. Ga. Jan. 28, 1970); *Northcross v. Board of Education of Memphis*, — F. 2d — (6th Cir. Jan. 12, 1970).

opening of schools next fall.[5] We sincerely hope that this can be accomplished. Prompt resolution of the issues presented by this case will greatly assist not only Charlotte-Mecklenburg, but other courts and school systems everywhere to conform their desegregation plans to the standards established by this Court in this case and to minimize the costly disruptions that will be the result of continued uncertainties or misconceptions regarding the necessary ingredients of a unitary system and the means of establishing and maintaining one.

In the portions of this cross petition which follow, the cross petitioners set forth a discussion of the questions presented for review.

I.

The Board Plan Based on Geographic Attendance Zones Gerrymandered to Achieve Maximum Racial Mix Established a Unitary System and the Court of Appeals Joined in the Error of the Trial Court by Disapproving that Plan.

One of the basic issues involved in this case is whether a desegregation plan based on comprehensively restructured geographic attendance zones satisfies the Constitutional requirement of a unitary system, in a situation where these zones are established to promote the maximum amount of desegregation possible by the employment of this technique. This issue also involves a consideration of the extent to which a School Board may employ this technique as a means of preserving some semblance of the

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[5]Cross petitioners are advised that the Norfolk, Virginia and Little Rock, Arkansas schools are seeking review of their cases in this Court which will offer a broad spectrum in which to resolve this national problem.

neighborhood school concept which it believes to be beneficial.

A. *The Geographic Attendance Zones.*

To achieve maximum desegregation of the 103 schools in the Charlotte-Mecklenburg System, the February 2, 1970, School Board plan is based exclusively on geographic attendance areas which ignore natural boundaries. Maps comprising a part of the Board plan (Exhibits A, C and G attached to February 5, 1970 Order) show attendance zones of the schools at each of the three instructional levels.[6] These attendance zones were grotesquely gerrymandered by extending finger-like corridors into and out of the densely populated, predominantly black inner-city areas to obtain sufficient black and white children to create a favorable racial composition at the schools involved.

Under the Board plan, 100 of the 103 schools in the Charlotte-Mecklenburg System would have some degree of racial mix, leaving only three all-white schools. Sixty-eight percent (68%) of the black students would attend 93 schools with less than 40% black student bodies—leaving the remaining 32% of the black pupils in the 10 remaining schools having white ratios of 17% to 1%.[7] These 10 predominantly black schools remained in spite of the Board's best efforts to achieve a more satisfactory racial mix in them by means of the drastically gerry-

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[6]The Court is reminded that these maps, plans, appendix and a book containing supporting data were furnished to the Court in connection with petitioners' application for stay which was denied on March 16, 1970.

[7]See appendix attached to this petition for statistical data pertaining to the Board plan.

mandered attendance lines. Of these 10 schools 9 are elementary[8] and 1 is a junior high school.[9]

In addition, the Board plan specifically provides that the faculty of each school shall be assigned so that the ratio of black teachers to white teachers in each school will be approximately the same as the ratio in the entire system (i.e., a ratio of about 1 to 3). The racial composition of its faculty is educationally beneficial and will contribute substantially to thorough integration of the 103 schools of the system.

The remaining predominantly black schools are located in the inner-city core which is populated for the most part by blacks, many of whom due to shifting housing patterns had moved into previously white areas. In its Findings of Fact (146a), the trial court acknowledged:

> "Both Dr. Finger and the school board staff appear to have agreed, and the *court finds as a fact*, that for the present at least, there is *no way to desegregate* the all-black schools in Northwest Charlotte *without providing* (or continuing to provide) *bus or other transportation for thousands of children.* All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion." (Emphasis supplied)

Brown II, 349 U. S. 294 (1955) recognized that an acceptable desegregation plan may employ geographic re-

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[8]Under the Board plan, these 9 elementary schools have the following black-white ratios: Bruns Ave. (90-10); Marie Davis (88-12); Double Oaks (99-1); Druid Hills (96-4); First Ward (99-1); Lincoln Heights (99-1); Oaklawn (99-1); University Park (85-15); and Villa Heights (83-17). (A Plan for Student Desegregation — Systems Associates, Inc., page 31.)

[9]Under the Board plan, Piedmont Junior High has a black-white ratio of 90% (B)-10% (W). (A Plan for Student Desegregation —Systems Associates, Inc., Page 31.)

zoning if done fairly and in good faith to effect "a revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis."[10] See also *Green, supra.*

A consideration of the pro-desegregation gerrymandered geographic zones of the Board plan excludes any inference that they were formulated for any purpose other than a conscious one to promote maximum desegregation of the Charlotte-Mecklenburg schools.

The desegregation achieved by the geographic zones of the Board plan is supplemented in another very material respect: A majority to minority transfer provision which allows any black child in a school having more than 30% of his race to attend one that is less than 30% black, but permits a white child to transfer only if the school he is attending has more than 70% of his race and the one to which he seeks assignment is less than 70% white. The Court of Appeals correctly inferred that these transfer provisions were purposely designed by the Board to promote stable desegregation in the schools by preventing "tipping" or resegregation (199a). The Court of Appeals'

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[10]A pertinent historical note is made by Alexander M. Bickell in his recent book, *The Supreme Court and the Idea of Progress*:

> "At the first argument of *Brown v. Board of Education* in 1952, Justice Frankfurter asked the future Justice Thurgood Marshall, then counsel for the Negro children, whether a decision in his favor would 'entitle every mother to have her child go to a non-segregated school?' Mr. Marshall replied in the negative. 'What will it do?' Justice Frankfurther pursued. Mr. Marshall replied: 'The School Board, I assume would find some other method of distributing the children by drawing district lines.' The only requirement would be, Mr. Marshall added, that the lines be drawn 'on a natural basis,' and not be gerrymandered so as to enclose or exclude Negro neighborhoods." Bickell, *The Supreme Court and the Idea of Progress*, p. 117 (1970). See also 1 U.S.L.W. 3164 (1952).

determination that these transfer provisions are unduly restrictive is unwise and unwarranted. The restrictions imposed are an effective method of preserving the stable desegregation achieved by the Board's geographic zones at all three instructional levels and will allow more blacks the opportunity to transfer than the usual majority to minority transfer.

The Court of Appeals misconceived the beneficial purpose sought to be achieved by the 70-30 transfer provision as well as the 60-40 ratio of white to black utilized initially in designing attendance zones. These limitations were imposed for the sole purpose of assuring stability of the desegregation effort. In *Beckett v. Norfolk, supra*, the District Court quoted with approval the views of Dr. Thomas F. Pettigrew, a member of the Advisory Committee to the Coleman Report:

> "In sum, Pettigrew assigns five reasons why the ratio of 70% white to 30% Negro, with a maximum of 60% white and 40% Negro, points to long-range success. His testimony is quoted:
>
> '(1) That I believe it will minimize the middle class flight, if you want to call it that. I don't think it excludes it completely, that's why I use 'minimize.'
>
> (2) That I think it gives you a good chance for integration, not just desegregation, therefore maximizes black achievement.
>
> (3) Maximizes or should maximize white achievement.
>
> (4) It should maximize other positive benefits, non-achievement benefits, like college aspirations, occupations aspirations, interracial—better interracial attitudes and behavior on the part of blacks.

(5) The same non-achievement benefits on the part of whites.' "

In disapproving the geographic plan of the School Board, the Court of Appeals admonished the Board "to explore every method of desegregation, including rezoning with or without satellites, pairing, grouping, and school consolidation." (199a). The Board had previously considered the feasibility of such techniques and concluded that a plan based solely on non-discriminatory geographic attendance zones would best serve the Charlotte-Mecklenburg System, the cause of education and the promotion of stable desegregation.

We applaud the Rule of Reason espoused by the Court of Appeals in desegregation cases, but question whether the application of that Rule may properly veto a geographic plan such as the one presented by the School Board. A review of this case will afford this Court an opportunity to resolve this as yet unresolved problem for the guidance of not only Charlotte-Mecklenburg, but other school systems who await an authoritative declaration of the scope and limits of techniques to be employed in fulfilling the mandate of the Constitution that no child is to be "effectively excluded" from any school on account of his race or color.

B. *The Neighborhood School Under the Board Plan.*

The neighborhood school concept is one that the Board considers to be beneficial to the children and enhances the support that comes when children and parents identify themselves with a particular school and its programs. Fragmentation of this type of association is not in the best interest of our schools.

In its April 23, 1969, Order, the District Court volunteered its own educational philosophy in opposition to the neighborhood school concept (22a):

> "Today people drive as much as forty or fifty miles to work; five or ten miles to church; several hours to football games; all over the country for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood. * * * If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships. * * *"

To the contrary, all too many of our present day relationships have become institutionalized and depersonalized. We believe this trend to be unwholesome. Close relationships among teachers, parents and children should to the maximum extent be encouraged and undergirded. The neighborhood school plays an important part in fostering such relationships—particularly at the elementary level where the ties between home, school and after-class activities are an important part of the educational process of children in their early formative years. In a metropolitan system such as ours the ideal may not always be achieved. This should not be a reason for dismantling and abandoning the neighborhood school.

From the beginning there has been this marked contrast between the views of the trial court and those of the Board regarding the pertinence of the neighborhood school.[11] The School Board responded to the pressure of

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[11]Geographical zoning is the common method of determining school attendance and the neighborhood school is the predominant attendance unit. Racial Isolation in the Public Schools — Summary of a Report by the Commission on Civil Rights, page 3, (March 1967).

the trial court when it submitted its February 2, 1970 plan—a plan which retained, but severely strained, the principle of the neighborhood school.

The Fifth Circuit has approved a neighborhood school plan as satisfying the constitutional mandate for the establishment of a "unitary system." *Ellis v. Orange County, Florida*, —— F. 2d —— (5th Cir. 1970); *Deal v. Cincinnati Board of Education*, 324 F. 2d 209 (7th Cir. 1966) succinctly stated the case for the neighborhood school:

> "Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such a minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication."

In his policy statement of March 24, 1970, entitled *SCHOOL DESEGREGATION: A Free and Open Society* (116 Cong. Rec. S4351, Daily Ed., March 24, 1970), the President of the United States addressed himself at length and in depth to the important role that the neighborhood school plays in the education of our public school children. He said in part:

> "In devising local compliance plans, primary weight should be given to the considered judgment of the local

school boards—provided they act in good faith, and within Constitutional limits.

The neighborhood school will be deemed the most appropriate base for such a system.

Transportation of pupils beyond normal geographical school zones for the purpose of achieving racial balance will not be required."

As previously noted, the trial court quite obviously disagreed with the import of the President's policy statement. The Court of Appeals, although not addressing itself *per se* to the neighborhood school concept, nevertheless disapproved the geographic zones at all three instructional levels which the Board in its considered judgment had proposed to achieve a unitary system while retaining the basic benefits of the neighborhood school.

On review, this Court should clearly address itself to the extent that the neighborhood school may be retained and employed as part of a fairly administered non-discriminatory plan for the establishment of a unitary system.

II.

The Constitution Does Not Require Racial Balancing in Schools or Busing of Children Outside Geographic Attendance Zones to Effect Such Balancing. The Court of Appeals Joined in the Error of the Trial Court by Requiring Such Balancing and Busing.

As previously noted, we approve the test of reasonableness adopted by the Court of Appeals—instead of one that calls for absolutes. Such a test is consistent with the equitable principles elucidated in *Brown II*, which made

it clear that desegregation plans and the means of implementing them should take into account a variety of local problems and conditions—including by implication those specifically itemized by the Court of Appeals (age of pupils, board resources, cost, effect of busing on traffic and the distance and time for transportation).

We agree with the Court of Appeals that the application of the Rule of Reason requires that school boards must use all reasonable means to integrate their schools and that, if these efforts prove unavailing, a system may nevertheless be unitary even though an "intractible remnant of segregation" and some predominantly black schools remain.

Further, we agree that transportation may be employed on a "reasonable" basis as a legitimate tool to effectively desegregate an otherwise dual system. However, this still leaves open to question the circumstances under which and the purposes for which busing may be or should be imposed upon a school system.

The net effect of the trial court order of February 5, 1970, was to require racial balancing at all three instructional levels and the busing necessary to implement it—regardless of cost or disruptions. The net effect of the Court of Appeals decision was to require racial balancing at the junior and senior high levels and to authorize it at elementary level—tempered only by its test of reasonableness with reference to the amount of busing involved.

We do not believe that the mandate of the Constitution requires racial balancing nor compulsory busing outside of normal attendance zones to achieve such balancing, assuming, of course, that the attendance areas are fairly drawn so as to maximize desegregation.

The circumstances of this case and the decisions of the trial court and Court of Appeals regarding the extent to which racial balancing and compulsory busing may or must be required are basic unresolved problems that are plaguing not only Charlotte-Mecklenburg, but courts and school systems everywhere. The sooner these problems are resolved, the sooner the costly uncertainties and disruptions in the field of school desegregation will be minimized or dispelled and school boards and administrators can get on with their primary task of providing quality education for all children, black and white. We urge this Court to take the opportunity afforded by this case to cope with these issues.

A. *Analysis of Racial Balancing and Busing Imposed Upon Charlotte-Mecklenburg Schools.*

At the heart of the controversy involved in this case is the lawfulness of the trial court's February 5, 1970, order requiring long distance busing in the senior high, junior high and elementary schools. In order to highlight the implications of the decisions of the trial court and the Court of Appeals with respect to balancing and busing, we discuss the problems and issues involved at each of the three instructional levels.

Senior High Schools

The Board's pupil assignment plan for senior high schools effectively desegregated each of the ten high schools; nine of them would have black ratios of 17%-36%. The student body of the remaining school, Independence High, would be 2% black. This plan was adopted by the court consultant and the trial court with one exception: A requirement was engrafted upon the Board plan that 300 black students residing in the inner core of the

City must be bused from the area of their residence through the center city traffic a distance of about 12 or 13 miles to Independence High School located in white suburbia. This arrangement in turn was approved by the Court of Appeals as a "reasonable" means of eliminating Independence as an almost totally white school. The Court of Appeals observed that the bus mileage involved for the black youngsters was about the same as the average one-way bus route of others attending that school —but neglected to take into account the fact that the existing bus routes were primarily in rural and suburban areas rather than in the congested inner-city areas which would be traversed by the 300 black students.

Under the plan as proposed by the Board, these 300 children would have attended a thoroughly desegregated high school having a racial composition of 36% black and 64% white. The only purpose served by the court directed shifting of these 300 was to make a white school less white.

We do not think that the Constitution requires this racial balancing nor the busing necessary to implement it. Neither do we feel these requirements fall within the purview of the Rule of Reason.

Junior High Schools

The Board plan proposed to restructure the attendance lines of the 22 junior high schools so that all but one of them would have not more than 38% black students. In spite of the Board's best efforts, the one remaining school (Piedmont Junior High) housing about 840 pupils was left 90% black and 10% white. In order to reduce the percentage of blacks in this one school from 90% (758 pupils) to 32% (243 pupils) the court consultant re-

shuffled the Board's proposed attendance zones for the junior high schools and provided for satellite busing of 1,372 additional (total of 2,760) inner-city black youngsters to nine predominantly white suburban schools. This proposal of Dr. Finger was approved by the trial court and the Court of Appeals.

By way of summary, the restructuring the Board's attendance lines and the busing of 1,372 additional black children were directed in order that the black student body at Piedmont would be reduced by 515 students. We do not think that this dislocation of 1,372 additional black pupils, nor the cost of busing required to accomplish this racial balancing, can stand up under the test of reasonableness or the requirements of the Constitution.

Elementary Schools[13]

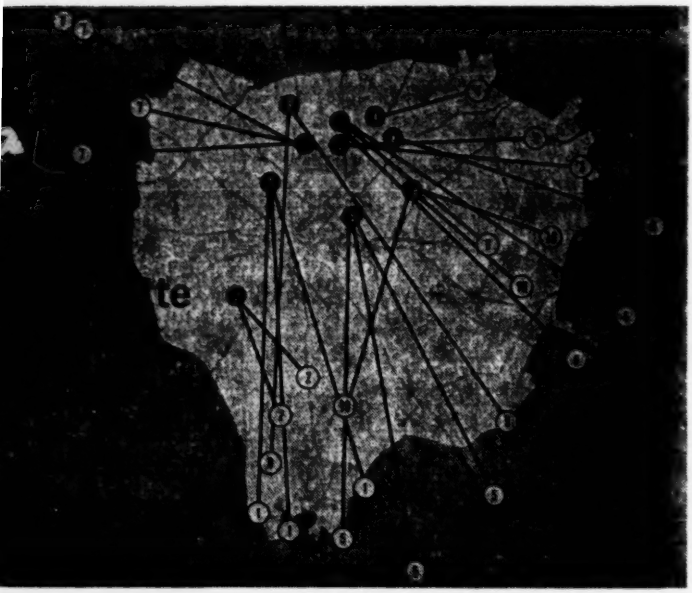
The most burdensome part of the trial court's order was the long distance cross-busing of about 10,200 elementary children to eliminate the nine predominantly black inner-city schools by clustering them with 24 predominantly white suburban schools—requiring the busing of 5,100 black first, second, third and fourth graders to the white schools and 5,100 white fifth and six graders to the black schools. A schematic portrayal of the clustering and cross-busing ordered by the trial court follows on the next page. The particulars regarding the number and cost of the buses required to effectuate this arrangement are set forth in the opinion of the Court of Appeals (191a, 192a) and will not be repeated here.[14]

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[13]The 76 elementary schools referred to by the Court of Appeals (191a) includes four child development centers and learning academy. The remaining 72 schools are conventional elementaries.

[14]There is a marked disparity between transportation cost estimates of the school staff and those set forth in the trial court's

A Maze of Bus Routes to Integrate Charlotte Schools



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Under its test of reasonableness, the Court of Appeals properly held that, based on the trial court's estimate, the resulting increase of 39% in the number of elementary children bused and 32% in the present bus fleet was too extensive and too onerous. The Court of Appeals reversed the trial court's order with reference to this phase of the plan and remanded with instructions that the Board con-

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Supplementary Findings of Fact (152a-157a), which drastically discounted those of the administrators and minimized the relevance of the cost increases for administration, bus parking, maintenance, driver education and similar items. In this opinion, the Court of Appeals set forth both sets of figures and observed that the findings of the district court and the evidence submitted by the Board rest on many variables (193a).

sult with HEW and consider methods other than geographic attendance areas, including rezoning with or without satellites, pairing, grouping and school consolidation.

In its remand, the Court of Appeals directed that any new elementary plan approved by the trial court be put into effect next September. We reiterate our fervent hope that this Court will give appropriate directions before the Board is faced with the disruptions and expenditures that may ultimately prove to be unnecessary.

B. *Racial Balancing as Basis for Decision of Trial Court and Court of Appeals.*

The trial court's February 5, 1970, order begins with the assertion: "The order which follows is ***not*** based on any requirement of 'racial balance.'" (Emphasis supplied) (115a). That it was the obvious purpose of the trial court, not only to eliminate each black school, but also to eliminate all-white schools by requiring a racial mix to make them less white is readily apparent from the following excerpt from Paragraph 12 of its December 1, 1969, Order (105a):

> "* * * (T)he Court will start with the thought, originally advanced in the Order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from the norm may be unavoidable."

Further, Paragraph 13 of the trial court's February 5, 1970, order (118a) not only requires an initial establishment of racial ratios in the various schools but also implementation of a continuing program "computerized or

otherwise" of assigning pupils throughout the school year "for the conscious purpose of maintaining each school * * * in a condition of desegregation."[15]

This requirement that children be reshuffled periodically to maintain prescribed ratios makes of our children unwitting pawns in a colossal numbers game.

Although the majority of the Court of Appeals did not expressly confirm or deny that it was engaging in racial balancing (albeit tempering the absolutism of the trial court with its own rule of reasonableness), Bryan, Circuit Judge, in his dissent made his own appraisal of the main thrust of the majority's decision (215a-217a):[16]

> "The Court commands the Charlotte-Mecklenburg Board of Education to provide busing of pupils to its public schools for 'achieving *integration*'. (Accent added) '(A)chieving *integration*' is the phraseology used, but actually, achieving racial *balance* is the objective. Busing to prevent racial imbalance is not as yet a Con-

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[15]The likely results of such a program were described in *Beckett v. School Board of City of Norfolk, supra.*:

> "If such a mandate requires the *mixing of racial bodies* in each and every school building, irrespective of any local problems confronting the School Board, the answer is obvious. Under such circumstances racial balancing, or some system approximating same, must be ordered, and it would be a waste of time and effort to file plans which may be educationally beneficial to the children. The Civil Rights Division conceded, in argument, that any approach to racial balancing would annually require a *constant shuffling and reshuffling of children throughout the school system.* It is agreed by all that such a shuffling process is most *detrimental to children.*" (Emphasis supplied)

[16]See also President Nixon's policy statement of March 24, 1970, entitled *SCHOOL DESEGREGATION: A Free and Open Society, supra.*

stitutional obligation. Therefore, no matter the prior or present utilization of busing for this or other reasons, and regardless of the cost considerations or duplication of the bus routes, I think the injunction cannot stand.

Without Constitutional origin, no power exists in the Federal courts to order the Board to do or not to do anything. I read no authority in the Constitution, or in the implications of Brown v. Board of Education, 237 U. S. 483 (1954), and its derivatives, requiring the authorities to endeavor to apportion the school bodies in the racial ratio of the whole school system.

The majority opinion presupposes this racial balance, and also busing to achieve it, as Constitutional imperatives, but the Chief Justice of the United States has recently suggested inquiry on whether 'any particular racial balance must be achieved in the school; . . . (and) to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.' * * *

I would not, as the majority does, lay upon Charlotte-Mecklenburg this so doubtfully Constitutional ukase." (Emphasis by Judge Bryan).

The concerns and dissent of Judge Bryan find expression in earlier cases. For example, in *Carr v. Montgomery County Board of Education,* — F. Supp. — (M.D. Ala. 1970):

"Plaintiffs' objections * * * appear to be based on a theory that racial balance and/or student ratios as opposed to the complete disestablishment of a dual system is required by the law. Such is not this Court's concept of what the law requires. *Complete disestablishment of the dual school system to the extent that it is based*

on race is required. While pairing of schools may sometimes be required to disestablish a dual system, the pairing of schools or *the busing of students to achieve a racial balance*, or to achieve a certain ratio of black and white students in a school is *not required by law.* * * *" (Emphasis supplied)

And even more succinctly in the dissent of Judge Gewin (Bell, J., concurring) in *U. S. v. Jefferson County Board of Education*, 380 F. 2d. 385, 403 (5th Cir. 1967):

"* * * No consideration is given to any distinction in any of the numerous school systems involved. Urban schools, rural ones, small schools, large ones, areas where racial imbalance is large or small, the relative number of Negro and white children in any particular area, or any of the other myriad problems which are known to every school administrator, are taken into account. All things must yield to speed, uniformity, percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since Brown II. As the Court there stated:

> 'Because these cases arose under *different local conditions* and their disposition will involve a variety *of local problems*, we required further *argument* on the question of relief.' (349 U. S. p. 298, 75 S. Ct. p. 755)" (Emphasis added).

As suggested by Circuit Judge Bryan, it would be in order for this Court to address itself to this as yet unresolved problem.

C. *Role of School Boards and Administrators in Controlling the Destiny of Public Education.*

"In devising local compliance plans, primary weight should be given to the considered judgment of local school boards—provided they act in good faith, and within Constitutional limits." President Nixon's March 24, 1970, policy statement entitled *SCHOOL DESEGREGATION: A Free and Open Society, supra.*

If it were otherwise, the admonition of Judge Coleman in his dissenting opinion in *Bivins v. Bibb County Board of Education*, 419 F. 2d. 1211 (5th Cir. 1970), is pertinent:

"Some of these days, the Courts are going to have * * * to free themselves of their tragic failures in the role of school administrators and get back to their primary functions."

As expressed in its February 2, 1970, plan, it was the considered judgment of the Charlotte-Mecklenburg School Board that the benefits to be obtained from the use of extensive transportation to eliminate the 10 remaining black schools previously referred to would be far outweighed by the resulting burdens, inconvenience and cost:

"* * * Bussing in a school system as large as the Charlotte-Mecklenburg System is at best an expensive and complex operation. It is acknowledged that a large number of children are already being bussed to and from school. However, the burden, expense, hardship, inconvenience, hazards, expenditures of unproductive time and added administrative problems occasioned by any bussing program should be minimized. * * * The Board cannot justify on any reasonable basis the very substantial additional cost and burden of the compulsory bussing that would be required for the sole purpose of effecting a desired racial mix in the remaining 10 black schools. Under the best arrangement, the Board could envision to eliminate these black schools, massive

cross-bussing would require the transportation of about 10,300 black and white children, 5,150 into and 5,150 out of the inner-city at the elementary level and 590 into and 590 out of the inner-city at the secondary level. This involuntary bussing would involve an approximate 15-mile trip each way (30 miles round trip)[17] for each student moved through the heart of the business and residential sections of the City. * * * A plan that generates unnecessary transportation costs and occasions unnecessary burdens and inconveniences for parents and children alike would jeopardize the public support which provides the tax and bond money upon which our schools are totally dependent for financing the already high cost of education. * * * The burden of extra bussing that would be required to desegregate each of the 10 remaining predominantly black schools would fall primarily on elementary children. The major impact of this burden would be imposed upon children who, because of their tender years, are the most illogical candidates to bear this burden."

The Charlotte-Mecklenburg School Board is an elective body and, as such, is charged with the responsibility of exercising its own judgment regarding the needs of the System and the best interest of its children.

It is the School Board's duty to determine whether the dollars allocated to it by other elective officials (the Board of County Commissioners for Mecklenburg County) for the education of our children shall be spent for *books or buses*. It is for the Board to determine whether the existing transportation system shall be expanded or contracted, whether it is educationally good or bad to stagger the

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[17]Compare findings of trial court; 8,000 students cross bussed, 7 miles one way and 14 miles round trip. (155a).

opening and closing of schools at any particular grade level, whether after school activities will suffer, whether inconvenience and disruptions to children and parents are justifiable, whether overloaded buses are acceptable or safe, whether the time of children in transit is justifiable and how the host of other value judgments and policies shall be made to administer effectively a large complex metropolitan school system charged with awesome responsibility of providing 84,500 school children in 103 schools with a quality education.

Books, bricks and buses (and all that they imply) are part of the tools to be used in the educational process. How and when these tools are used must be left to the good faith decision of local school boards or the boards should be disestablished and the administration of school systems should be turned over to the courts.

The fact that now the Charlotte-Mecklenburg school system transports 23,000 children with 280 buses, the opening and closing of some of its schools are staggered, in some schools after-school activities are impaired, some school buses travel over congested traffic arteries, some elementary children wait for the school bus by the side of the road at 6:30 in the morning and others get home at 5:00 in the afternoon, some buses are overloaded and some children must stand up, some buses are unsound and should be replaced—*is no answer* to the administrative and educational problem of how much of this is desirable, tolerable or necessary in a system as large and complex as Charlotte-Mecklenburg. A court mandate that edicts racial balancing and forced busing supplants the value judgments of the elected school board and the educators on its administrative staff. An overdose of judicial paternalism and control will ultimately sign the death warrant for public education.

We hope this Court will evolve standards and guidelines for desegregation plans sufficiently clear and definite that courts will not be tempted or required to rely on their personal educational and social philosophies.

D. *Racial Balancing and Compulsory Busing Infringe on the Personal Rights and Freedom of the Children Involved.*

In its February 2, 1970, plan, the School Board concluded with a statement of its conviction that its duty is to protect the rights of all children:

> "* * * The Board understandably is prone to *exercise caution lest, in protecting the rights of some of its citizens, it tramples on the rights of others* in the absence of a clear mandate from the Supreme Court." (Emphasis supplied)

The caution of the Board was well-founded. We believe that the busing requirements of the trial court and the Court of Appeals will violate the individual rights guarteed by the Fourteenth Amendment of those blacks and whites caught up in the forced mass movement of children away from their neighborhoods and out of their normal attendance zones for the sole purpose of achieving racial balancing.

It is obvious that a School Board must necessarily have wide latitude in the establishment of attendance zones for orderly administration of the various schools in its system and that, if these zones are fairly conceived on a nondiscriminatory basis, the children may be compelled to attend the school to which they are assigned under the applicable compulsory attendance laws. (See N.C.G.S. Secs. 115-116 *et seq.*) Absent an unlimited freedom of choice arrangement (which the Charlotte-Mecklenburg Board has not proposed), the right of a child to go to a

particular school is, of course, not absolute, but circumscribed by the inherent power of a School Board to make reasonable attendance assignments to conform to the needs of the school system and the community it serves.

Whether or not the Board itself could lawfully have required cross and satellite busing to effect the compulsory mass movement of children is an open question. But the resolution of that question is not before this Court—for the reason that the Board did not choose to go to this extreme. The point now at issue is whether the orders of the trial court and Court of Appeals infringe on the individual constitutional rights of the children and their parents—black and white—who do not want to be bused. These orders effectively exclude a child from attending the school in his attendance zone solely on account of the child's race.

From time immemorial, the public school has been a focal point of community and family life. The location of a particular school is a major consideration for parental decisions regarding the location of their homes and the neighborhood in which they choose to live. Obviously, affluent whites and blacks are normally better able to make this choice than poor whites and blacks. Nevertheless, some poor people prefer that their children attend the school serving the areas of their residence. To afford disadvantaged parents the flexibility of greater options for the education of their children than their existing economic or social status may permit and to bring these available options more in line with those enjoyed by the more affluent citizens are worthwhile objectives of any desegretion plan. But it is quite a different matter for a judicial decree to compel busing to a distant school outside the normal attendance zones—whether the parents like it or not. A court mandate that requires this coercion to achieve what it conceives to be a worthy social purpose (i. e. racial balance) is judicial paternalism.

The dissenting opinion of Judge Bell (concurred in by Judge Gewin) in *United States v. Jefferson County Board of Education*, 380 F. 2d. 385 (5th Cir. 1967) at p. 411, involving the desegregation of numerous deep south schools, speaks to the matter at hand:

> "Then there is the matter of personal liberty. *Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty.* History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty. * * * They (the majority opinion) *cast a long shadow over personal liberty as it embraces freedom of association and a free society.* They do little for the cause of education." (Emphasis supplied)

In *Jefferson County, supra*, Judge Gewin in his own dissent (concurred in by Judge Bell) expressed similar views (at pp. 404-406):

> "* * * There must be a mixing of the races according to majority philosophy *even if such mixing can only be achieved under the lash of compulsion.* * * * Accordingly, *while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike.* There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law. * * * *When our concepts as to proportions and percentages are imposed on school systems,* notwithstanding free choices actually made, *we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly embrace.*" (Emphasis supplied)

The majority in *Jefferson, supra*, and other courts have sought to justify infringement on the rights of students in the majority where segregation is said to rest upon *de jure* action.

We respectfully suggest that the distinction between *de facto* and *de jure* is not a valid test by which to measure the constitutional rights of either black children or white children and that there is no valid reason for applying a more exacting standard to a *de jure* child than a *de facto* child in a consideration of his individual rights. We think it a fair assumption that both the black and white elementary (junior and senior high) child are blissfully unaware of the differences between *de facto* and *de jure* and suggest that the subtle difference between *de facto* and *de jure* has no pertinence when it comes to appraising the personal rights and liberties of a child.

This case presents for review the important question of whether court decreed compulsory racial balancing and busing unlawfully inroad upon the constitutional rights and freedoms of the children and parents involved.

E. *The Compulsory Busing Approved by the Court of Appeals is Violative of the Provisions of Section 401(b) and 407(a)(2) of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b) and 6(a)(2)) which Expressly Prohibits a United States Court to Order Transportation to Achieve Racial Balance in Schools.*

The Court of Appeals has read into the Civil Rights Act of 1964 interpretations which are not fairly warranted by the plain and intelligible language of the Act or supported by its legislative history. In doing so, it has joined the error committed by the Court of Appeals for the Fifth Circuit in *Jefferson, supra*, which reached its conclusion by a strained illogical analysis of this Act and the legislative history.

The clear language of the Act makes no distinction between *de facto* and *de jure* segregation and the legislative history expressly disclaims any sectional or tenuous distinctions adopted by the Court of Appeals and the cases on which it relies. If it were otherwise, Congress would have expressly so stated and the proponents of the bill would have made it so known.

The courts have been unwilling to give any definitive statement with respect to the term "desegregation" and, therefore, it became incumbent upon Congress to supply answer in this void. 42 U.S.C. 2000c(b) provides as follows:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

It is therefore apparent that Congress in expressing a definition of "desegregation" in a positive manner stated that no student would be *excluded* from his school on account of race, color, religion or national origin. This is the language of *Alexander v. Holmes*, 396 U. S. 19 (1969). Congress also negatively stated "desegregation" does not mean assignment to overcome racial imbalance.

In order to give further meaning to its definition, Congress by 42 U.S.C. 2000c-6(a) provides in part as follows:

> "* * * (P)rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or other-

wise enlarge the existing power of the court to insure compliance with Constitutional standards.***"

The term "desegregation" has taken on such national concern and importance that a definition may properly be regarded as a statement of public policy. Although the courts may take action with reference to establishing public policy, it primarily rests with the lawmakers to determine public policy. In *Building Service Employees International Union v. Gazzam*, 339 U. S. 991, 70 S. Ct. 1019 (1950), the Supreme Court held:

"The public policy of any state is to be found in its Constitution, acts of the legislature, and decisions of its courts. *Primarily, it is for the lawmakers to determine the public policy of the state.* (p. 787) *Twin City Pipeline Company v. Harding Glass Co.*, 283 U. S. 353, 357, 51 S. Ct. 476, 478, 75 L. Ed. 1112, 83 A.L.R. 1168."

Having primary responsibility, and acting to fill a void left by the courts, the public policy as expressed by the Congress of the United States is binding upon the judiciary.

Obviously, the opinion and order of the Court of Appeals approving the order of the trial court, when measured with the attempt to achieve precise balances or ratios of students in the secondary level, clearly indicates that the effect of the order was directed unerringly to the premise of racial balance. If not, why would the court disturb desegregation on the senior high level where no school was more than 36% black. The answer is supplied by the Court of Appeals:

"The transportation of 300 high school students from the black residential areas to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools." (195a)

It is clear that the district court and the Court of Appeals were of the opinion that all high schools in the system should contain the same racial ratio or racial balances.

Similarly, the establishment of nine satellite zones in black areas for assignment to distant suburban white schools was devised for the purpose of achieving maximum racial balance. Of the 21 junior high schools, 16 of them would have black ratios of 27% to 33%, four a ratio of 21% to 25% and one at 9%. It is obvious that a system of this size having such ratios imposed has been "racially balanced" under the plain meaning of the Civil Rights Act of 1964.

Judge Bryan in his dissent clearly reveals congressional hostility to the principle of "racial balance:"

> "Even construed as only incidental to the 1964 Civil Rights Act, this legislation in 42 United States Code §2000c-6 is necessarily revealing of Congress' hostile attitude toward the concept of achieving racial balance by bussing. It unequivocally decried in this enactment "any order [of a Federal Court] seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . to achieve racial baalnce. . .' "

Similarly, the North Carolina Legislature in North Carolina General Statute 115-176.1 adopted a state law expressing the public policy of this state to be such that involuntary transportation of students for the purpose of creating a balance or ratio of races is prohibited. The constitutionality of this statute is on appeal to the Supreme Court from the opinion of a three-judge court which held this statute to be unconstitutional on April 29, 1970. To have separate treatment herein is deemed unnecessary.

The *de jure-de facto* distinction adopted by certain courts of appeal (216a) defies all reason in applying

different standards to school systems solely because of their geographical location. The United States Commission on Civil Rights study concerning causes of segregation has found substantial similarity without regard to state laws. It is now time for the Supreme Court to address itself to this question, which unanswered, threatens to further divide this nation.

CONCLUSION

Therefore, the cross petitioners respectfully request that this Court grant this cross petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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SUMMARY OF RESULTS FROM RESTRUCTURED SCHOOL ATTENDANCE LINES

		1969-1970		1970-1971	
	% Black	No. of Students	No. of Schools	No. of Students	No. of Schools
Elementary Schools	All White	6,607	9	6,437	8
	1- 5	9,519	17	2,477	4
	6-10	7,349	11	5,603	8
	11-15	3,595	6	5,311	10
	16-41	6,516	12	17,626	33
	42-100	11,312	17	7,242	9
	Error			202	
	Totals	44,898	73	44,898	72
Junior High Schools	All White	-0-	-0-	557	1
	1- 5	4,539	3	1,875	2
	6-10	6,372	5	524	1
	11-15	876	1	1,282	1
	16-41	5,049	5	16,227	15
	42-100	4,563	5	842	1
	Error			92	
	Totals	21,399	19	21,399	21
High Schools	All White	-0-	-0-	-0-	-0-
	1- 5	2,133	1	1,264	1
	6-10	1,592	1	-0-	-0-
	11-15	5,398	3	-0-	-0-
	16-41	4,287	2	15,895	9
	42-100	3,902	3	-0-	-0-
	Error			153	
	Totals	17,312	10	17,312	10
Total All Schools	All White	6,607	9	6,994	9
	1- 5	16,191	21	5,616	7
	6-10	15,313	17	6,127	9
	11-15	9,869	10	6,593	11
	16-41	15,852	19	49,748	57
	42-100	19,777	26	8,084	11
	Error			447	
	Totals	83,609	102	83,609	104

*Figures presume present inner-city bussing remains in effect.

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POPULATION CHARACTERISTICS OF THE SYSTEM

	Number of Students			
	Black	White	Total	% Black
Elementary	13,162	31,534	44,696	30
Junior High	5,931	15,376	21,307	28
High School	4,139	13,020	17,159	26
(Error)			447	0.5
	23,232	59,930	83,609	28

BLACK STUDENT POPULATION DISTRIBUTION

Black Students in Predominantly Black Schools

Elementary Schools	6,739
Junior High Schools	758
Senior High Schools	-0-
	7,497
% of Black Students in Black Schools	32%

BLACK STUDENT DISTRIBUTION BASED ON RESTRUCTURED ATTENDANCE LINES

% of Black Students	Number of Black Students	% Black Students by Integration %
0- 5%	121	.5
6- 10%	436	2.0
11- 15%	855	3.8
16- 41%	14,246	61.4
42-100%	7,497	32.3
	23,155	100.0

ELEMENTARY SCHOOLS

Results of Attendance Line Restructing Projected for 1970-71*

School	1969-70 Enrollment	69-70 % Black	Black Students	White Students	Total Students	Rated Capacity	Over (Under) Capacity	% Black
Albemarle Road	514	1	4	469	473	432	41	1
Allenbrook	513	12	59	496	555	540	15	11
Ashley Park	601	4	155	421	576	621	(45)	27
Bain	768	4	25	706	731	702	29	3
Barringer	875	98	203	320	523	486	37	39
Berryhill	789	14	247	574	821	836	(15)	30
Beverly Woods	752	9	8	648	656	540	124	1
Billingsville	610	100	113	325	438	594	(156)	26
Briarwood	686	1	2	663	665	540	225	0
Bruns Avenue	784	99	624	73	697	675	22	90
Chantilly	492	1	142	303	445	432	13	32
Clear Creek	295	17	43	266	309	297	12	14
Collinswood	554	20	224	448	672	621	51	33
Cornelius	432	45	182	265	447	459	(12)	41
Cotswold	560	4	128	449	577	540	37	24
Davidson	290	36	102	174	276	324	(48)	32
Marie Davis	691	100	666	82	748	756	(8)	88
Derita	851	19	152	595	747	783	(36)	20
Devonshire	903	0	0	925	925	648	277	0
Dilworth	449	25	241	376	617	567	50	39
Double Oaks	836	100	825	3	828	675	153	99
Druid Hills	475	99	465	20	485	486	(1)	96
Eastover	601	7	157	478	635	648	(13)	25

School	1969-70 Enrollment	69-70 % Black	Black Students	White Students	Total Students	Rated Capacity	Over (Under) Capacity	% Black
Elizabeth	517	71	112	294	406	405	1	28
Enderly Park	374	1	119	238	357	297	60	33
First Ward	820	100	770	7	777	702	75	99
Hickory Grove	603	12	74	556	630	459	171	12
Hidden Valley	1,100	0	1	1,077	1,078	648	438	0
Highland	374	18	76	237	313	297	16	24
Hoskins	241	5	124	219	343	297	46	36
Huntersville	689	22	130	554	684	675	9	19
Huntingtowne Farms	610	1	3	614	617	594	23	1
Idlewild	653	9	59	549	608	594	14	10
Irwin Avenue	315	100	277	7	284	837	(553)	98
Amy James	476	99	90	169	259	243	16	35
Lakeview	364	78	119	285	404	378	26	29
Lansdowne	877	9	79	719	798	756	42	10
Lincoln Heights	711	100	903	6	909	648	261	99
Long Creek	735	36	259	523	782	837	55	33
Matthews	888	10	81	837	918	945	(27)	9
Merry Oaks	442	0	0	557	557	486	71	0
Midwood	488	2	116	401	517	459	58	23
Montclaire	718	0	1	781	782	675	107	0
Myers Park	478	5	150	314	464	432	32	32
Nations Ford	728	6	177	548	725	621	104	24
Newell	512	14	64	436	500	594	(94)	13
Oakdale	586	12	202	460	662	540	122	31
Oakhurst	621	1	92	504	596	594	2	15
Oaklawn	613	100	597	3	600	594	6	99
Olde Providence	592	14	83	461	544	486	58	15

School	1969-70 Enrollment	69-70 % Black	Black Students	White Students	Total Students	Rated Capacity	Over (Under) Capacity	% Black
Park Road	592	7	41	570	611	540	71	7
Paw Creek	636	4	83	602	685	774	(89)	12
Paw Creek Annex	301	10						
Pineville	521	28	123	379	502	486	16	25
Pinewood	674	0	0	900	900	648	242	0
Plaza Road	450	20	181	350	531	459	72	34
Rama Road	816	0	3	744	747	648	99	0
Sedgefield	551	1	223	364	587	540	47	38
Selwyn	648	5	32	459	491	486	5	7
Shamrock Gardens	515	0	84	496	580	486	94	15
Sharon	453	20	91	421	512	459	53	18
Starmount	737	3	67	838	905	648	257	7
Statesville Road	855	39	160	553	713	549	164	23
Steele Creek	514	1	195	475	670	378	292	29
Thomasboro	690	0	135	777	912	729	183	15
Tryon Hills	488	66	200	342	542	513	29	37
Tuckaseegee	636	9	57	510	567	540	27	10
University Park	825	100	735	132	867	648	219	85
Villa Heights	1,017	91	877	170	1,047	810	237	83
Westerly Hills	585	8	144	332	476	405	71	30
Wilmore	463	49	153	250	403	378	25	38
Windsor Park	749	0	1	782	783	648	135	0
Winterfield	736	7	52	653	705	648	57	7
TOTALS	44,898		13,162	31,534	44,696			

POPULATIONS OF PREDOMINANTLY BLACK ELEMENTARY SCHOOLS

School	Capacity	Projected Number of Students White	Black	Total	% Black
Bruns Avenue	675	73	624	697	90
Marie Davis	756	82	666	748	90
Double Oaks	675	3	825	828	99
Druid Hills	486	20	465	485	96
First Ward	702	7	770	777	99
Irwin Avenue	837	7	277	284	97
Lincoln Heights	648	6	903	909	99
Oaklawn	594	3	597	600	99
University Park	648	132	735	867	85
Villa Heights	810	170	877	1,047	84
Totals	6,831	503	6,739	7,242	

proximately 0.5% and therefore, projected enrollment does not exactly equal actual enrollment.

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ELEMENTARY SCHOOLS

With Predominately Black Student Populations

	1969-1970		Projected for 1970-1971*	
1.	Barringer	98%		
2.	Billingsville	100%		
3.	Bruns Avenue	99%	Bruns Avenue	90%
4.	Marie Davis	100%	Marie Davis	90%
5.	Double Oaks	100%	Double Oaks	99%
6.	Druid Hills	99%	Druid Hills	96%
7.	Elizabeth	71%		
8.	First Ward	100%	First Ward	99%
9.	Irwin Avenue	100%	Irwin Avenue	97%
10.	Amy James	99%		
11.	Lakeview	78%		
12.	Lincoln Heights	100%	Lincoln Heights	99%
13.	Oaklawn	100%	Oaklawn	99%
14.	Tryon Hills	66%		
15.	University Park	100%	University Park	85%
16.	Villa Heights	91%	Villa Heights	84%

ELEMENTARY SCHOOLS

With 99 or 100% White Populations*

School	% Black	School	% Black
Albemarle Road	1	Albemarle Road	1
Beverly Woods		Beverly Woods	1
Briarwood	1	Briarwood	0
Chantilly	1		
Devonshire	0	Devonshire	0
Enderly Park	1		
Hidden Valley	0	Hidden Valley	0
Huntingtowne Farms	1	Huntingtowne Farms	1
Merry Oaks	0	Merry Oaks	0
Montclaire	0	Montclaire	0
Oakhurst	1		
Pinewood	0	Pinewood	0
Rama Road	0	Rama Road	0
Sedgefield	1		
Shamrock Gardens	0		
Steele Creek	1		
Thomasboro	0		
Windsor Park	0	Windsor Park	0

*If present inner-city bussing is discontinued, Lansdowne, Park Road, and Sharon Schools will be 100% white as they would also have been in 1969-70.

JUNIOR HIGH SCHOOLS
Results of Restructured Attendance Lines

School	69/70 Enrollment	69/70 % Black	Number of Students Black	White	Total*	Rated Capacity	Over (Under) Capacity	% Black
Albemarle Road	1,058	6	19	783	802	948	(146)	2
Alexander	1,140	32	309	699	1,008	874	127	30
Cochrane	1,631	5	571	1,150	1,721	1,190	531	33
Coulwood	876	12	313	551	864	704	160	36
Eastway	1,417	4	375	971	1,346	1,093	253	28
Alexander Graham	1,141	10	261	888	1,149	996	153	23
Hawthorne	1,068	56	276	704	980	850	130	28
Kennedy	863	94	325	540	865	801	64	38
McClintock	1,381	7	25	1,048	1,073	923	150	2
Northwest	1,053	100	296	685	981	1,068	(87)	30
Piedmont	498	89	758	84	842	631	211	90
Quail Hollow	1,576	10	138	1,144	1,282	1,238	44	11
Randolph	999	29	327	703	1,030	672	58	31
Ranson	808	32	295	558	853	851	2	35
Sedgefield	976	17	234	612	846	777	69	28
Smith	1,491	4	330	957	1,287	1,093	194	26
Spaugh	1,126	25	346	752	1,098	826	272	32
Williams	1,081	100	336	722	1,058	801	257	32
Wilson	1,216	6	346	795	1,141	1,044	97	30
Carmel	—	—	2	555	557	558	(1)	0
J. H. Gunn	—	—	49	475	524	558	(34)	9
	21,399		5,931	15,376	21,307	18,796	2,389	

*These projections are based on 1969-70 enrollment by map location code or "grid". This population data contains an error of approximately 0.5% and therefore, projected enrollment does not exactly equal actual enrollment.

SENIOR HIGH SCHOOLS

Results of Restructured Attendance Lines

School	69/70 Enrollment	69/70 % Black	Number of Students Black	White	Total*	Expt. Growth	Rated Capacity	Over (Under) Incl. Growth	Max. Capacity	Over (Under) Max. Capacity	% Black
West	1,592	9	494	998	1,492	75	1,374	193	1,660	(93)	33
Olympic	888	42	201	687	888	50	807	131	1,100	(162)	23
Harding	1,356	47	395	692	1,087	25	1,202	(90)	1,300	(188)	36
West Charlotte	1,658	100	597	1,045	1,642	50	1,593	99	1,800	(108)	36
South	2,133	5	482	1,846	2,328	150	1,523	955	2,200	278	21
Myers Park	2,000	12	426	1,883	2,309	-50	1,679	580	2,200	59	18
Garinger	2,640	19	721	1,914	2,635	50	1,874	811	2,450	235	27
East	2,152	11	360	1,716	2,076	150	1,700	526	2,200	26	17
Independence	1,246	11	23	1,241	1,264	100	1,047	317	1,400	(36)	2
North	1,647	28	440	998	1,438	0	1,158	280	1,650	(212)	31
	17,312		4,139	13,020	17,159	600	13,957	3,802	17,960	(201)	

*These projections are based on 1969-70 enrollment by map location code or "grid". This population data contains an error of approximately 0.5% and therefore, projected enrollment does not exactly equal actual enrollment.

IN THE

Supreme Court of the United States

October Term, 1969

No. ———

JAMES E. SWANN, et al.,
Petitioners and Cross Respondents,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, et al.,
Respondents and Cross Petitioners.

CERTIFICATE OF SERVICE

This is to certify that copies of cross petitioners' petition for a writ of certiorari to the United States Court of of Appeals for the Fourth Circuit were served upon counsel listed below by United States mail, first class or airmail as required by the rules of this Court as follows:

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FILED
SEP 16
E. ROBERT SEAVER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 349

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al,

Cross Petitioners,

v.

JAMES E. SWANN, et al,

Cross Respondents.

BRIEF OF CROSS PETITIONERS

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BRIEF OF CROSS PETITIONERS

INTRODUCTORY STATEMENT REGARDING BRIEF

The briefs submitted in the companion cases Nos. 281 and 349 are identical. This statement is made so that this Court may be spared the inconvenience of a separate detailed analysis of both briefs.

Case No. 281 relates to the Petition filed by the plaintiffs for a review of the decision of the Circuit Court of Appeals

for the Fourth Circuit. Case No. 349 relates to the Cross-Petition of the defendants from the same decision. The plaintiff's Petition in case 281 was granted on June 29, 1970. Although action on the defendants' Cross-Petition has been deferred until the convening of this Court at its October 12, Term, 1970, this Court has advised that both cases will be heard on October 12, 1970, and has instructed the defendants to file briefs in both cases. The two cases have not been consolidated for briefing.

Each of the two cases involves the same school system, the same orders of the district court and Circuit Court and the same issues. In order to be of as much assistance as possible to this Court, it is prudent that one comprehensive presentation shall be made. It is for this reason that, although separate briefs are filed, their text and content are the same.

OPINIONS BELOW

The opinions of the courts below are set forth in Brief for Petitioners filed in No. 281 on pages 1 through 3 thereof.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 26, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The Petition for Writ of Certiorari was filed in this court on July 2, 1970. On August 31, 1970, the Chief Justice deferred action on Cross Respondents' pending Petition for Writ of Certiorari and directed filing of briefs and set this case for oral argument on Monday, October 12, 1970.

QUESTIONS PRESENTED

1. Did the Court of Appeals join in the error of the trial court in rejecting the desegregation plan offered by the Board of Education where 68% of the black students would attend schools in which their race was in the minority and where the remaining 32% of the black students would attend schools having white ratios of 17% to 1% and these black students would be taught by a predominantly white faculty and further where such black students were offered more generous freedom of transfer than that offered by the customary majority to minority transfers?

2. Did the Court of Appeals join in the error of the trial court in rejecting the plan for desegregation of the 72 elementary schools prepared and offered by the Board of Education, where the plan left no all-black schools, though nine of 72 schools had white ratios of 1% to 17% and black students attending those schools would have an untrammeled right to transfer to any one of the 63 remaining elementary schools, and upon departure from elementary schools would be assured of a desegregated education during the remainder of their schooling?

3. Did the Court of Appeals join in the error of the trial court in rejecting (by the trial court's offering the Board a "Hobson's choice") the Board plan for desegregation of junior high schools where only one of 21 junior high schools would have more than a 39% black student ratio and the remaining predominately black school would house 758 black and 84 white students and have a predominately white faculty by imposing a requirement on the Board to create nine black satellite districts containing approximately 2,700 black students and assigning them to predominately white suburban junior high schools?

4. Did the Court of Appeals join in the error of the trial court in rejecting the Board plan for desegregation of senior high schools where the plan provided that no school would have more than a 36% black ratio and that each school would

have a predominately white faculty and in imposing a further requirement upon the Board that 300 black students residing in four designated grids would be bussed a substantial distance from the northwestern part of the city to a high school serving the extreme southeastern portion of the county?

5. Did the Court of Appeals join in the error of the trial court in imposing racial balances in junior and senior high schools in contravention of Title 42 U.S.C. 2000(c)(b) and 6(a)(2) (Sections 401(b) and 407(a)(2)) of the Civil Rights Act of 1964.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, Section 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. 2000(c)(b) and 6(a)(2)].

PRELIMINARY STATEMENT

The principal question presented by the several appeals herein relates to whether or not the Charlotte-Mecklenburg public school system may retain one or more predominately black schools. If the absolutists are to prevail, then the presentation which follows is wholly irrelevant. The Court of Appeals held that no such absolute requirement exists as desegregation of the predominately black schools will be adjudged by the "test of reasonableness."

In order to answer the question, one must have an understanding of this school system. The system involves 103 schools, 4 kindergarten programs and one learning academy, which last year served approximately 84,500 students of which 29% were black and 71% were white. The system is expected to grow by an approximate 3,000 students this

school year. In comparison to other school systems in this nation, the system ranks 43rd largest.

As an urban school district, it shares the same problem of other urban school systems. Since 1954, the black student population has increased from 10,000 to 24,000 students and during this period eleven formerly all-white schools are now almost entirely black (691a). The transition has been rapid. In 1965 these eleven schools housed a 35% black student population. During the 1969-70 school year, these schools housed an 81% black population and the areas in which this transition has taken place are located generally in the older white neighborhoods. Charlotte has experienced phenomenal growth and, therefore, the older neighborhoods are primarily located near the center of the city, which serves as the base for the expanding black areas as whites on the economic move improve their position; blacks improving their position take over the white homes. This had led to the transition of schools from white to black. Today, 95% of the black students reside in the northwestern inner-city quadrant or the fringes thereof.

The Board was in the process of combating this problem by construction of schools in areas which would offer more stable desegregation, the most notable of which were Olympic High School, originally scheduled for construction in a predominately black neighborhood, and Randolph Junior High which was also scheduled for construction in a similar neighborhood (72a-73a).

Further efforts of the Board involved closing and consolidating of twenty schools; creation of a single athletic league; nondiscriminatory employment practices; substantial desegregation of school faculties with total desegregation to follow for the 1970-71 school year; cross racial assignment of principals; appointment of black professionals to ranking administrative positions; board appointment of a black member to the Board of Education; elimination of the dual bus system; nondiscrimination with respect to teacher salaries, school fees, school lunches, library books, instructional materials,

quality of school buildings, use of federal funds, course offerings and evaluation of students; merger of the black and white PTA Councils; operation of specialized and supplementary programs implemented to increase desegregation; redesigning of freedom of choice so that its only effect would increase desegregation and give racial stability to the schools; gerrymandering of attendance lines to promote maximum racial desegregation and other techniques designed to create and promote racial stability (681a-683a, 1265a-1266a).

The rural areas of the school system do not offer such difficult problems in desegregation as the races are scattered and, therefore, as with most rural systems, these schools present substantial stable desegregation (313a).

Freedom of choice has neither perpetuated nor made substantial inroads on the desegregation problem. The superintendent estimated that approximately 1,200 (565a) white students had left predominately black schools where they would have been mixed in varying degrees with approximately 16,000 blacks.

In 1957 Charlotte led the South in opening its schools to students of both races. However, it is admitted that there were few students who took advantage of this option. Consolidation of the city and county systems, the two largest in the state, occurred in 1961, creating a school system having an east-west span of 22 miles and a north-south span of 36 miles and comprised approximately 550 square miles. The City of Charlotte contains 64 square miles, making it larger than the District of Columbia. The county is nearly twice the size of the City of New York.

In 1965 a plan was devised by the Board embracing freedom of choice, rezoning and non-racial assignment of faculty which entirely abolished the former dual system under the law as then understood. That plan was approved by the district court in 1965 and by the Court of Appeals in 1966. The plan led to the abolition of all dual auxiliary programs and services, such as transportation, athletic leagues, PTA's, etc.

Consistent with racial anonymity, racial identification of students and faculty was completely removed from all school records. Because of this, during the course of this litigation, requests for racial information created a substantial burden on the school system in producing this data.

The plan proposed by the Board eliminates 8 of the 17 predominately black elementary schools, four of the five predominately black junior high schools and establishes ten senior high schools so that no high school will have more than a 36% black ratio. It reduces the number of blacks attending predominately black schools to 7,497. (Compare district court's finding of 16,000 previously). Faculties will be racially balanced.

These exemplary steps have been taken by a school board which petitioners variously label as "recalcitrant," "contemptuous," "lawless" and similar characterizations.

STATEMENT OF THE CASE

The plan for desegregation offered to the district court by the Charlotte-Mecklenburg Board of Education would place 68% of the 24,000 black students in predominately white schools and the remaining 32% would attend schools having a black ratio of 83% to 99%. No other school system of similar size and complexity in this nation has the degree and volume of desegregation offered by this plan.

The exemplary proposal of the Board was summarily rejected by the district court for the reason that this system would not be permitted to have a predominately black school. The district court therefore ordered racial balancing of the schools served by the system.

The present action was instituted in 1965 which resulted in the district court's approval of the plan then offered by the Board. The salient features of the plan related to school closings, school consolidation, freedom of choice (as suggested by *Goss v. Knoxville*, 373 U.S. 683 (1963)), rezoning, nonracial assignment of teachers, and nonracial records of students. Circuit Judge Craven, then district judge, noted:

> As a general proposition, it is undoubtedly true that one could deliberately sit down with the purpose in mind to change lines in order to increase mixing of the races and accomplish the same with some degree of success. I know of no such duty upon either the school board or the district court. The question is not whether zones can be gerrymandered for the assumed good purpose of racial mixing, but whether gerrymandering occurred for the unconstitutional purpose of preventing the mixing of races. I am unable to find from the evidence a sufficient showing of the unconstitutional purpose with respect to any school zone . . . *Swann v. Charlotte-Mecklenburg Board of Education,* 242 F. Supp. 667 (1965).

The holding of the district court was affirmed by the Court of Appeals for the Fourth Circuit in *Swann v. Charlotte-Mecklenburg Board of Education,* 369 F.2d 29 (1966).

Following the Supreme Court decision in *Green v. New Kent County,* 391 U.S. 430 (1968), and companion cases, the petitioners filed a motion for further relief alleging discrimination in teacher salaries, school plants, facilities and numerous other areas, and in addition sought further desegregation. During the course of the hearings conducted in March 1969, the district court noted that it was familiar with the fact that in this system black teachers as a group were paid higher salaries than white teachers for the reason that they had longer tenure and had more graduate education (93a).

In its order of April 23, 1969, the district court found there was no racial discrimination or inequality with reference to the use of federal funds for special aid to the disadvantaged, use of mobile classrooms, the quality of school buildings and equipment, coaching of athletics, parent-teacher association contributions and activities, school fees, school lunches, library books, elective courses, individual evaluation of students and gerrymandering (293a-302a).

The district court further noted that school location in Charlotte had followed residential development including its *de facto* patterns of segregation (305a).

With respect to the motives and judgment of the School Board, the district court found that the schools had been operating pursuant to ". . . the general understanding of 1965 about the law regarding desegregation." The Board had "achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been reviewed in the appellate court decisions." The schools served by this system were "in many respects models for others", and "the rules of the game have changed and the methods and philosophies which in good faith the Board have followed are no longer adequate to complete the job which the courts now say must be done 'now'." (311a-312a).

The court then concluded:

> The school board has an affirmative duty to promote faculty desegregation and desegregation of pupils and to *deal* with the program of the all-black schools (313a). (Emphasis added)

Thereupon, the district court directed the Board to submit a plan for complete desegregation of teachers to be effective for the 1969-70 school year and to submit a plan and time table for the desegregation of pupils to be predominantly effective in the fall of 1969 and completed by the fall of 1970 (314a-315a). The plan submitted pursuant to the order of April 23 was found inadequate by the district court and submission of a new plan by August 4 was directed.

During the interim, this Court decided the case of *United States v. Montgomery*, 395 U.S. 225 (1969), which for the first time indicated limited racial ratios in faculty could be required by the courts.[1] In accordance with *Montgomery*,

[1] *In Montgomery, supra*, page 236, the court noted: ". . . Petitioners on the other hand, do not argue for precisely equal ratios in every school under all circumstances . . . . As the United States, Petitioner in

supra, the Board of Education proposed a plan for desegregation which would produce substantial faculty[2] and student desegregation for the school year 1969-70 and proposed a comprehensive computer-assisted study for the purpose of restructuring attendance lines for the year 1970-71. It was estimated that the study would require approximately six months to complete (487a). On August 15, 1969, the district court entered an order (579a) in which it noted the repudiation by the Fourth Circuit of the *Briggs v. Elliott* dictum on July 11 in *Hawthorne v. Lunenburg*, 413 F.2d 53 (4th Cir. 1969) (581a). The trial judge found that the Board had acknowledged its affirmative duty to desegregate pupils, teachers, principals, and staff members at the earliest possible date (583a) and had dramatically exceeded its goal in desegregating former all black faculties (584a). It approved the reassignment of consenting inner-city black students to outlying white schools for the school year 1969-70.[3] Further,

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No. 798, recognizes in its brief, the district court's order is designed as a *remedy* for past racial assignment . . . . We do not, in other words, argue here that racially balanced faculties are constitutionally or legally required."

[2]The Board reported: "With reference to faculty desegregation, substantial changes have been made as indicated on Exhibit "A" (498a-502a). With few exceptions, schools having black or nearly all black students have white faculties ranging from 40 to 50 percent of the faculty of such schools. By the school term 1970-71, further faculty desegregation will be experienced." (495a).

[3]The Board proposed offering transportation to the reassigned black students and made extensive efforts to secure their acceptance of reassignment. The court stated:

> However, this part of the plan is not compulsory. Students who want to remain in the comfort of their area may elect to attend the Zebulon Vance School (Irwin Avenue) instead; alternatives also are provided for the junior high students. (587a).

In response to objections to reassignment of blacks, the district court stated:

> No legal authority is cited that the Constitution prohibits transportation of *consenting* black children from an inferior educational environment into a better environment for the

the court approved in principle the proposed restructuring of attendance lines and other factors for the 1970-71 school year, but rejected them for lack of specific detail and time table.[4] Results of the desegregation of faculties commended by the district court appears in the record (642a-649a).

In view of the fact that it was impossible to complete the computer restructuring of attendance lines within the time limited, motion was made for additional time in which to present the plan. The district court responded by presenting interrogatories to the Board and issuing its last benign statement on behalf of the Board as follows:

> Nearly six months after the original order, faculty desegregation is well along and there have been a number of substantial improvements in the stated policies of the Board, including the stated assumption of the duty by the Board to desegregate the schools "at the earliest possible date." Limited steps

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purpose of complying with the constitutional requirement of equal protection of laws. (589a). (Emphasis added.)

The Board pointed out that it could not specify the number of students who might object to such assignments (493a).

Nevertheless, later the district court unjustly condemned the Board for not carrying out the plan as "advertised." (658a). "The performance gap is wide." (659a).

At the request of black community leaders, the Board proposed and secured a modification to permit substitution of Irwin Avenue Junior High School for the Zeb Vance school for black students exercising freedom of choice to attend a black elementary school in the inner city. The district court denied the Board the opportunity of upgrading the education for these black students by imposing restrictions on innovative programs for such students unless provided for all blacks who transfer to white schools (593a). The Board was forced to abandon innovative programs for these blacks as such programs require full student participation or segregation of black students in the white schools.

[4]The Board proposed completing the computer restructuring of attendance lines within six months or February 1, 1970 (487a). Furthermore, implementation was directed for the school year beginning 1970-71. (457a and 315a).

> have been taken toward compliance with pupil desegregation provisions of the original order . . . (601a).

Pending application for an extension of time, this Court announced its decision in *Alexander v. Holmes County*, 369 U.S. 19 (1969), and the district court held that as a result of *Alexander*, discretion to grant an extension was prohibited (667a). The district court in its November 7, 1969, order then proceeded to severely criticize the Board for not implementing its 1969-70 desegregation plan. The district court stated "the plan has not been carried out as advertised" (658a) and "the 'performance gap' is wide" (659a). It is difficult to reconcile this criticism in the face of the district court's previous defense of the right of the Board to transport consenting black students to outlying schools and in view of faculty desegregation that resulted in precisely the figures estimated by the Board (589a and 584a). The district court reversed its earlier finding ". . . Location of schools in Charlotte has followed the local pattern of residential development, including its *de facto* patterns of segregation" (305a) and substituted ". . . There is so much state action imbeded in the shaping of these events that the resulting segregation is not innocent or *'de facto'*, and the resulting schools are not 'unitary' or desegregated." The district court further found that freedom of choice had tended to perpetuate segregation by allowing children to leave schools where their race would be a minority (662a).[5] The district court noted that the school system ranked high with reference to desegregation in comparison with the 100 largest school systems, but held this to be immaterial (664a).

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[5]The evidence clearly shows that only 1,200 white students had left predominately black schools (665a) (housing a total of 16,000 blacks). This would therefore appear to fall under the *de minimus* rule. Compare the limited number of students who sought freedom of choice and the infinitesimal effect it had on desegregation for the school year 1969-70 (635a-638a).

For reasons not understood, the attitude of the district court changed with increasing frequency to condemnation or misconstruction of whatever the Board proposed. It assumed that the Board's computer program, designed to promote stability by a 40% limitation on black student assignments, precluded white students from attending predominately black schools. Obviously, if the computer designed a school on a 50/50 ratio, the whites would soon leave the attendance district. The Board has no intention of devising attendance districts which would offer such instability. However, after the best efforts of the computer had been exhausted, those white students residing in the ultimate attendance zones populated predominately by blacks, would nevertheless be assigned to those schools. The district court simply misconstrued one step of the Board plan as constituting the final plan.

In fairness to the district court and the petitioners, the Board on October 19, 1969, gave advance notice that its plan would be unable to eliminate each all-black school (665a).[6] The district court, continuing its castigation of the Board, said the Board had "demonstrated a yawning gap between predictions and performance." (666a). The court thereupon directed the filing of a plan for desegregation ten days later on November 17, notwithstanding the fact that the Board had reaffirmed February 1, 1970, as the earliest date for presentation of a comprehensive plan.

Therefore, faced with this unrealistic time table, the Board was compelled to present an admittedly incomplete plan for desegregation (670a) and report (680a) in which the Board took a strong position for the purpose of attempting to determine the meaning of a "unitary system" and related terms. Attention is directed to the fact that the Board predictions with reference to desegregation of elementary schools was substantially accurate as disclosed by the following:

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[6]At this point, the Board had been admonished to "deal with the problem of the all black schools" (313a).

Percentage Black Students	Projected No. of Schools Nov. 17, 1969	Board Final Plan, No. of Schools Feb. 2, 1970
0-10%	21	20
11-40%	44	43
41-100%	7	9

It would therefore appear that the Board performed as "advertised". There was no wide "performance gap" and there was no "yawning gap between predictions and performances." The court was further advised in August that the Board plan would be complete approximately the first of February 1970, and the Board performed (726a).

On December 1, 1969, the district court again misconstrued the computer instructions as being the results of a finalized plan. Although the Board proposed that each faculty would be predominately white at each school, the court seemed to take offense at the fact that there was no promise of total balance (700a). Compare *Montgomery, supra,* which countenances schools having 83% black faculties.

In response to the inquiries of the Board, the district court outlined some of the parameters of its notions of a desegregated system, which included pro rata distribution of teachers by race and that "all the black and predominately black schools in the system are illegally segregated" (711a and 714a). The district court further held that any plan should seek to reach a 71-29 ratio so that one school would not be racially different from the others though variations may be unavoidable (710a). It is believed that the absolutes of the district court's legal position began to crystalize with the order of November 7, 1969.[7] This has resulted in the

[7]In the order of November 7, 1969, and all subsequent orders, namely, December 1, 1969, February 5, 1970, March 21, 1970 and August 3, 1970, resulted in reversal of facts previously found in favor of the Board and many inferences resolved against the Board together with misconstruction of many of the facts presented to the court. The Board attempted to correct many of the findings by Objections and Exceptions thereto (1239a) and Objections and Exceptions to Findings of Fact dated August 14, 1970.

failure of the court to make any subsequent findings favorable to the Board.

The district court then disapproved the Board's plan for further desegregation and directed desegregation of faculties on a three-to-one ratio effective not later than September 1, 1970, and indicated that a court consultant would be appointed. This was accomplished by order of the court dated December 2, 1969, wherein the court appointed Dr. John Finger as the court's consultant, a witness who had previously testified on two occasions for the plaintiffs and had offered earlier desegregation plans. The order of December 1 did not suggest implementation of pupil desegregation would be advanced to a date earlier than September 1, 1970. The Board was invited to continue working on its plan (714a-716a).

The Board submitted its completed plan on February 2, 1970 (726a). The plan utilized computers to achieve a maximum racial mix of 71% white and 29% black in each school where possible by restructuring attendance lines. One hundred (100) of the 103 schools would have a racial mix, leaving only three all-white schools. Sixty-eight per cent (68%) of the black students would attend schools having less than 40% black population. Thirty-two per cent (32%) of the black students would attend nine elementary and one junior high schools which would have black ratios of 83% to 99% under the Board plan (R. Br. A-4-6, A-10). This plan reduced the number of blacks in predominately black schools from 16,197 to 7,497 and the number of predominately black schools from 22 to 10.

The plan for desegregation submitted by the Board included imposition of faculty ratios of approximately three-to-one, white predominating, in each school and proposed implementation of its plan for the school year 1970-71 in accordance with the various court orders. The Board plan would require the in-district transportation of approximately 5,000 additional students, who would qualify for such transportation under state law.

The court consultant's plan was submitted contemporaneously with that of the Board on February 2, 1970, which effectively adopted in many respects the Board's geographic zoning plan and engrafted upon it the features of pairing of distant elementary schools and creation of satellite districts in predominately black inner-city areas whose students were assigned to distant predominately white outlying secondary schools.

On February 2, 1970, the court conducted a hearing limited solely to the question of time required for implementation. It refused to hear any evidence with reference to the merits of the two plans before the court. On February 4, 1970, the Board made a motion for hearing on its plan and for the opportunity to examine the court consultant, who resides in Rhode Island and beyond the process available to the Board. In response thereto, the court permitted a short hearing severely limited as to time on the following day and declined to direct the consultant to be present for examination. The Board was compelled to submit substantial evidence nunc pro tunc (848a-900a).

On the same day, February 5, 1970, the court entered its order, in which the court found in part as follows:

> The Board plan, prepared by the school staff, relies almost entirely on geographic attendance zones, and is tailored to the Board's limiting specifications. It leaves many schools segregated. The Finger plan incorporates most of those parts of the Board plan which achieve desegregation in particular districts by rezoning; however, the Finger plan goes further and produces desegregation in all the schools in the system.
>
> Taken together, the plans provide adequate supplements to a final desegregation order (819a).

Although the court stated "the order which follows is not based on any requirement of 'racial balance' . . ." (821a), the court then adopted the entire plan of the court consultant and thereby directed racial balancing with reference to the various schools:

A. The Board's pupil assignment plan for senior high schools was approved[8] upon condition that 300 black students residing in four grids suggested by the court consultant would attend Independence High School. Therefore, the court consultant's sole recommendation with reference to high schools was approved, although no school under the Board plan would house more than a 36% black ratio.

B. With respect to junior high schools, the Board plan was approved[9] upon condition that the only junior high school out of 21 which would remain predominately black would be desegregated by giving the Board a "Hobson's choice" of furnishing transportation and increasing blacks in attendance at several outlying schools and in default of rezoning (which had been fully explored), two-way transportation of students (which is cross bussing to which the Board is opposed) or closing the junior high school (whose classrooms are desperately needed to minimize the already serious overcrowding which exists at the junior high level). None of the alternatives were accepted. Therefore, the Board was directed to implement the court consultant's plan, which provided for establishing nine satellite attendance districts (containing 2,760 students) in inner-city black areas for attendance at nine distant predominately white suburban schools.

C. With respect to elementary schools, the court adopted the court consultant's plan which utilized the Board's rezoning[10] and engrafted upon it the features of pairing and grouping nine inner-city black schools with 24 suburban white

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[8]The Board plan for senior high schools eliminated the one all black senior high school, West Charlotte, and established black ratios of 17% to 36% for nine of the ten schools. The remaining school, Independence, would house a 2% black ratio. (748a).

[9]The Board plan for junior high schools eliminated four of the five predominately black schools and the remaining school, Piedmont, would have a 90% black ratio or 758 black students (747a).

[10]The Board plan reduced the number of predominately black elementary schools from 17 to 9 (744a-746a).

schools, thereby necessitating extensive cross-bussing.[11] Approximately 10,300 students would be involved in the elementary cross assignments.

The Board plan contemplated transporting only those students eligible for transportation under state law which would result in furnishing additional transportation to approximately 5,000 students (871a-875a). The order of desegregation imposed substantial additional transportation requirements upon the school system (880a-884a) which were compiled by the transportation office of the school system as follows:

Finger Plan

Additional Students	No. of Buses	First Year Cost
23,000	526	$4,199,439.00

Board Plan

Additional Students	No. of Buses	First Year Cost
4,935	104	$ 864,767.00

Supplementary findings of the court dated March 21, 1970, (1217a-1219a) reflect a finding that transportation as ordered by the court would show the following totals:

Court Estimates

Additional Students	No. of Buses	First Year Cost
13,300	138	$1,011,200.00[12]

[11]The Board transportation office estimated these students would travel fifteen miles each way per day (860a). The district court estimated the school to school distance at seven miles (1261a).

[12]The district court found that the cost of 138 buses would be $743,200.00. The annual operating cost of $532,000.00 was reduced by one-half in its order of April 3, 1970 (1259a), resulting in a total of $1,011,200. The district court amended its February 5 order by order dated March 3, 1970 (921a) to provide that transportation should be offered only to those city students who lived in an area which had been rezoned as a result of the court order. The Board accordingly submitted revised estimates which reduced the requirements for addi-

Extensive objections and exceptions (1239a) were filed by the Board with reference to the findings of the district court dated March 21, 1970, and the Court of Appeals noted that it was difficult to furnish reliable predictions with respect to transportation estimates (1271a).

On appeal, the Court of Appeals approved the provisions of the order of the district court with reference to assignment of faculty and assignment of students to secondary schools and reversed and remanded for further consideration the assignment of pupils attending elementary schools (1262a). In doing so the Court of Appeals noted that the voluntary faculty desegregation of the Board was in compliance with other orders of that court (1263a). The finding of the district court with reference to residential patterns leading to segregation resulting from federal, state and local government action was affirmed on "familiar principles of appellate review."[13]

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tional transportation to 19,285 students and 422 buses at a first year cost of $3,406,687.00. Thereafter, State Board of Education, pursuant to *Sparrow v. Gill*, 304 F. Supp. 86 (MDNC 1969) authorized transportation of all city students residing a mile and a half from their school. Accordingly, this reinstated the original estimates of the local transportation staff.

[13]In view of the importance of other issues in this case, the Board does not deem it appropriate to fully controvert the very shallow and incompetent evidence upon which the district court's findings were made on November 7 reversing its prior findings without benefit of further evidence or hearing. We would point out several areas. With respect to racial restrictive covenants, the only evidence was a 1946 North Carolina Supreme Court case enforcing such restrictions. Other evidence of racial restrictions or the extent thereof is absent from the record. Blacks have for many years purchased homes in predominately white neighborhoods. Plaintiffs' evidence (31a-34a) discloses that relatively small black areas have taken over large white communities. As a result, blacks predominated in 11 former all white schools (591a). Although older black and white neighborhoods were zoned industrial in 1947, no substantial inroads were made in these neighborhoods by industry (254a), industrial zoning in residential areas was substantially curtailed (254a) and existing zoning generally follows existing land use (261a). Urban redevelopment assisted the displaced persons in finding

The reforms the Board undertook to create a unitary school system were applauded by the Court of Appeals (1265a). Noting the district court's holding "that the Board must integrate the student body of every school" (1266a) the Court of Appeals gave a partial answer to the unitary school question in holding:

> . . . first, that not every school in a unitary system need be integrated; second, nevertheless, school boards must use all reasonable means to integrate the schools in their jurisdiction; and third, if black residential areas are so large that not all schools can be integrated by using reasonable means, the school boards must take further steps to assure that pupils are not excluded from integrated schools on the basis of race . . . (1267a).

The Court of Appeals thereupon adopted ". . . the test of reasonableness–instead of one that calls for absolutes–because it has proved to be a reliable guide in other areas of the law . . ." (1267a).

Although Piedmont Junior High School was a formerly all white facility, and nearly all white in 1965 (25 blacks) (691a), the Court of Appeals noted that this school was now in the heart of the black residential area (1268a), a school which could not be desegregated by rezoning. This school precipitated the creation of nine satellite junior high school districts for the purpose of eliminating this one predominately black junior high school.

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new homes but had no power to direct the location to which they moved (265a). Furthermore, there is no evidence that any citizen was so directed. Many other examples could be cited.

It is noted the findings of the district court, although largely unsupported, closely parallel those of the U.S. Commission on Civil Rights with respect to separation of races in 75 representative cities scattered throughout this nation. *Racial Isolation in the Public Schools–Summary Report by the Commission on Civil Rights (1967).*

The Court of Appeals, utilizing the district court's unrealistic transportation estimates, found its approval of the secondary portion of the desegregation plan precluded approval of the elementary plan. The combined plans would represent a 56% increase in pupils transported and the number of buses would be increased by 49%. The Circuit Court acknowledged that the Board ". . . should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system." (1276a).

The Court of Appeals thereupon vacated the judgment of the district court and remanded ". . . the case for reconsideration of the assignment of pupils in the elementary schools, and for adjustments, if any, that this may require in plans for the junior and senior high schools." (1277a).

On remand, the district court had before it five elementary, two junior and two senior high school plans. An understanding of these plans will be facilitated by reviewing the separate map appendix to this brief.

Pursuant to the suggestion of the Court of Appeals, the Board met with representatives of HEW and sought to participate in the development of a new desegregation plan. Although the Department of Health, Education and Welfare obtained from the Board all the information it desired, it refused to accept the Board offers to assist it in developing a plan (Tr. 197, July 15, 1970). Nevertheless, the Board reconsidered all the techniques of desegregation in an effort to develop a new plan (Tr. 10-20, July 15, 1970). After presentation of the HEW plan on June 26, it was reviewed by the Board and rejected by a unanimous vote. Nevertheless, the Board presented the HEW plan to the district court for its consideration.

A hearing was convened on July 15, 1970, at which time the district court again reviewed the February 2, 1970 Board plan and the February 5, 1970 court approved Finger plan. The district judge also considered the HEW plan, a plan prepared by minority of Board members, and an earlier draft of a plan considered by the court consultant.

The Board and court approved plans have been described earlier herein.

The HEW plan's salient features involved utilization of the Board restructured lines and then clustering a group of school districts contiguous to each other for specialized grade assignment to a particular school, for instance, one school might house grades 1 and 2, a second school grade 3, etc. Many of the districts involved in these clusters were desegregated by the Board's rezoning.[14]

A four-member minority of the Board presented an elementary plan which utilized the 1969-70 school zones, grouped 72 elementary schools within eighteen separate clusters, many of which were far removed from each other. The court's attention is invited to the map (R. Map Appendix), which gives a clear picture of what this plan does to the elementary schools of the Charlotte-Mecklenburg system. It was an obvious successful attempt at racial balancing, as all 72 elementary schools would house black ratios ranging from 27% to 34%. Students chosen for attendance outside their district would be selected on a lottery basis. (R. Ex. 45, July 15, 1970). Dislocations and transportation requirements were essentially equivalent to those of the court ordered Finger plan (Order, August 3, 1970).

Petitioners, calling Dr. Finger as their witness, had him unveil a draft of a preliminary plan previously prepared by him. Basically, the plan was Dr. Finger's attempt to restructure attendance zones. Finding his rezoning attempts left

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[14]Cluster or zone number IV of the HEW plan grouped all white Pinewood, nearly all black Marie Davis with Sedgefield (38% black) and Collinswood (33% black). This plan was roundly condemned for the reason that an elementary student in such a zone would attend four elementary schools in six years and it interfered with the educational programs and organizations of the school system. It also involved substantial transportation and utilized many schools that already had the approximate racial ratio of the entire system. Most of the groupings were near-black or predominately black (R. Ex. 1 and 2, July 15, 1970).

approximately 6,800 black elementary school children in inner-city black schools (Tr. 264, July 15, 1970), he then developed walk-in attendance zones for black students at those schools who would comprise approximately 30% of the capacity of the school. The blacks would attend these schools for six years. Whites residing generally in the inner perimeter of the city limits would be transported to such schools. Blacks who were not assigned to the inner city schools would be transported for six years to suburban white schools. The grade structure of the suburban schools was rearranged on a 3-3 basis with grades 1 - 3 in one school and a school in a contiguous area would have grades 4 - 6. Students in the contiguous zones would attend these two schools along with blacks from the inner city schools. Dr. Finger admitted the plan was incomplete (Tr. 263, July 15, 1970) and contains a complex grade structure (Tr. 258, July 15, 1970). The enormous amount of dislocation and transportation is apparent. As the district court found:

> 26. All plans which desegregate all the schools will require transporting approximately the same number of children. In overall cost, if a zone pupil assignment method is adopted, the minority Board plan may be a little cheaper than the Finger plan. (Order, August 3, 1970).

The district court characterized three of the plans as "reasonable": the court ordered (Finger) plan, the minority board plan and the earlier draft of a Finger plan. The Board was given the "option" of adopting any one of these plans for the elementary schools. The Board met and found the three alternate plans to be unreasonable and the court ordered (Finger) plan was thereupon imposed by order of August 7, 1970.

The Board filed notice of appeal to the Court of Appeals for the Fourth Circuit on August 14, 1970, and has made application to this Court for permission to supplement the record or, in the alternative, that the motion be considered as a writ of certiorari to the Court of Appeals for the Fourth Circuit pursuant to Rule 20 of the Rules of the Supreme Court. No action has been taken thereon at this writing.

SUMMARY OF ARGUMENT

Both the district court and the Fourth Circuit have misapplied the Constitutional imperatives of *Brown I, Brown II* and *Green* as they apply to the Charlotte-Mecklenburg schools. In doing so, both of these Courts erred in disapproving the Board plan and imposing upon this System requirements that are unlawful and unwarranted by the facts in this case.

The basic error stems from the misconception of the rights guaranteed black and white children by the Fourteenth Amendment and the goal to be achieved by a dismantling of a dual system and the establishment of a unitary one. Although disclaiming any intent to require racial balancing, the orders imposed upon the Charlotte-Mecklenburg System are based upon the proposition that student assignments at each school must be fashioned in a manner which will achieve or approximate the 70% white - 30% black racial ratio of the system at large. This false premise in turn is founded on the erroneous notion that each black or white child has an individual guaranteed right to attend a school having the prescribed racial mix. Any fair interpretation of the orders of the trial judge point unerringly to the conclusion that he deemed that presumed right to be an absolute one that cannot be diluted or denied by reason of circumstances, costs, disruptions or educational or administrative considerations. Tacitly, the Circuit Court also espoused racial balancing as its goal—but sought unsuccessfully to temper the absolutism of the district court with a test of reasonableness, to which on remand the trial judge gave only thinly veiled lip service. The Board is in general agreement with the employment of a Rule of Reason in appraising desegregation plans. But in this case, the Fourth Circuit misapplied its own Rule of Reason and in effect the district court ignored it. Racial balancing is not required by the Constitution and when imposed by a court violates the prohibitions of the Civil Rights Act of 1964.

Contrary to these erroneous views, the pronouncements of this Court make it clear that the guaranteed right of a child is to attend a school *system* within which discrimination originating from the old state-imposed dualty has been eliminated. If such discrimination has been eradicated and if schools are fairly operated and administered on a nonracial basis, a dual system has been dismantled and a unitary one has been established within which no child is excluded because of his race or color. Nondiscriminatory geographic attendance zones, including those promoting the neighborhood school concept, establish a unitary system—notwithstanding a residue of predominately black schools that remain for reasons totally unrelated to race.

A corollary to the requirement of racial balancing is the burden of massive bussing and dislocation of children to achieve the goal of 70% white–30% black ratio in the schools of the Charlotte-Mecklenburg System. This balancing and the bussing to implement it impinges upon the Constitutional rights of children, both black and white, who may not wish to be assigned and moved out of their neighborhood attendance zones for the sole purpose of promoting the presumed rights of other children.

The February 2, 1970, Board plan is based on geographic attendance zones that were drastically gerrymandered to promote desegregation. This plan severely strains, but maintains the basic benefits of the neighborhood school concept. By this technique, the Board satisfactorily desegregated all but 10 of its 103 schools. *All* but a small handfull of the black children who remain in these 10 schools will have a desegregated school experience for at least one-half of their 12 years of schooling. The Board itself sought to achieve in as many schools as possible a maximum racial mix. By doing so, the Board proposal exceeds Constitutional imperatives. The compulsion of court orders cannot be employed to coerce a school system to do what the Constitution does not require.

The Board plan is reinforced by majority to minority transfers to promote stable desegregation, prevent resegregation and afford blacks that remain in the 10 predominately black schools an opportunity to attend a predominately white school with free transportation to accomplish the move. The teachers at each school are assigned on a ratio of 3 to 1 which is the ratio of white to black teachers in the system. The staff, extra-curricular activities, transportation, facilities, programs and other facets of the system are nondiscriminatory and thoroughly desegregated, and are employed to promote integration throughout the system.

The Board plan effectively establishes a unitary system. Both the district court and the Fourth Circuit erred in disapproving that plan and supplanting it with one or more alternatives designed to racially balance each school, with the consequent bussing and movement of children that the Board considered unnecessary, impractical, costly, disruptive, educationally unsound and not required by the Constitution.

ARGUMENT

I. GENERAL DISCUSSION OF CONSTITUTIONAL PROBLEMS AND CONCEPTS.

A. A CHILD'S CONSTITUTIONAL RIGHT GUARANTEED BY THE FOURTEENTH AMENDMENT IS TO GO TO SCHOOL IN A UNITARY SYSTEM. IF THE SCHOOL IS PART OF SUCH A SYSTEM, HE HAS BEEN ACCORDED THAT RIGHT.

It is unarguable that the negro and white children in the Charlotte-Mecklenburg system must be and will be accorded their Constitutional rights in full measure. However, the district court's misconception of the nature of those rights is succinctly stated in its August 3, 1970, Order (Pets' Br. Al):

> The issue is not the validity of a "system", but the rights of individual people.

Of course, the Constitutional rights of a black or white child under the Fourteenth Amendment are individual and per-

sonal, but the question remains: What is the essence of that right–the right to do what? The trial judge concludes that the right is an absolute one of each child to be in a desegregated school and presumably in a desegregated classroom within the school–regardless of the rights of white children, circumstances, problems peculiar to urban areas, costs, disruptions, educational considerations and other factors which prevent a color blind school system from achieving the ideal racial mix in every one of its schools.

This view does not comport with the previous declarations of this Court. Briefly stated, it is our understanding that this Court has defined the right guaranteed a negro or white child by the Fourteenth Amendment as being the right to attend a school in a *system* where no state-imposed discrimination exists and has prescribed the attendant affirmative duty of a school board to establish such a *system*. This right and duty are summarized in *Green v. New Kent County*, 391 U.S. 430 (1968):

> [I]t was such dual *systems* that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* "to effectuate a transition to a racially nondiscriminatory school *system*" . . . *Id.* at 435. (Emphasis added)
>
> . . . *Brown II* commanded the abolition of such dual *systems* . . . *Id.* at 437. (Emphasis added)
>
> School boards such as the respondent then operating State-compelled dual systems were nevertheless clearly charged with the affirmative duty . . . to convert to a *unitary system* in which racial discrimination would be eliminated root and branch . . . The constitutional rights of Negro school children articulated in *Brown I* permit no less than this . . . *Id.* at 437-38 (Emphasis added)

The thrust of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Brown v. Board of Education*, 349 U.S. 294 (1955) and all that this Court has said since those landmark decisions point unerringly to the validity of this proposition:

State-imposed dual *systems* must be abolished and must be replaced with unitary *systems.* The Constitution does not guarantee to a child the right to attend a school having any particular racial complexion. The Fourteenth Amendment secures for him only the privilege to attend a school that is part of a unitary *system* which is comprised of "just schools" (*Green, supra,* at 442)–schools that are operated and administered without any vestige of discrimination. Once a conversion or transformation to a unitary nondiscriminatory *system* has been accomplished, every child in that *system* has been accorded his rights. Those who contend for a particular racial mix or balance in each school propose a perversion of the commands of *Brown I* and *II* and *Green.*

It is by these standards that the plan of the School Board in this case must be judged. An analysis of that plan clearly demonstrates that it realistically will achieve the nondiscriminatory unitary system the Constitution requires. The oppressive plan of the district court does not conform with these standards. In spite of disclaimers, its objective is the racial balancing of each one of the schools of the Charlotte-Mecklenburg system.

B. A UNITARY SYSTEM IS ONE WITHIN WHICH NO CHILD IS EXCLUDED FROM ANY SCHOOL BECAUSE OF RACE. IF A DESEGREGATION PLAN PROMISES REALISTICALLY TO ACCOMPLISH THIS, IT IS CONSTITUTIONALLY ACCEPTABLE NOTWITHSTANDING A RESIDUE OF PREDOMINATELY BLACK OR WHITE SCHOOLS THAT REMAIN FOR REASONS UNRELATED TO RACE.

The now familiar definition of a unitary system is one "within which no person is to be effectively excluded from any school because of race or color." *Alexander v. Holmes,* 396 U.S. 19 (1969); *Northcross v. Board of Education* (Burger, Chief Justice, concurring opinion) 397 U.S. 232 (1970). Unhappily for school boards charged with the responsibility of fashioning a unitary system, this definition only begins,

not ends, inquiry regarding the necessary ingredients and characteristics of a unitary system.

This Court is well aware of the diversity and change of opinion both among and within courts that have been wrestling with the scope and meaning of this definition. This ought not to be. We hope this Court will find an opportunity in this case to put some meat on the bare bones of this definition which will give instruction and guidance to school boards and will help dispel the disparity that presently characterizes the findings of fact, conclusions and opinions of the lower courts.

Brown I and *II*, the *Green* triad and *Alexander v. Holmes* are of some help—but not much for practical application "in the field." From these cases, we understand a unitary system to have at least these attributes: It is "nonracial." It is "racially nondiscriminatory." It is what is left after a "well-entrenched dual system" has been "dismantled." It is one in which "racial discrimination" is "eliminated root and branch." It is one within which no child is "effectively excluded because of race or color." Running through all of these criteria is one common theme: If a system is established that does not discriminate against the race of a child and thereafter operates on a color blind basis, a former dual system has been transformed, converted and, we presume, purged.

It is worth noting that the 2-school rural residentially mixed New Kent County involved in *Green* typifies the systems stricken down by *Brown I* and *II*, a fact which is specially commented upon at page 435:

> The pattern of separate "white" and "Negro" schools in the New Kent County school system established under the compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two

> schools but to every facet of school operations–faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "negro."
>
> It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system." 349 U.S. at 301, 75 S.Ct. at 756.

The *Green* triology formed the primary vehicle for the last detailed pronouncements of this Court concerning some of the characteristics of a dual and non-dual system. The factual context within which the teachings of *Green* were made presents considerable difficulties when these guides are applied to a complex urban system like Charlotte-Mecklenburg–particularly when that system has long since abandoned the discriminatory practices that were so flagrantly involved in New Kent County.

In identifying a unitary system, the *Alexander v. Holmes* definition embodies two basic aspects: (1) effective exclusion and (2) the reason for exclusion–i.e. because of race.

The word "exclude" means to shut out. It implies keeping out hwat is already outside. That a person remains outside does not necessarily mean that he is excluded. The idea of shutting out suggests affirmative action on the part of someone to accomplish the exclusion. If a person outside is afforded an opportunity to come inside, he is not barred or excluded. This opportunity must be a reasonable one. If the opportunity accorded a person is unreasonable, he may be said to be effectively excluded.

The *Holmes* definition does not prohibit all exclusion–only invidious ones based on race or color. There are any number of reasons why a child can fairly be required to attend one school instead of another: capacity, distance,

cost, disruptions, location of residence, age, travel, safety, administrative problems, educational considerations and a host of other factors that have absolutely nothing to do with his race or color.

If, in the operation of a school system, these factors are honestly, realistically and reasonably applied without the slightest degree of racial discrimination, the system is nonetheless unitary even though by reason of these factors some black children remain in predominately black schools.

The Fourth Circuit correctly comes to this conclusion in the Charlotte-Mecklenburg case (1267a):

> . . . [W]e hold: First, not every school in a unitary system need be integrated . . .
>
> . . . [I]f a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary system. *Ellis v. Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970).

This view agrees with the trend of lower court decisions which may be summarized as follows: The maintenance of some all-black or all-white schools in a given school system will not automatically invalidate a desegregation plan nor will it automatically indicate a shirking of responsibility by school board officials so long as the segregation is the result of housing patterns and means are made available whereby black children in the all-black areas may transfer to predominately white schools. The operation and maintenance of a particular school building, attended only by negro or white children, is not *per se* unconstitutional. *United States v. Greenwood Municipal Separate School District*, 406 F.2d 1085, 1093 (5th Cir. 1969), *Ellis v. Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970), *Goss v. Board of Education, City of Knoxville, Tennessee*, 406 F.2d 1183 (6th Cir. 1969), *Deal v. Cincinnati Board of Education*, 419 F.2d, 1387 (6th Cir. 1969).

The trial judge who heard the Charlotte-Mecklenburg case is out of step with this trend and obviously disagreed with the opinion of the Court of Appeals for the Fourth Circuit. On February 5, 1970, the trial judge ordered (822a); "That no school be operated with an all-black or predominantly black student body." The district court did not retreat from this position in its August 3, 1970, Order (Pets.' Br. A1) issued after the conclusion of hearings held pursuant to the Circuit Court directives. This misconception of what the Constitution requires lies at the heart of the unlawful orders of the district court and the unwarranted findings of fact which the trial judge used to support his erroneous conclusions.

C. A "RULE OF REASON" RATHER THAN A "RULE OF ABSOLUTES" SHOULD BE THE STANDARD BY WHICH TO JUDGE THE SUFFICIENCY OF A DESEGREGATION PLAN.

We approve the test of reasonableness adopted by the Court of Appeals–instead of one that calls for absolutes (1267a-1268a):

> We adopted the test of reasonableness–instead of one that calls for absolutes–because it has proved to be a reliable guide in other areas of the law. Furthermore, the standard of reason provides a test for unitary school systems that can be used in both rural and metropolitan districts. All schools in towns, small cities, and rural areas generally can be integrated by pairing, zoning, clustering or consolidating schools and transporting pupils. Some cities, in contrast, have black ghettos so large that integration of every school is an improbable, if not an unattainable, goal. Nevertheless, if a school board makes every reasonable effort to integrate the pupils under its control, an intractable remnant of segregation, we believe, should not void an otherwise exemplary plan for the creation of a unitary school system. *Ellis v. Board of Public Instruc. of Orange County*, No. 29124, Feb. 17, 1970___ F.2d. ___ (5th Cir.)

Such a test is consistent with the equitable principles elucidated in *Brown II* which made it clear that desegregation plans and the means of implementing them should take into account a variety of local problems and conditions–including by implication those specifically itemized by the Court of Appeals (age of pupils, board resources, costs, effect of bussing on traffic and the distance and time for transportation).

In the name of common sense, what standards other than "reasonable" ones should be applied to test the efficacy of desegregation plans? In fashioning and effectuating decrees, *Brown II* directed that trial courts be guided by equitable principles. The very concept of equity presupposes the application of fairness, practicability and reason. Equity is employed where absolutes are inappropriate.

As stated in *Green, supra:*

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in the light of the circumstances present and the options available in each instance.[15] *Id.* at 439.

The August 3, 1970, Order of the district court (including its findings of fact) clearly shows that the trial judge gave only lip service to the test of reasonableness directed by the Court of Appeals. The recital of a few evidences of this lip service will suffice at this point: "The circuit court's reasonableness order is vague" (Pets.' Br. A7); "reservations" about the pertinence of a rule of reason are expressly acknowledged (Pets.' Br. A31); the size of a system is immaterial (Pets.' Br. A10); " 'Busing' is still an irrelevant issue" (Pets.' Br. A10); current long distance bussing of kindergarten children is cited as justification for bussing thousands

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[15]With tongue-in-cheek solemnity, the district judge in *Ross v. Eckels, Houston Independent School District*, F. Supp. (S.D. Texas 1970), in commenting on the practical problem occasioned by Buffalo Bayou, proclaimed: "A child is not required to swim or fly to school."

of elementary youngsters (Pets.' Br. A16, A18); "There is no way to decide what remnant shall be determined intractable" (Pets.' Br. A18); "cost and inconvenience" are not pertinent considerations (Pets.' Br. A31).

In view of the reservations entertained by the district court about the pertinence of a Rule of Reason, it is not surprising that upon remand the trial judge concluded that his own prior orders were "reasonable"—notwithstanding the determination of the Fourth Circuit that the trial judge's earlier mandate regarding the elementary plan was unreasonable. This reaffirmation by the district court of its own prior conclusions evidences a subjectivity that does not square with either the directions of the Court of Appeals or with the equitable principles decreed by this Court.

It is incomprehensible that two dissenting members of the Court of Appeals (Judges Sobeloff and Winter) should find a "test of reason" so frightening. They find it undefined, subjective, ambiguous and pernicious (1288a, 1289a, 1290a, 1302a, 1303a). They say it threatens dire consequences of delay and exploitation. (1290a).

In his dissent Judge Sobeloff rejects what he calls (1291a) the "slippery test" of reasonableness because it implies that desegregation is not "worth the price" (1288a). This misconception is echoed by the plaintiffs' assertion (Br. 58) that the Circuit Court's reasonableness rule demonstrates a departure from the educational goal of desegregation laid down in *Brown I* and *II* and reinforced by *Green.*

This unwarranted conclusion misconstrues the goal sought to be achieved. *Green, supra,* succinctly defined that goal:

> [S]chool boards operating such school systems (i.e. dual systems) were *required* by *Brown II* "to effectuate a transition to a racially nondiscriminatory school system" . . . The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . *Id.* at 435-36 (Emphasis by Court).

And at 437-38, school boards were charged with:

> [T]he affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Regardless of the prior dualty of a school system previously operated under the authority of *Plessy v. Ferguson*, 163 U.S. 537 (1896) or otherwise, from these teachings it follows that if a current desegregation plan of a school board realigns its schools and its assignment policies in a fashion that effects a conversion to a nonracial, nondiscriminatory system, the commands of this Court have been obeyed. "Discrimination' is defined as "the act, practice, or an instance of discriminating categorically rather than individually." *Webster's Seventh New Collegiate Dictionary* (1967). Within the context of desegregation, if the operation and administration of a school system does not countenance such acts and practices on account of race, discrimination has been eliminated.

It is for the courts to appraise the plans proffered by a school board to determine whether the results achieved are genuinely founded on considerations that are completely disassociated from any degree of racial discrimination. When judged by the peculiarities of local problems, conditions and circumstances, the plan of the Charlotte-Mecklenburg School Board ought not to be supplanted by a court plan that comports with the subjective views of a trial judge that absolutes are required.

In his dissent in *United States v. Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967), Judge Gewin (Bell concurring) responded to the champions of absolutism:

> . . . No consideration is given to any distinction in any of the numerous school systems involved. Urban schools, rural ones, small schools, large ones, areas where racial imbalance is large or small, the relative number of Negro and white children in any particular area, or any of the other myriad problems which are known to every school administrator, are taken

into account. All things must yield to speed, uniformity percentages and proportional representation. There are no limitations and there are no excuses. This philosophy does not comport with the philosophy which has guided and been inherent in the segregation problem since Brown II. As the Court there stated:

> Because these cases arose under *different local conditions* and their disposition will involve a variety of *local problems*, we required further argument on the question of relief. (349 U.S. p. 298, 75 S.Ct. p. 755). *Id.* at 403.

In appraising the efficacy of desegregation plans, even courts espousing the Rule of Reason have been prone to place undue emphasis upon tangible factors such as numbers of buses and numbers of dollars–with very little direct consideration of the effect of such plans upon the educational processes of a particular system. After all, education is what *Brown I* and *II* professed to be all about.

We believe that judicial restraint should be employed in assessing the impact of a particular desegregation plan upon the educational program of a local system lest the excesses of plans devised by absolutists tear to shreds the fabric of the educational process that the decisions of this Court were designed to improve and promote for all children–black and white.

This is not meant to imply that courts should refrain from looking behind the judgments of school boards and administrators to ascertain whether or not they are in fact being employed as a guise to circumvent the commands of *Brown I* and *II* and *Green*. We suggest, however, that the judiciary should beware lest court-devised plans throw the education baby out with the bath water.

The Fourth Circuit (1267a) explained its reasons for adopting a Rule of Reason:

> We adopt the test of reasonableness–instead of one that calls for absolutes–*because it has proved to be a reliable guide in other areas of the law.* (Emphasis added)

The soundness of the explanation assigned by the Court of Appeals for its adoption of this test should require no documentation, except for those encumbered by a predisposition for absolutes.

The "other areas of the law" referred to by the Court of Appeals include the construction and application by this Court of a variety of fundamental individual rights guaranteed by the Constitution. By way of example we call attention to only a few.

Some of the limitations on Freedom of Religion are summarized in *Mohammad v. Sommers*, 238 F. Supp. 806 (E.D. Mich. 1964):

> [I]n the interest of the public weal, there are many limitations which bound religious freedom. Generally, it can be said that these limitations begin to operate whenever activities in the name of religion affect or collide with the liberties of others or of the public, or violate public policy. Witness this but partial lists of instances of such conflicts which have all been resolved against the claims of religion: Sunday closing, spiritualistic readings, selective service, parading in the streets, practice and advocacy of polygamy, vending periodicals in the streets, fluoridation of water, compulsory school attendance, child labor regulations, compulsory vaccination, blood transfusion, surgery and medical attention. *Id.* at 808.

Numerous limitations have been imposed upon the Right of Free Speech. For example, see *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gitlow v. People of the State of New York*, 268 U.S. 652 (1925); *Times Film Corporation v. City of Chicago*, 365 U.S. 43 (1961)–"It has never been held that liberty of speech is absolute"; *Schenck v. United States*, 249 U.S. 47 (1919); *Gilbert v. Minnesota*, 254 U.S. 325 (1920)–"it is not absolute–it is subject to restriction and limitation;" *Dennis v. United States*, 341 U.S. 494 (1951).

The same is true of the Right to Trial by Jury. Of interest is what this Court said in *Duncan v. Louisiana*, 391 U.S. 145

(1968), holding that a jury trial for petty offenses was not required by the Sixth and Fourteenth Amendments:

> . . . [T]he *possible consequences to defendants* from convictions for petty offenses had been thought *insufficient to outweigh* the *benefits* to efficient law enforcement and simplify judicial administration resulting from the availability of speedy and *inexpensive nonjury adjudications.* These same considerations compel the same result under the Fourteenth Amendment. *Id.* at 1453. (Emphasis added)

And in *Baldwin v. State of New York,* ___ U.S. ___, 90 S.Ct. 1886 (1970)

> One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences which face him, and the consequences which face appellant here. Indeed, the prospect of imprisonment for however short of time will seldom be viewed by the accused as trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. *Where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they be, may be outweighed by the benefits which result from speedy and inexpensive nonjury adjudications. Id.* at , 90 S. Ct. at 1890. (Emphasis added)

With reference to the Right to Counsel as expounded by this Court in *Gideon v. Wainwright,* 372 U.S. 335 (1963), the Court in *Brinson v. State of Florida, County of Dade,* 273 F. Supp. 840 (S.D. Fla. 1967), at 845-47 had this to say:

> . . . The right to counsel should not be treated as an abstract theorem, but rather as a means of achieving the most perfect justice possible in a given situation. The essence of the right is to protect those charged with crimes from wrongful conviction. However, *that right is qualified by practical exigencies . . .*
>
> *The right to counsel guaranteed by the Sixth and Fourteenth Amendments is not an absolute right,*

> *nor are any of the rights guaranteed by the Constitution "absolute."* See *Creighton v. State of North Carolina*, 257 F. Supp. 806 (E.D.N.C. 1966). *As stated in that case, the Constitution was not written to provide an exercise in abstract idealism but as a practical guide for the management of the affairs of the country and the protection of the rights of its citizens. In today's complex society there can be no truly "absolute" rights.* Thus, the right to free exercise of the religion of one's choice is on its face absolute, but in application is limited since a religion requiring illegal activities would not be constitutionally protected. One cannot refuse to pay taxes because of religious scrupples, nor can one engage in polygamy or any other practice directly harmful to the safety, morals, health or general welfare . . . The "absolute" right to free speech has been qualified and curtailed by libel and slander laws. Such right, on occasion, must be subordinated to other values and considerations. *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1950). It does not confer the right to persuade others to violate the law. *Bullock v. United States*, 265 F.2d 683 (6th Cir. 1958) . . . Neither does such right preclude Congress from excluding obscene matter from the mails or from punishing person advocating overthrow of the government by force. *United States v. Bryan*, 167 F.2d 241. *Likewise, the "absolute" right to counsel in all criminal prosecutions must be qualified by practical exigencies and, unless this is done, the necessities of sound judicial administration would be disregarded* and the administration of justice thrown into senseless chaos. (Emphasis added)

Without belaboring the point further, these examples are cited to demonstrate the futility of a Rule of Absolutes and the necessity for a Rule of Reason. As the dissenting opinion of Judges Sobeloff and Winter and the orders of the district court suggest, if a test of reasonableness is slippery and inapplicable to an evaluation of a school board's efforts to convert to a unitary system, a consideration of costs, disrup-

tions, buses, administrative problems, and impact on educational programs become totally unnecessary and irrelevant. If such be true, there would be no need for complex desegregation plans and much of the elapsed time since *Brown I* and *II* has been wasted.

To the contrary, we subscribe to what this Court said in *Dennis v. United States, supra:*

> Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. *Id.* at 866.

Green gave birth to a major portion of the nomenclature applied to measure school systems and desegregation plans. We find little evidence of any disposition on the part of the absolutists to heed the admonition suggested by *Dennis* that there are differences, which should reasonably be taken into account, between the 2 rural schools (1300 pupils) of New Kent County and the 103 primarily urban schools (84,500 pupils) of Charlotte-Mecklenburg.[16] The absolutists springboard from the nomenclature of *Green* to rationalize their own views, without taking into account the limitations of the ruling of this Court in that case:

> *[A]ll we decide today* is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself. *Id.* at 440. (Emphasis added)

If the review of the Charlotte-Mecklenburg case does nothing else, we hope standards and guidelines for desegregation

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[16]The trial judge glibly dismisses the differences in his August 3 Order (Pets.' Br. A10): "The principal difference between New Kent County, Virginia, and Mecklenburg County, North Carolina, is that in New Kent County the number of children being denied access to equal education was only 740, whereas in Mecklenburg that number exceeds 16,000." Even this reference to 16,000 leaves an erroneous impression. Under the Board plan only 7,497 black youngsters will attend predominately black schools. See statistical data relating to the Charlotte-Mecklenburg schools and the Board plan attached hereto at A-3.

plans will be evolved that are sufficiently clear and definite to curtail the temptation of some lower courts to rely on their personal educational and social philosophies in judging plans and the system for which they are formulated.

D. THE DISTINCTION BETWEEN DE FACTO AND DE JURE IS NOT A VALID STANDARD BY WHICH TO DETERMINE WHETHER A SCHOOL SYSTEM IS UNITARY.

A major thrust of the district court's sweeping orders is based upon its findings that such segregation as remained in the Charlotte-Mecklenburg schools was the result of *de jure*, not innocent *de facto*, action of federal, state and local authorities. These findings are summarized in the opinion of the Court of Appeals (1264a):

> The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property until *Shelley v. Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage. The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accommodate the

needs of immediate neighborhoods. Predominately black schools were the inevitable result. The interplay of these policies on both residential and educational segregation previously has been recognized by this and other courts.

These findings were employed as a justification by both the trial judge and the Court of Appeals for the disapproval of the Board's plan that would desegregate all but 10 of the system's 103 schools and place 100% of the black and white children in schools with thoroughly integrated teaching staffs and 68% of the blacks in 93 predominately white schools–with almost all of the remaining black children being scheduled to attend such schools for at least one-half of their 12 years of schooling. These *de jure* findings are in marked contrast to earlier findings of the district court in its April 23, 1969, Order (311a-312a):

> A word about the School Board.–The observations in this opinion are not intended to reflect upon the motives or the judgment of the School Board members. They have operated for four years under a court order which reflected the general understanding of 1965 about the law regarding desegregation. *They have achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts, and have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions.* The Charlotte-Mecklenburg schools in many respects are *models for others.* They are attractive to outside teachers and offer good education. The problem before this court is only one part (albeit a major part) of the educational problem. The purpose of this court is not to criticize the School Board, but to lay down some legal standards by which the Board can deal further with a most complex and difficult problem. The difference between 1965 and 1969 is simply the difference between *Brown* of 1965 and *Green v. New Kent County* of 1968. *The rules of the game have changed, and the methods and philosophies which in good faith the Board has followed* are no longer adequate to complete the job

> which the courts now say must be done "now". (Emphasis added)

Of particular interest is the district court's April 23, 1970, finding:

> . . . Location of schools in Charlotte has followed the local pattern of residential development, including its *de facto patterns of segregation.* (305a) (Emphasis added)

Six months later, in its November 7, 1969, Memorandum Opinion (661a-662a) the district court gratuitously and without the benefit of further evidentiary hearings reversed its previous findings that segregation in Charlotte was *de facto.* The trial judge attributed to the School Board every real or fancied ill that beset the Charlotte-Mecklenburg community and stemmed from federal, state, local and private action, including, among others, public accommodations and housing, racial restrictions in deeds, zoning ordinances, urban renewal, low rent housing and placement of neighborhood schools.

The unfairness and artificiality of these attributions is underscored by a comparison of the district court's findings in this case with those of the Sixth Circuit in *Deal v. Cincinnati Board of Education, supra,* wherein the Court considered the same factors, and arrived at a diametrically opposite result and concluded:

> In our opinion, the burden of righting wrongs alleged to have been committed by public or private agencies ought not to be foisted upon Boards of Education, which have enough problems of their own to solve in providing proper education for the young. *Id.* at 1392.

In *Deal, supra,* the Court observed that in Cincinnati due to residential patterns there was a large concentration of negroes in one portion of the city and schools had been located to serve the neighborhoods where the children live. The Court in *Deal* referred to an Ohio statute that *required* the selection of school sites in areas of the heaviest concentration of children and declared that:

> Even in the absence of such a statute, it would seem prudent to locate the schools where they will be easily accessible and convenient to most of the children and without the necessity of bussing the children or their crossing dangerous thoroughfares. The Board should consider locations in areas that are being developed where large population increases are anticipated, and locations in areas where the Board already owns property.

We, of course, are mindful of the holding of this Court in *Cooper v. Aaron*, 358 U.S. 1 (1958) which is frequently cited for the proposition that as agents of the state a local school board is responsible for conditions created by state officials. This holding was made within the context of the violent, disruptive and overt action generated by Governor Faubus and other state officials to thwart the rezoning efforts of the local school board. In the case of Charlotte-Mecklenburg it is manifestly unsound, unfair and unrealistic that the actions of others should be arbitrarily attributed to its School Board as justification for the excessive order approving the disruptive and costly plan of the district court and disapproving the plan proposed by the Board.

It is common knowledge that prior to 1954 Charlotte-Mecklenburg maintained a dual system, sanctioned by the laws of the State of North Carolina promulgated under the authority of the "separate but equal" doctrine of *Plessy v. Ferguson, supra,* stricken down by *Brown I* and *II,*

Following the mandates of *Brown I* and *II,* in order to achieve further racial mixing Charlotte-Mecklenburg adopted a plan of redistricting that in 1966 was found by the Court of Appeals for the Fourth Circuit to comply with the Constitution as then understood. *Swann v. Charlotte-Mecklenburg Board of Education,* 369 F.2d 29 (1966). Thereafter, in furtherance of additional desegregation, the Board initiated a number of actions which were applauded by the district court in its April 23, 1969, Order (298a-301a, 311a-312a). Following *Green* and in response to the orders of the district court the School Board submitted its plan that on

February 5, 1970, was disapproved by the district court in favor of its own—reciting in support of its action that the local system was tainted by the *de jure* factors referred to above.[17]

The history of this case, the 1966 Circuit Court approval of geographic zones, the Board's initiative to promote desegregation and the results which will be achieved by the February 2, 1970, plan of the Board compels an answer to this question: When, if ever, can a school system born under the ill-fated star of *Plessy v. Ferguson* purge itself of the *de jure* stigma reserved for systems that once-upon-a-time had the dualty that *Plessy* condoned?

We suggest that the distinction between *de jure* and *de facto* is invalid and artificially contrived. In doing so, it is not our purpose to whitewash the Charlotte-Mecklenburg system by pointing a finger at other systems in other parts of the nation that have escaped the lash of oppressive court orders because they operate behind the mask of *de facto* segregation. We do suggest, however, that the *de jure - de facto* standard is not an appropriate test by which to judge a school board's compliance with the commands of *Brown I, Brown II* and *Green*. Schools everywhere should be measured by the same yardstick.

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[17]In Charlotte-Mecklenburg, 68% of the blacks during the school year 1969-70 attended predominately black schools. Under the Board plan this percentage is dramatically reduced to 32% (see A-3 Appendix attached to this brief). Comparable information derived from HEW figures reflects the following percentages of black students at predominately black schools: New York City, 86%; Los Angeles, 96%; Detroit, 91%; Philadelphia, 90%; Milwaukee, 88%; San Francisco, 54%; Boston, 77%; and Cincinnati, 78%.

The percentages of black students attending schools housing 95% to 100% black students in other cities is as follows: Baltimore, 76%; Cleveland, 80%; Washington, 89%; St. Louis, 86%; Newark, 75%; Buffalo, 61%; Gary, Indiana, 80%. In Chicago, 76% of the blacks attended schools less than 2% white. Source: United Press International *Release*, May 17, 1970.

The flaw in the *de jure - de facto* dichotomy is that from the moment *Brown I* was announced all federal, state and local laws requiring or permitting segregation were void and of no effect. On and after May 31, 1955, there plainly could be no *de jure* racial discrimination in any school system in the United States. What was left, North and South, was segregation in the schools in fact.

The *de jure* concept was never of any importance except as a handle upon which to hang state action and an affirmative duty to dismantle. If one accepts an affirmative conception of the Constitution, the *de jure* idea becomes worthless and the North and South distinctions intolerable.[18]

If separation by race in the public schools renders educational opportunities inherently unequal and if accomplishment of a social purpose is really the true goal, it ought to be purely of historical interest and wholly irrelevant how the practice originated, whether by law, custom or ghetto economics.

It is abundantly clear that social reform is the goal that the trial judge sought to achieve in Charlotte-Mecklenburg: Segregation *per se* is unlawful; educational opportunities and performances are not controlling–"Segregation would not become lawful, however, if all children scored equally on the [achievement] tests" (Pets.' Br. A15); "no school [shall] be operated with an all-black or predominately black student body" (822a); the "pupils of all grades [shall] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students" (822a); the School Board shall "maintain a continuing control over the race of children in each school . . . to prevent any school from becoming racially identifiable" (823a); the School Board shall "implement a continuing program, computerized or otherwise, of assigning pupils and teachers during the school

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[18]Senator Abraham Ribicoff, of Connecticut, has described this double standard as "monumental hypocricy."

year as well as at the start of each year for the conscious purpose of maintaining each school and each faculty in a condition of desegregation" (824a).[19] One embarked upon a crusade for social reform finds both opportunity and justification in the *de jure* precept. By way of illustration, it seems rather strained that private racial deed restrictions negated by *Shelley v. Kraemer*, 334 U.S. 1 in 1948 should be relied upon in support of nefarious state action now. The same is true of the purported effects of federal financing and other governmental action over which the school board has no control.

It is inescapable that an all-black school in Washington or Baltimore is just as unequal as an all-black school in Charlotte or Atlanta. People are pretty much the same everywhere and race prejudice now and in the past has not been confined to the southern part of the United States.[20]

If social reform were to be candidly admitted as the objective, we could more profitably concern ourselves with what is reasonably practicable for a school board to do to correct

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[19]Even if *arguendo* the *de jure - de facto* distinction were to be accepted, such a requirement of continued maintenance and control over the race of children in each school would seem to exceed the authority of a district judge, once he concludes that a desegregation plan has dismantled a dual system and has established a unitary one. After this has been accomplished, any future segregation would be *de facto*–not *de jure*.

[20]*Racial Isolation in the Public Schools, Summary Report by the Commission on Civil Rights* (1967), at 3:

> Although school segregation was sanctioned by law and official policy in Southern cities until 1954, there is a legacy of governmentally sanctioned school segregation in the North as well. State statutes authorizing racially separate public schools were on the books in New York until 1938, in Indiana until 1949, and in New Mexico and Wyoming until 1954. Although not sanctioned by law in other States, separate schools were maintained for Negroes in some communities in New Jersey, Illinois, and Ohio, as late as the 1940s and 1950s. In some cities such as New Rochelle, N.Y. and Hillsboro, Ohio, the courts found that school district lines have been gerrymandered for the purpose of racial segregation.

social inequities–North and South–rather than having our attention diverted to how a particular school system may have gotten that way. Further, it would obviate the necessity for artifically contrived rationales to support a trial court desegregation order, which in this case the Court of Appeals accepted "under familiar principles of appellate review."

E. THE CONSTITUTION DOES NOT REQUIRE RACIAL BALANCING IN SCHOOLS OR BUSSING OF CHILDREN OUTSIDE GEOGRAPHIC ATTENDANCE ZONES TO EFFECT SUCH BALANCING. BALANCING AND COMPULSORY BUSSING INFRINGE ON THE PERSONAL RIGHTS AND LIBERTIES OF THE CHILDREN INVOLVED.

The test of reasonableness adopted by the Court of Appeals–instead of one that calls for absolutes–can be the only sensible standard. Transportation may be employed on a "reasonable" basis as a legitimate tool to effectively desegregate an otherwise dual system. However, this still leaves open to question the circumstances under which and the purposes for which bussing may be or should be imposed upon a school system.

The mandate of the Constitution does not require racial balancing or compulsory bussing outside of normal attendance zones to achieve such balancing if the attendance areas are fairly drawn.

1. Racial Balancing and the Bussing to Achieve It Were the Bases for the Decisions of the Trial Court and Court of Appeals.

The net effect of the trial court orders of February 5, 1970, and August 3, 1970, was to require racial balancing at all three instructional levels and the bussing necessary to implement it–regardless of cost or disruptions. The net effect of the Court of Appeals decision was to impose racial balancing at the junior and senior high levels and to authorize

it at elementary level—tempered only by its test of reasonableness with reference to the amount of bussing involved.

In its August 3, 1970, Order the district court asserts that " 'Racial balance' is not required by this court, merely racial diversity." (Pets.' Br. A10). This was merely a reaffirmation of its previous denials that its prior denials that its prior orders were not based upon a requirement of "racial balance" (710a, 821a). A careful consideration of the various orders of the district court clearly shows that contrary to the trial judge's disclaimers his rulings were in fact premised upon the proposition that a racial balancing of the Charlotte-Mecklenburg schools is required by the Law of the Land.

In its April 23, 1969, Order (310a) the trial court entertained doubts about its power to order a racial ratio in the various schools of the Charlotte-Mecklenburg system:

> Counsel for the Plaintiffs says that since the ratio of white to black students is about 70/30 the School Board should assign children on a basis of 70% white and 30% black and bus them to all schools. This Court does not feel that it has the power to make such a specific order.

In its December 1, 1969, Order (710a) the trial judge acknowledged that his previously expressed doubts had been dispelled:

> . . .[T]he court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71/29 ratio in the various schools so that there would be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.

In his February 5, 1970, Order (822a) the trial judge abandoned temporarily any pretense concerning racial balancing as a requirement when he directed:

> That pupils of all grades be assigned in such a way that as nearly as practicable the various schools at

various grade levels have about the same proportion of black and white students.

The Court of Appeals likewise disavowed any purpose to require racial balancing of the Charlotte-Mecklenburg schools. In his dissent, Circuit Judge Bryan cut through the sematics employed by both the district court and his colleagues on the Court of Appeals (1293a-1294a):

> The Court commands the Charlotte-Mecklenburg Board of Education to provide busing of pupils to its public schools for "achieving *integration*". (Accent added) "[A]chieving integration" is the phraseology used, but actually, achieving racial *balance* is the objective. Busing to prevent racial imbalance is not as yet a Constitutional obligation. Therefore, no matter the prior or present utilization of busing for this or other reasons, and regardless of the cost consideration or duplication of the bus routes, I think the injunction cannot stand.
>
> Without Constitutional origin, no power exists in the Federal courts to order the Board to do or not to do anything. I read no authority in the Constitution, or in the implications of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its derivatives, requiring the authorities to endeavor to apportion the school bodies in the racial ratio of the whole school system.
>
> The majority opinion presupposes this racial balance, and also busing to achieve it, as Constitutional imperatives, but the Chief Justice of the United States has recently suggested inquiry on whether "any particular racial balance must be achieved in the school; . . . (and) to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court." . . .
>
> I would not, as the majority does, lay upon Charlotte-Mecklenburg this so doubtfully Constitutional ukase. (Emphasis by Judge Bryan.)

In expressing his approval of the district court's plan at all three instructional levels, Circuit Judge Winter in his dissenting opinion candidly acknowledges that racial balancing *per se* should be required and cites as his justification the teacher ratios discussed in *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969). Judge Winter concludes: "if in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason why the same should not be true to achieve pupil integration . . ." (1301a-1302a).

Having had substantial integration of its faculties in the past, with the opening of its schools this fall Charlotte-Mecklenburg has in each of its 103 schools a white-black teacher ratio of about 3 to 1, which is the racial ratio of faculty members throughout the system. The School Board believes these assignments to be beneficial for both black and white children. However, we do not agree with the district court or Circuit Judge Winter that racial balancing of teachers can be cited as support for the proposition that children can or should be racially balanced as a Constitutional requirement. Teachers are under no compulsion to teach in a particular system. Teacher assignments occasion little, if any, inconvenience for the teacher and no costs or disruptions are imposed upon the school system. By contract they are employed by a system to apply their teaching talents wherever needed. If dissatisfied, they are free to quit and move to a system where employment contracts and conditions are more to their personal likings. Children must attend the school to which they are assigned and have no option to escape the unpalatable effects of their forced participation in a program of racial balancing designed to accommodate others.

In *United States v. Montgomery County Board of Education, supra*, at 236, this Court observed that the petitioners in that case did not argue "for precisely equal ratios in every single school under all circumstances" and that the United States did not argue that "racially balanced faculties are constitutionally required." As noted above, in apparent

agreement with the principle of racial balancing of school children, Circuit Judge Winter sought to temper the import of the district court order with the mollifying comment that "deviations from the overall ratio" had been permitted to "accommodate circumstances" with respect to particular schools. To one wedded to the proposition that racial balancing and ratios is the desired objective, circumstances and practical problems will seldom be asserted to prevent the achievement of this goal.

2. Racial Balancing and Compulsory Bussing Required by the District and Circuit Courts Violate the Constitutional Rights of the Children Involved.

In its February 2, 1970, Plan the School Board concluded with a statement of its conviction that its duty is to protect the rights of all children (741a):

> . . . The Board understandably is prone to *exercise caution lest, in protecting the rights of some of its citizens, it tramples on the rights of others* in the absence of a clear mandate of the Supreme Court. (Emphasis added.)

This concern of the Board was well-founded. The compulsory cross and satellite bussing requirements of the district court and the Court of Appeals will violate the individual rights guaranteed by the Fourteenth Amendment of those blacks and whites caught up in the forced mass movement of children away from their neighborhoods and out of their normal attendance zones for the sole purpose of achieving the racial balancing prescribed by those orders. It is ironic that the counterpart of the compulsion outlawed by *Brown I* and *II* is now employed in the name of the Constitution. Is it trite to suggest that two wrongs do not make a right?

It is obvious that a school board must necessarily have wide latitude in the establishment of attendance zones for orderly administration of the various schools in its system

and that, if these zones are fairly conceived on a nondiscriminatory basis, the children may be compelled to attend the school to which they are assigned under the applicable compulsory attendance laws. (See N.C.G.S. Sec. 115-116 et seq.) Absent an unlimited freedom of choice arrangement (which the Charlotte-Mecklenburg Board has not proposed), the right of a child to go to a particular school is, of course, not absolute, but circumscribed by the inherent power of a school board to make reasonable attendance assignments to conform to the needs of the school system and the community it serves.

Whether or not the Board as an elective body could lawfully have required cross and satellite bussing to effect the compulsory mass movement of children may be open to question. Suffice it to say, the Board did not choose to go to this extreme. The point now at issue is whether the judiciary under the mandates of the district court and the Court of Appeals infringed upon the individual constitutional rights of the children and their parents–black and white–who do not want to be bussed or balanced. In requiring this compulsory bussing those orders exceeded any Constitutional requirement, by *excluding* children from attending nearby schools *solely* on account of their race.

Deal v. Cincinnati Board of Education, supra, at 1391-92 (6th Cir. 1969) addressed itself to this matter:

> It is the contention of appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty. *Appellants are not the only children who have constitutional rights.* There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neigh-

> borhoods in order to mix the races. (Emphasis added.)

The district judge in *Ross v. Eckels, Houston Independent School District, supra*, asked an interesting question:

> Our hypothetical student well might say to the Superintendent of Instruction, "You are excluding me from School A, two blocks from my home, because I am black, and for no other reason. How can you do this when the Supreme Court of the United States in its latest pronouncement on the subject imposes on you the duty 'to operate as [a] unitary school system *within which no person is to be effectively excluded from any school because of race or color*?" I would be interested to know how this question would be answered. (Emphasis added.)

From time immemorial, the public school has been a focal point of community and family life. The location of a particular school is a major consideration for parental decisions regarding the location of their homes and the neighborhood in which they choose to live. Obviously, affluent whites and blacks are normally better able to make this choice than poor whites and blacks. Nevertheless, some poor people prefer that their children attend the school serving the areas of their residence. To afford disadvantaged parents the flexibility of greater options for the education of their children than their existing economic or social status may permit and to bring these available options made in line with those enjoyed by the more affluent citizens are worthwhile objects of any desegregation plan. But it is quite a different matter for a judicial decree to compel bussing to a distant school outside the normal attendance zones—whether the parents like it or not. A court mandate that requires this coercion to achieve what it conceives to be a worthy social purpose (i.e. racial balance) is judicial paternalism.

The dissenting opinion of Judge Bell (concurred in by Judge Gewin) in *United States v. Jefferson County Board of Education, supra*, involving the desegregation of numerous deep south schools, speaks to the matter at hand (at 411):

> Then there is the matter of personal liberty. *Under our system of government, it is not to be restricted except where necessary, in balance, to give others their liberty, and to attain order so that all may enjoy liberty.* History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty . . . They (the majority opinion) *cast a long shadow over personal liberty as it embraces freedom of association and a free society.* They do little for the cause of education. (Emphasis added.)

In *Jefferson County, supra*, Judge Gewin in his own dissent (concurred in by Judge Bell) expressed similar views

> . . . There must be a mixing of the races according to majority philosophy *even if such mixing can only be achieved under the lash of compulsion* . . . Accordingly, *while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike.* There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law . . . *When our concepts as to proportions and percentages are imposed on school systems*, notwithstanding free choices actually made, *we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly . . . embrace.* (Emphasis added.)

The majority in *Jefferson, supra*, and other courts have sought to justify infringement upon the rights of students in the majority where segregation is said to rest upon *de jure* action.

The distinction between *de facto* and *de jure* is not a valid test by which to measure the liberties of either black children or white children. It is fair to assume that both black and white school children are blissfully unaware of any such distinction or of the circumstances that are relied

upon by some to justify unequal treatment. The personal rights and liberties of one child should not be sacrificed to promote those of another.

3. A Neighborhood Plan Fairly Administered Without Racial Bias Satisfies the Constitutional Requirements of a Unitary System.

The neighborhood school concept[21] is one that the Board considers to be beneficial to the children and enhances the support that comes when children and parents identify themselves with a particular school and its programs. Fragmentation of this type of association is not in the best interest of our schools.

In its April 23, 1969, Order the district court volunteered its own educational philosophy in opposition to the neighborhood school (306a):

> Today people drive as much as forty or fifty miles to work; five or ten miles to church; several hours to football games; all over the country for civic affairs of various types. The automobile has exploded the old-fashioned neighborhood . . . If this court were writing the philosophy of education, he would suggest that educators should concentrate on planning schools as educational institutions rather than as neighborhood proprietorships . . .

To the contrary, all too many of our present day relationships have become institutionalized and depersonalized. We believe this trend to be unwholesome. Close relationships among teachers, parents and children should to the maximum extent be encouraged and undergirded. The neighborhood school plays an important part in fostering such relationships–particularly at the elementary level where the

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[21] Geographical zoning is the common method of determining school attendance and the neighborhood school is the predominant attendance unit. *Racial Isolation in the Public Schools–Summary of a Report by the Commission on Civil Rights*, page 3, (March 1967).

ties between home, school and after-class acitvities are an important part of the educational process of children in their early formative years. In a metropolitan system such as ours the ideal may not always be achieved. This should not be a reason for dismantling and abandoning the neighborhood school.[22]

From the beginning there has been this marked contrast between the views of the trial court and those of the Board regarding the pertinence of the neighborhood school. The School Board responded to the pressure of the trial court when it submitted its February 2, 1970, plan—a plan which retained, but severely strained, the principle of the neighborhood school. *Deal v. Cincinnati Board of Education*, 324 F.2d 209 (6th Cir. 1966) succinctly stated the case for the neighborhood school:

> Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominately or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and

[22]It is interesting to note that in the brief filed by petitioners with this Court in *Green, supra*, October Term, 1967, No. 695, substantially the same view of the importance of the neighborhood school was expressed at page 14 of that brief: "Prior to the relatively recent controversy concerning segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need for transportation, encourage the use of schools as community centers and generally facilitate planning for expanding school populations."

> administration through the use of neutral, easily determined standards, and better home-school communication.

This appraisal was reaffirmed in *Deal v. Cincinnati Board of Education* (1969) *supra*, wherein the Court observed that the neighborhood school concept was not only sanctioned, but required, by statute in the State of Ohio.

In his policy statement of March 24, 1970, entitled *SCHOOL DESEGREGATION: A Free and Open Society* (116 Cong. Rec. S4351, Daily Ed., March 24, 1970), the President of the United States addressed himself at length and in depth to the important role that the neighborhood school plays in the education of our public school children. He said in part:

> The neighborhood school will be deemed the most appropriate base for such a [unitary] system.
>
> Transportation of pupils beyond normal geographical school zones for the purpose of achieving racial balance will not be required.

An earlier statement[23] by Robert Finch, then Secretary of Health, Education and Welfare, with particular reference to the Charlotte case, underscored some of the ill-effects of a dismantling of the neighborhood schools:

> We have a very confused set of decisions—that go to both ends of the spectrum with regard to the question of bussing, for example. We have a decision out of the Fifth Circuit involving Orange County, Florida, which says in effect the neighborhood school is the important concept, and that must be preserved at all costs, and that's where the dollars ought to be allocated.
>
> Then you have decisions like Charlotte, in the Carolinas, in Los Angeles, which I think are totally unrealistic, because they say that you shall take the

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[23] *PROFILE*, a production of Metromedia Radio News, Feb. 27, 1970, Transcript at 7-8.

> percentages in the district as a whole and apply those and force those on each district—or, each school within that district.
>
> And in the case of Charlotte, they have to buy 400 new buses; in the case of Los Angeles, they have to buy, I guess, better than 500 new buses, with all that goes with that, and when you have that kind of a situation, that's not the best use of your resources, because you're trying desperately to keep the doors open, to pay faculty, to pay janitors. But beyond that, it's not the best educational experience, because to haul young children, for an hour or more, across long distances, as you have particularly in the Los Angeles situation, means they can't get any tutoring after school, the parents can't—have great difficulty in getting to the teacher to talk about their child; they can't take part in athletic events, or dramatic events or extracurricular events, and it's not good educational policy.
>
> So that I feel very strongly that those decisions are moving in the wrong direction.

In the Charlotte-Mecklenburg case, the trial court quite obviously considered the neighborhood school to be unimportant and irrelevant. The Court of Appeals, though not addressing itself *per se* to the neighborhood school concept, nevertheless disapproved the geographic zones at all three instructional levels which the Board in its considered judgment had proposed to achieve a unitary system while retaining the basic benefits of the neighborhood school.[24]

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[24]In commenting upon the complexities of ineffective freedom of choice plans, the petitioners in *Green, supra*, at page 15 of their brief, recommended the simplicity of disestablishing dual zones by conversion to compact attendance areas close to home: "The easiest method, administratively, was to convert the dual attendance zones into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience. With rare exception, however, southern school boards, when finally forced to begin desegregation, rejected this relatively simple method . . . ."

The School Board plan clearly demonstrates a good faith, conscious and effective effort to keep its neighborhood school attendance areas—drastically gerrymandered to promote maximum desegregation. This plan satisfies the Constitutional requirement that a unitary system be established within which no child is excluded because of race or color.

4. The Compulsory Bussing Approved by the Court of Appeals Is Violative of the Provisions of Section 401(b) and 407(a)(2) of the Civil Rights Act of 1964 [42 U.S.C. 2000c(b) and 2000c-6(a)(2)] Which Expressly Prohibits a United States Court To Order Transportation To Achieve Racial Balance in Schools.

The Court of Appeals has read into the Civil Rights Act of 1964 interpretations which are not fairly warranted by the plain and intelligible language of the Act or supported by its legislative history. In so doing, it has joined the error committed by the Court of Appeals for the Fifth Circuit in *Jefferson, supra*, which reached its conclusion by a strained illogical analysis of this Act and the legislative history.

The clear language of the Act makes no distinction between *de facto* and *de jure* segregation and the legislative history expressly disclaims any sectional or tenuous distinctions adopted by the Court of Appeals and the cases on which it relies. If it were otherwise, Congress would have expressly so stated and the proponents of the bill would have made it so known.

The Courts have been unwilling to give any definitive statement with respect to the term "desegregation" and, therefore, it became incumbent upon Congress to supply an answer in this void. 42 U.S.C. 2000c(b) provides as follows:

> "Desegregation" means the assignment of students to public schools and within such schools without

> regard to their race, color, religion or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

It is therefore apparent that Congress in expressing a definition of "desegregation" in a positive manner stated that no student would be *excluded* from his school on account of race, color, religion or national origin. This is the language of *Alexander v. Holmes, supra*. Congress also negatively stated "desegregation" does not mean assignment to overcome racial imbalance.

In order to give further meaning to its definition, Congress by 42 U.S.C. 2000c(a) provides in part as follows:

> . . .[P]rovided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with Constitutional standards. . . .

The term "desegregation" has taken on such national concern and importance that a Congressional definition may properly be regarded as a statement of public policy. Although the courts may take action with reference to establishing public policy, it primarily rests with the lawmakers to determine public policy. In *Building Service Employees International Union v. Gazzam*, 339 U.S. 991 (1950), the Supreme Court held:

> The public policy of any state is to be found in its Constitution, acts of the legislature, and the decisions of its courts. *Primarily, it is for the lawmakers to determine the public policy of the state.* (p. 787) *Twin City Pipeline Company v. Harding Glass Co.*, 283 U.S. 353, 357, 51 S. Ct. 476, 478, 75 L. Ed. 1112, 83 A.L.R. 1168.

Having primary responsibility, and acting to fill a void left by the courts, the public policy as expressed by the Congress of the United States is binding upon the judiciary.

Shortly after the Civil Rights Act of 1964 became the law of the land, the Circuit Court for the Fifth Circuit by a three-judge panel in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (1966) commonly referred to as *Jefferson I*, and *en banc* in *United States v. Jefferson County School Board*, 380 F.2d 385 (1967), commonly referred to as *Jefferson II*, undertook to dissect that Congressional enactment. In *Jefferson I* the Court acknowledged the supremacy of the legislature in the establishment of national policy in the constitutional scheme of things and the restraints that should be employed by the judiciary in running counter to such a declaration policy:

> More clearly and effectively than either of the other two coordinated branches of government Congress speaks as the voice of the nation. (at page 850) . . . When Congress declares national policy, the duty the other two coordinated branches owe to the nation requires that, within the law, the judicial and executive respect and carry out that policy. (at 856) . . . We shall not permit the Courts to be used to destroy or dilute the effectiveness of the Congressional policy. (at 856) . . .

Having made these pronouncements, the panel in *Jefferson I* abandoned these professed restraints and adopted a rationale by which it came to unwarranted conclusions that clearly thwarted the legislative policy as expressed in the Civil Rights Act of 1964[25] expressly forbidding racial balancing

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[25]The remarks of Hubert Humphrey, then Majority Whip, made during the course of Senate deliberations are a clear down-to-earth expression of the legislative intent:

> . . .[T]he Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The

and the use of transportation to achieve it. This error was perpetuated by the majority in *Jefferson II* and other courts relying upon the ill-considered reasoning of these cases.

Judge Bryan in his dissent in the Charlotte-Mecklenburg case clearly recognizes congressional hostility to the principle of "racial balance":

> Even construed as only incidental to the 1964 Civil Rights Act, this legislation in 42 United States Code §2000c-6 is necessarily revealing of Congress' hostile attitude toward the concept of achieving racial balance by bussing. It unequivocally decried in this enactment "any order [of a Federal Court] seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . to achieve racial balance . . .

The opinions and orders of the Court of Appeals and of the district court are based on the premise that balancing of the races in each of the Charlotte-Mecklenburg schools is the optimal objective. Those opinions and orders contravene the prohibition of the Civil Rights Act of 1964.

F. RACIAL BALANCE–THE HARBINGER OF MASSIVE COURT INVOLVEMENT IN SOCIAL THEORIES.

The Supreme Court is now being asked by petitioners to direct this School Board to engage in another experiment in efforts to seek some educational or social goal which has eluded them and will continue to do so for years to come. It is well known that social balance, social equivalence,

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bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems. The natural factors such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional. 110 Cong. Rec. p. 12717, June 4, 1964.

educational equivalence and related concepts will not be accomplished by the blacks over night. All the sociologists and educators agree on this point.

The theory advanced by the petitioners in the original *Brown* case, *supra*, was not that every child would be entitled to go to a non-segregated school, but rather that the children would be distributed to the schools by drawing attendance lines on a natural basis. 21 U.S.L.W. 3164 (Dec. 16, 1952). This position was pursued in *Cooper v. Aaron*, 358 U.S. 1 (1958) where petitioners sought enforcement of a plan which proposed to "develop school attendance areas consistent with the location of white and colored pupils with respect to the present and future physical facilities of the Little Rock school district." *Norwood v. Tucker*, 287 F.2d 798 (8th Cir. 1961).

The theory of freedom of choice was successfully urged upon this Court in *Goss v. Knoxville*, 373 U.S. 683 (1963) and was openly embraced by the Department of Health, Education and Welfare under the Civil Rights Act of 1964 and by the Fifth Circuit in *United States v. Jefferson*, 380 F.2d 385 (1967).

Petitioners' attorneys in *Green, supra*, (Oct. term, 1967, #695), on page 15 of their brief, argued:

> After Brown, southern school boards were faced with the problem of "effectuating a transition to a racially non-discriminatory system" (Brown II at 301). *The easiest method*, administratively, was *to convert* the dual attendance zones *into single attendance zones*, without regard to race, so that assignment of all students would depend only on *proximity* and *convenience*.[16]

[16]Indeed, it was this method that this Court alluded in Brown II when it stated "[t]o that end, the courts may consider problems related to administration, arising from . . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis" (349 U.S. at 300-301). (Emphasis added.)

Similar expressions appear throughout petitioners' brief in *Green*.

Notwithstanding petitioners' arguments in *Green*, and notwithstanding appellate approval of the existing attendance lines of the Charlotte-Mecklenburg system, the Board gerrymandered so as to produce a maximum racial mix in schools and proposed to totally desegregate faculties. It has gone far beyond the requirements of *Brown, Green* and the position of the NAACP throughout all Supreme Court proceedings. Now the NAACP seeks total racial balance. Why?

For years, the courts and school systems have been advised that dramatic improvement in the performance of black students could be expected upon the attainment of desegregation. The Coleman Report teaches there is a tendency for blacks to improve in desegregated schools. The achievement tests of this system (R. Ex. 64, July 15, 1970) disclose that the improvement brought about by desegregation is indeed slight. Perhaps the reason is that this system has been offering educational equivalence in its facilities and programs for some years (298a-302a).

The disappointing results of school desegregation brings to the forefront the environmentalists who have consistently maintained that the environment and attitudes of a child are the largest determinants in achieving equivalence. How will the courts meet this problem? Will it require massive economic assistance to families in the lower economic strata? Perhaps the court will be persuaded that the attitudes and environment of the blacks may be enhanced by enlarging the school board's responsibility with respect to food, clothing and shelter, all of which may best be resolved by placing these children in state maintained boarding educational centers. If the court has at that time accepted the racial balance theory, then in view of the substantial transportation times which children encounter in traveling to and from these centers, it is a simple step of mental gymnastics to require full attendance of whites in these educational centers so as to further satisfy the peer

group advocates. If this Court embraces the principle of racial balancing, it will have adopted the proposition that the constitutional rights of one child may be submerged to promote the presumed rights of another.

Even this will not produce total social mixing sought by petitioners and additional areas of court intervention will be requested which the court must be prepared to face. For instance, the district court conjectured that public housing has been concentrated by action of federal officials. Obviously, the concentration of blacks in large public housing projects would perpetuate segregation not only in the schools but in neighborhoods. Will the court limit the size of public housing projects and the distance between such projects so as to assure dispersal of blacks?

Related questions arise in the area of private residential housing which the district court said perpetuated segregation. Will this Court ultimately require a private owner of a subdivision to include a prescribed quota of homes for blacks only in each block of a residential development? Will transportation be required in remote suburban areas for those blacks who customarily use public transportation?

Numerous other questions relate to what extent this Court will require local public authorities to inaugurate plans for the racial residential balancing of entire communities. If community balancing is required, will judicial control over power possessed by local building licensing officials be used to establish and maintain such balancing? Will local governments be required to submit for court approval plans for desegregation of entire cities? Will such plans be subject to continued judicial review and supervision?

Another area which petitioners may pursue through the courts relates to school grading, IQ and achievement tests administered by the school system. Obviously, those students who perform poorly in school on such tests are less likely to get the desired employment positions. The remedy which may be urged upon the courts is that such grading is unfair to minority groups with different cultural back-

grounds. Therefore, all students should be automatically promoted as having received the same education and given the same certificate on graduation. In the eyes of the prospective employer, all students would possess the same educational qualifications. Is this Court prepared to foist this theory upon the nation?

Recently, this Court had occasion to pass upon the unconstitutionality of disproportionate district representation which resulted in the "one man one vote rule." *Reynolds v. Sims*, 377 U.S. 533 (1964). School boards are now being faced with demands by black students that student organizations, cheerleaders, school officers, class officers and other positions ordinarily determined by popular vote be accorded blacks pro rata and without regard to the vote of the majority. If this Court should direct pro rata representation in the schools, then this Court must be prepared to answer similar demands of these black students when they move into the adult world which does not permit racial ratios in elective offices. Will this Court direct that minority groups be permitted to select a pro rata number of seats in Congress, state legislatures and other positions of government?

It is quite obvious that this Court would be unwilling to order the adults of this society to such extremes in an attempt to attain social racial balances. Are children any less citizens by reason of their youth? Certainly not, as they are accorded the full spectrum of constitutional rights and obligations conferred on adults, other than the right to vote. This being true, this Court cannot justify taking from the children involved their personal preferences, their time, their right to free association and the host of other rights they possess as citizens which would be sacrificed in being involuntarily transported to a school beyond the area in which they reside–solely for the purpose of satisfying a racial balance numbers game. The rights of one child and the child's parents to be free of standardization by the state is clearly enunciated in *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925):

> . . . The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to *standardize its children* by forcing them to accept public instruction from public teachers only. *The child is not the mere creature of the state*. Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. (Emphasis added.)

In describing the word "liberty", this court held in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as follows:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of the happiness of men . . . The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect . . .

If this Court directs racial balance in the child's world, then there is no constitutional prohibition which would prevent the court ordering racial balance in the adult world. The Constitution as written and as developed contains no premise upon which to undergird such reckless appropriation of the constitutional rights of its citizens, be they children or adults. Mr. Justice Reynolds in *Meyer v. Nebraska, supra*, describing the totalitarian ancient state of Sparta, stated:

> . . . In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and entrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of the state without doing violence to both the letter and spirit of the Constitution.

Will the courts tread where it has forbidden the legislature to walk?

II. DISCUSSION OF CONSTITUTIONAL PRINCIPLES TO DESEGREGATION PLANS.

A. GENERAL STATEMENT REGARDING DESEGREGATION PLANS INVOLVED IN THIS CASE.

When the Fourth Circuit heard this case, there were two plans before it, both of which related to all three instructional levels: The February 2, 1970, plan of the Board and the February 5, 1970, plan of the district court, which the trial judge later reapproved and reinstated in his orders of August 3 and August 7, 1970. After remand by the Court of Appeals, during the course of the hearings held pursuant to the Circuit Court directives, three other desegregation plans were presented for the elementary level: the HEW plan, a plan prepared by a minority of the Board and an earlier draft of a plan prepared by the court consultant Dr. John A. Finger. In his August 3, 1970, Order, the trial judge disapproved the HEW plan and found the other two to be reasonable alternatives. Having appealed to the Fourth Circuit from the August 3 and August 7 Orders, the School Board on September 3, 1970, filed with this Court a motion for leave to supplement the record, or in the alternative for a Writ of Certiorari to the Court of Appeals, so that this

Court would have before it the complete record of the proceedings that culminated in the August 3 and August 7 Orders–including the three additional plans referred to above. As this brief is being prepared no action has been taken by this Court upon the Board's motion of September 3. On the assumption that the motion will be granted, this brief addresses itself to all five plans.

In an effort to be of the greatest possible assistance to this Court, as a separate appendix to this brief the School Board has filed a total of 9 maps (color coded where appropriate) to show graphically the attendance areas, pairings, clusters and other information concerning all of the plans–with the exception of the earlier Finger draft that was too indefinite for adaption to a graphic portrayal. Careful consideration of these maps is earnestly invited with the hope that this Court will find them to be a convenient means of getting a quick accurate picture and comparison of the various desegregation proposals.

B. THE BOARD PLAN CONVERTS THE CHARLOTTE-MECKLENBURG SCHOOLS TO A UNITARY SYSTEM. THE FOURTH CIRCUIT JOINED IN THE ERROR OF THE TRIAL COURT BY DISAPPROVING THAT PLAN.

1. The Board Plan Squares with the Conversion Checklist Prescribed by Green.

In *Green, supra*, this Court (commenting upon the typical pattern of state-imposed dualty found in New Kent County and outlawed by *Brown I* and *II*) observed at 435:

> . . . Racial identification of the system's schools was complete, extending not just to the *composition of student bodies* at the two schools but to every facet of school operations–*faculty, staff, transportation, extracurricular activities and facilities* . . . (Emphasis added.)

This itemization has been used by courts as a checklist by which to measure the effectiveness of desegregation efforts.

The administrative staff and school faculties of the Charlotte-Mecklenburg system are now thoroughly integrated. In its April 23, 1970, Order the district judge made specific findings that there was no discrimination with respect to the "other facets" referred to in *Green*, as well as a number of others (298a-301a). The Fourth Circuit also took note of these (1265a-1266a). In addition the Board has inaugurated many other innovative programs.

Most of these policies and practices were undertaken by the Board on its own initiative, a circumstance that prompted the district court to state that nothing in its April 23, 1969 Order shall be construed as any reflection on the good faith motives or judgment of the School Board which had "achieved a degree and volume of desegregation of schools apparently unsurpassed in these parts and have exceeded the performance of any school board whose actions have been reviewed in appellate court decisions. The Charlotte-Mecklenburg schools in many respects are models for others." (311a-312a).

Since the petitioners do not controvert the findings of the trial judge in giving Charlotte-Mecklenburg a clean bill of health with respect to these "other facets," the only one at issue in this case involves the question of whether the Board plan effectively eliminates discrimination in the schools and student bodies of this system.

2. The Board Plan Based on Geographic Attendance Zones Gerrymandered to Achieve Maximum Racial Mix Fully Complies with Constitutional Requirements for Desegregation of the Charlotte-Mecklenburg Schools and Their Student Bodies.

The pivotal issue in this case is whether the School Board's desegregation plan based on comprehensively restructured geographic attendance zones satisfies the Constitutional requirement of a unitary system in a situation where these zones are established to promote the maximum amount of desegregation possible by the employment of this tech-

nique.[26] This issue involves a consideration of the extent to which a school board may employ this technique as a means of preserving some semblance of the neighborhood school concept which it, together with most school systems and educators, believe to be beneficial.[27]

Of the maps previously referred to, the Court's attention is invited to Map Nos. 1, 6 and 8 showing the elementary, junior high and senior high restructured zones of the Board

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[26]The Board plan is supplemented by a majority to minority transfer program designed to promote desegregation and to prevent resegregation. It allows any black child in a school having more than 30% of his race to attend one that is less than 30% black, but permits a white child to transfer only if his present school is more than 70% white and the one to which he seeks assignment is less than 70% white. To encourage blacks to take advantage of this option, transportation is provided for those chosing to move from their neighborhoods.

[27]Compare article appearing in NATION'S SCHOOLS, June, 1970, page 100, entitled "*Forced Busing Vetoed by 90% of Schoolmen*":

> Although nearly 40 per cent of the nation's school superintendents think the Nixon Administration is vacillating on its enforcement of school desegregation, 90 per cent agree with the President's recently stated reservations about compulsory busing . . .
>
> Despite the various shadings of opinion on enforcement policy, most schoolmen reported unequivocal opposition to busing as a means for achieving desegregated schools. Judging form their comments, for a sizeable majority of superintendents the neighborhood school represents, as one New Yorker expressed it, "a fundamental principle in American public education." Objections to busing fell mainly into the following categories:
>
> Busing is an infringement on the rights of parents and students.
>
> Busing is a poor solution to the problem of desegregating the schools since the long-term answer depends on the alteration of residential housing patterns.
>
> Busing is too expensive a solution, when money could be better spent to upgrade educational programs in poverty area schools . . .
>
> How administrators voted: . . .

plan and Map No. 2 showing the new elementary zones superimposed upon the previous attendance areas.[28]

Under the Board plan, 100 of the 103 schools in the Charlotte-Mecklenburg System would have some degree of racial mix, leaving only three all-white schools. 68% (16,709) of the black students would attend 93 schools with less than 40% black student bodies[29]—leaving the remaining 32% of the black pupils in the 10 schools having white ratios of 17% to 1%.[30] These 10 predominately black schools remained in spite of the Board's best efforts to achieve a more satisfactory racial mix in them by means of the drastically gerrymandered attendance lines. Of these 10 schools, 9 are elementary[31] and 1 is a junior high school.[32]

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2. Do you think busing of students should be implemented to achieve desegregation, even if it means a weakening of the neighborhood school concept?

10% Yes 90% No . . .

The opinion poll survey, conducted monthly by the editorial staff of NATION's SCHOOLS, is based on a five per cent proportional sampling of 14,000 school administrators in 50 states. This month's poll brought a 40 per cent response.

[28]Some of these maps reflect slight adjustments occasioned by "rounding off" the square corners of the computer lines to conform them to identificable landmarks.

[29]This represents a 100% increase over 1969-70, when 8,858 blacks attended 73 predominately white schools. In March of 1965 only 343 blacks attended 22 white schools. Several predominately white schools slightly exceed 40% black.

[30]See Appendix attached to this brief for statistical data pertaining to the Board plan.

[31]Under the Board plan, these 9 elementary schools have the following black-white ratios: Bruns Ave. (90-10); Marie Davis (88-12); Double Oaks (99-1); Druid Hills (96-4); First Ward (99-1); Lincoln Heights (99-1); Oaklawn (99-1); University Park (85-15); and Villa Heights (83-17). (*A Plan for Student Desegregation*–Systems Associates, Inc., page 31.)

[32]Under the Board plan, Piedmont Junior High has a black-white ratio of 90% (B)-10% (W). (*A Plan for Student Desegregation*–Systems Associates, Inc., page 31.)

The remaining predominately black schools are located in the inner-city core which is populated for the most part by blacks, many of whom due to shifting housing patterns had moved into previously white areas. In its March 21, 1970, Supplemental Findings of Fact (1208a), the trial court acknowledged:

> Both Dr. Finger and the school board staff appear to have agreed, and the *court finds as a fact*, that for the present at least, there is *no way to desegregate* the all-black schools in Northwest Charlotte *without providing* (or continuing to provide) *bus or other transportation* for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion. (Emphasis added.)

In formulating its plan, the Board to a very significant degree has elected to exceed Constitutional requirements. It materially altered the compactness of neighborhood school areas.[33] It introduced into each school a precise black-white teacher ratio. It sought to achieve a 70/30

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[33] *Brown II* recognized that an acceptable desegregation plan may employ geographical rezoning if done fairly and in good faith to effect "a revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis." A pertinent historical note is made by Alexander M. Bickell in his recent book, *The Supreme Court and the Idea of Progress:*

> At the first argument of *Brown v. Board of Education* in 1952, Justice Frankfurter asked the future Justice Thurgood Marshall, then counsel for the Negro children, whether a decision in his favor would "entitle every mother to have her child go to a non-segregated school?" Mr. Marshall replied in the negative. "What will it do?" Justice Frankfurter pursued. Mr. Marshall replied: "The School Board, I assume would find some other method of distributing the children by drawing district lines." The only requirement would be, Mr. Marshall added, that the lines be drawn "on a natural basis," and not be gerrymandered so as to enclose or exclude Negro neighborhoods. Bickell, *The Supreme Court and the Idea of Progress*, p. 117 (1970). See also 21 U.S.L.W. 3164 (1952).

racial mix in as many of the 103 schools as possible–a goal which the Board maintains cannot be required by judicial fiat. Because of neighborhood patterns, only an intractable remnant of black children will be assigned to the 10 inner-city black schools. Any of these who wish to leave their neighborhoods are encouraged to do so by the majority to minority transfer policy and are provided the transportation with which to accomplish the move. Of those who remain, almost all are assured of a desegregated school experience for one-half of their 12 years.[34]

By any reasonable standard the Board plan dismantles whatever remained of the old dual system that years ago was maintained under the permissiveness of *Plessy v. Ferguson* and the compulson of State law. Any vestige of racial discrimination or identification has been obliterated. All facets of the Charlotte-Mecklenburg schools–including student bodies, faculty, staff, transportation, extracurricular activities and facilities–are desegregated. No child is excluded from any of the 103 schools because of race or color. As stated by the Court of Appeals (1268a), an intractable remnant of segregation "should not void an otherwise exemplary plan for the creation of a unitary system."

A consideration of the pro-desegregation gerrymandered zones of the Board excludes any inference that they were formulated for any purpose other than a color conscious one to promote maximum desegregation of the Charlotte-Mecklenburg Schools. The Board has acquitted its affirmative duty to convert to a unitary system.

Both the trial judge and the Court of Appeals erred when

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[34]Of the 32% black children who will remain in predominately black schools 6,739 are assigned to 9 (out of a total of 72) elementary schools and 758 will attend 1 (out of a total of 21) junior high school. All 10 of the high schools are desegregated. Under the Board plan all of the 758 junior high students will advance to the predominately white high schools and all but a small handful of the elementary youngsters will advance to the 20 desegregated junior high schools.

they disapproved the Board plan—errors premised upon the faulty notion that more racial balancing should be superimposed upon that which the Board itself elected to undertake. By so doing, the Circuit Court exceeded the bounds of its own test of reasonableness.

C. THE COURT APPROVED FINGER PLAN EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING RACIAL BALANCING AND THE BUSSING TO IMPLEMENT IT. THE FOURTH CIRCUIT JOINED IN THE TRIAL COURT'S ERRORS BY DISAPPROVING THE BOARD PLAN AND MISAPPLYING ITS OWN RULE OF REASON.

This controversy revolves around the trial court's February 5, 1970, Order requiring long distance bussing to racially balance the elementary, junior high and senior high schools of the Charlotte-Mecklenburg system. The plan adopted by the trial court and ordered into effect was prepared by Dr. John A. Finger, Jr., a Professor of Education at Rhode Island College, who had previously appeared as a witness for the plaintiffs.[35] The objectionable features of the Finger plan were basically occasioned by his adding to the Board plan the paired and clustered schools and satellite areas that he considered necessary to comply with trial court instructions to eliminate the 10 schools that remained predominately black under the Board plan and to create a racial balance in one senior high school (981a). Upon appeal, the Fourth Circuit approved the secondary plans of the district court, but disapproved its elementary plan as being unreasonably onerous. Upon remand (August 3, 1970, Order) contrary to the Circuit Court ruling the trial judge concluded

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[35]The Fourth Circuit in commenting on the use of Dr. Finger as court consultant cautioned against the use of a partisan witness, but concluded that his dual role did not cause him to be faithless to the trust imposed on him and therefore, "the error, if any, in his selection, was harmless." (1279a).

that his own elementary plan was reasonable and reaffirmed his February 5 Order at all three instructional levels.

1. An Analysis of the Court Approved Finger Plan Shows the Racial Balancing Imposed Upon the Charlotte-Mecklenburg Schools.

The following is a brief summary of the consequences of balancing requirements at all three instructional levels which were prescribed by the February 5 and August 3 Orders of the district judge—those at the secondary level having been approved by the Circuit Court and those at the elementary level having been held by the Circuit Court to be unreasonable because too extensive and onerous.

(a) *Elementary Schools*

The most burdensome part of the trial court's order is the long distance cross-bussing of about 10,300 elementary children to eliminate 9 predominately black inner-city schools by pairing them with 24 predominately white suburban schools—requiring the bussing of 5,150 black first, second, third and fourth graders to the white schools and 5,150 white fifth and sixth graders to the black schools.

It is ironic that, under court compulsion it is proposed to reinstate the dual bus system Charlotte-Mecklenburg abandoned years ago. Once again, buses for whites only and buses for blacks only will be passing each other on the streets of Charlotte.

This Court's attention is invited to Map 3 which shows more clearly than can any written description the practical effect of the racial balancing edicted by the court plan at the elementary level. The long streamers on that map are designed to assist this Court in identifying the 9 inner-city predominately black schools that are paired with the 24 white suburban schools for the sole purpose of achieving the optimal 70/30 racial mix the trial judge adopted as his goal.

These are the 9 elementary schools in which the School Board was unable to attain a more satisfactory mix[36] because the concentration in black neighborhoods is so great that pulling in whites from adjoining areas would cancel out the desegregation achieved under the Board plan in the nearby schools.

In disapproving the trial judge's elementary plan, the Fourth Circuit did not quarrel with the racial balancing goal sought to be realized. Under its test of reasonableness, the Court of Appeals merely concluded that, based on the trial court's estimates, the resulting increase of 39% in the number of elementary students bussed and 32% in the present bus fleet was too extensive and too onerous (1276a). The dissenters, Judges Sobeloff and Winter, were delighted with the results and the means of attaining them.

(b) *Junior High Schools*

The Board plan proposed to restructure the attendance lines of the 21 junior high schools so that all but one of them would not have more than 38% black students. In spite of the Board's best efforts, the one remaining school (Piedmont Junior High) housing about 840 pupils was left 90% black and 10% white. As was the case with the 9 elementary schools, the Board was unable to achieve further mixing of Piedmont Junior High because of the adverse domino effect upon the nearby junior highs where satisfactory racial ratios had been accomplished.

In order to reduce the percentage of blacks in this one school from 90% (758 pupils) to 32% (243 pupils), the court consultant reshuffled the Board's proposed attendance zones for the junior high schools and provided for satellite bussing

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[36]The results of the School Board plan regarding these 9 schools are summarized in footnote No. 31 at page 72 of this brief. Even under the Board plan in 4 of these 9 schools the student bodies would be comprised of 10%-17% whites, a mix considered completely acceptable by many courts.

of inner-city black youngsters to nine predominately white suburban junior high schools. This proposal of Dr. Finger was approved by the trial court and the Court of Appeals.

Map No. 7 shows the junior high zones restructured by district court and the streamers on that map identify the various inner-city schools from which black youngsters will be bussed to outlying schools. As indicated, all of these changes were occasioned by the insistence of both the district court and the Court of Appeals that the 90% black-10% white ratio at Piedmont is not good enough. The extensive court imposed surgery was undertaken notwithstanding the fact that the Board had already produced satisfactory ratios in all of the schools involved in the reshuffle, with the single exception of Piedmont, a school nearly all white 5 years ago (691a).

According to Board estimates these changes prescribed by Dr. Finger require the bussing of 4,741 additional children–6,129 under the Finger plan v. 1,388 under the Board plan (881a, 872a). All of this is directed to effect a reduction of black students at 1 of the 21 schools (Piedmont) by only 515 students. These dislocations and the cost of the bussing required to accomplish this racial balancing cannot stand up under the test of reason or the requirements of the Constitution.

(c) *Senior High Schools*

In some respects, the court action at the senior high school level evidences the most glaring, if not the most extensive, example of racial balancing. Under the Board plan all 10 high schools were desegregated–9 of them 17%-36% black and 1 (Independence High) with 2% black. This plan was adopted by the trial court and approved by the Circuit Court with one exception: 300 black students residing in the inner core of the City must be bussed from the area of their residence through center city traffic a distance of about 12 or 13 miles to Independence High School located in white suburbia.

Reference is made to Map No. 9 for a graphic illustration of the practical result of Dr. Finger's modification requiring the bussing of the 300 blacks from the inner city satellite area to Independence High.

The Court of Appeals referred to the bus mileage for the black youngsters as being about the same as the average of other bus routes serving Independence High (1273a)–but neglected to observe that the existing bus routes were primarily in rural and suburban areas, rather than in the congested inner city areas which would be traversed by the 300 black students.

Under the Board plan these 300 children would have attended a thoroughly desegregated high school having a racial composition of 36% black and 64% white. The only purpose served by the court-directed shifting of these 300 was to make a white school less white. Is the time and safety of these black children irrelevant? They were assured of a desegregated education.

2. The Court-Approved Finger Plan Is Unreasonable and Proper Consideration Was Not Given to the Burdens Which that Plan Imposes on the Charlotte-Mecklenburg System.

The reservations of the district court regarding the pertinence of the Fourth Circuit's Rule of Reason and its preference for a Rule of Absolutes impaired a proper and full consideration of the Board's evidence and the practical and educational problems confronting the Charlotte-Mecklenburg System within the context of a complex urban setting.

In his August 3 Order (Pets.' Br. Al *et seq*) after eight days of testimony at the hearing that the Circuit Court required, the district judge did not make a single finding of fact favorable to the School Board. The same is true with reference to the March 21, 1970 Supplemental Findings of Fact (1198a) made after hearings that were also held

pursuant to Circuit Court directions.[37] These findings indicate appalling disdain of the Board's evidence.

The School Board filed objections and exceptions to the findings of fact set forth in both of those Orders. The district court took no material action with respect to the Board's motions that these findings of fact be modified to conform to the evidence. The objections and exceptions to the March 21 findings appear at Appendix 1241a-1254a. Those submitted in response to the August 3 findings will be printed and filed with this Court as part of an additional appendix. A careful consideration of those objections and exceptions will assist this Court in appraising the conclusions of the district court.[38]

Due to limitation of space it is practical to discuss only a few of the areas wherein the findings of the trial judge failed to conform to the evidence.

There was a marked disparity between the estimates of the trial court and those of the experienced transportation staff of the schools regarding the additional number of children to be transported under the Finger plan and the number of busses required–13,300 (138 busses) according to the judge and 23,384 (526 busses) according to the staff. As the Court of Appeals observed (1271a), anyone's estimates rest on many variables. This is, of course true, but the judge's drastic discount factors (1215a) were unwarranted. The trial court's computations ignore the fact that

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[37]At the February 5, 1970 hearing the trial judge repeatedly stated that the evidence regarding transportation costs and other such data was irrelevant and indicated his impatience with the whole subject. (For example, see Tr. 111-14, 128-30, 133-134, 150-151, 153.) On March 5, 1970, the Fourth Circuit granted a stay of the February 5, 1970 Order with directions that the district court make supplemental findings of fact regarding transportation, the stay being left undisturbed by this Court.

[38]Among other portions of the record that this Court may find particularly helpful are the affidavit of J. D. Morgan and its attachments (853a-890a), the affidavit of William C. Self (850a-852a) and affidavits of Herman J. Hoose (894a-897a, 1038a-1040a).

the long routes through the city traffic will hamper the use of multiple bus trips and will occasion the need for hard-to-get adult drivers unless class schedules of student drivers are severely staggered to accommodate transportation. The court presumes that a bus can make 1.8 trips per day which was the 1969-70 experience of the system with its rural routes. This conclusion disregards the evidence showing that the 1.8 average includes empty bus trips by the driver, that (excluding empty bus trips) last year's average on primarily rural trips were 1.49 overall and 1.06 at the elementary level, that the length of trips includes not only school to school but the meanderings of routes to pick up children, that some busses must operate with under-capacity loads when necessary to pick up pockets of children in out-of-the-way areas and that busses in inner-city traffic should not be overloaded. In computing the additional children to be transplanted, the trial judge ignores the evidence that a space must be provided for each child assigned to a bus whether or not he is absent on a particular day, that due to familiarity with specific schools and community areas the school staff reduced where appropriate the eligible children who would not utilize the busses and that almost all of the children in the low economic areas would be dependent upon school bus transportation.

The district court's justification of the great expansion of the existing fleet resulting from its order by reference to the pre-existing transportation (280 busses; 23,000 children) is unwarranted and ignores the problems occasioned by the mass movement of children and busses over the streets and arteries of the inner-city and its perimeter already saturated and glutted to the breaking point–particularly during rush hour traffic. School busses having a 35 mile speed limit will be thrown into the stream of arteries moving 40-50 miles per hour. The city traffic engineer acknowledged that at present some school busses are being operated in congested areas–but equated the practice to a tolerable amount of "smallpox" that should not be consciously turned into an "epidemic." Overloaded busses on

rural routes cannot sensibly be cited to support the wisdom of overloading busses operating cross-town in the congestion of inner-city rush hour traffic—particularly with immature drivers.

The trial judge's findings imply the availability of unlimited funds from State and local sources with which to defray the extensive cost of the additional bussing imposed upon the Charlotte-Mecklenburg System—citing in support the size of the budgets for the State of North Carolina, the County of Mecklenburg and the local school system and implying that, if the local community gets financial assistance from the State, it is therefore "free." The evidence shows that the School Board has no control over the State budget, that the funds it gets from Federal and State sources are nondiscretionary and earmarked primarily for teacher salaries, instructional services and special programs, that the current local school budget permits the educational programs (severely beset by inflation and growing pains) to just about stay even and that diversion of funds to finance a greatly expanded transportation system will curtail the availability of funds for educational pursuits. To the extent the judge implies money from the State is "free" he overlooks the fact that the State gets its money from the taxpaying public and the source thereof is immaterial in applying a Rule of Reason. In seeking to minimize the cost of busses to implement the Finger plan for the 1970-71 school year, the district court takes refuge in the willingness of the State to lend the Charlotte-Mecklenburg System obsolete busses (14 to 16 years old) on a one-year basis as a supplement to the existing fleet.[39] This overlooks the obvious fact that

[39]Paragraph 14 of the order dated August 3, 1970, carries with it an implication of the Board's prior concealment of ownership of additional busses totaling 107. Common sense dictates that a bus fleet of 280 would require approximately 20 spare busses which could not be used for regular runs as they are required for use as substitutes while other busses are out of service. The 29 activity busses, although titled in the Board, are owned by the individual schools and for limited use, 500 to 600 miles annually (Tr. 1043, July 15, 1970). Delivery of

the capital outlay burden of acquiring busses is merely postponed to another day. The judge minimizes the cost and problems of reconditioning these obsolete busses and ignores the lack of wisdom of using them in congested traffic.

The district judge completely discounts other increased costs occasioned by an extensive expansion of the System's bus fleet (1218a). For example, the costs of additional supervisory, mechanical and clerical personnel; of additional drivers (the expense being greatly increased to the extent adults are used); of additional service and gasoline trucks and other equipment; of improving and constructing bus parking areas for loading and unloading children where insufficient or non-existent; of new and improved rights of way for safe and efficient circulation to, from and within school grounds (R. Ex. 47, 49-53, 65-68; 853a; P. Ex. 15).

In finding No. 3 of the August 3, 1970 order, the district court implies that desegregation will close the gap in the academic performance of the blacks. The test results of this System disclose that the improvement is slight.

Popular attitudes, which are apparently shared by the district court, are that desegregation eliminates or nearly eliminates the disparity of educational achievement between black and white children. Results of desegregation are material on the question of reasonableness but the district court's comparisons are meaningless in this regard. The Coleman Report makes a general finding that desegregation *tends* to hold that blacks advance without retarding the whites. Achievement statistics compiled by the Board relating to the performance of black students attending schools which have been desegregated since 1965 reflect that the improvement of the black students is indeed slight. For example, elementary schools which have been so dese-

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busses subsequent to the last hearings created the 30 used bus category, busses which are 14 to 15 years old. The 28 new busses were clearly scheduled for future delivery. This example is cited as an indication of the district court's predisposition to downgrade Board actions and representations.

gregated (Cornelius, Huntersville and Davidson) found that their black third-grade students performed on an average school level of second grade, first month, whereas predominantely black schools (First Ward, Irwin Avenue and Amay James) found that their third-grade black students performed at an average school level of first grade, ninth month, or a grade differential of one school month. Black students attending those schools at the sixth grade level performed at an average school level of fourth grade, third month at the desegregated schools; and third grade, ninth month at the predominantely black schools, or a difference of three school months improvement experienced by the blacks attending desegregated schools for a period of six years. In making these comparisons, the Board acknowledges that the sampling is small and that the performance of individual black students in some cases substantially exceeds the performance of the group, and conversely, other black students do not perform as well as the group. The primary purpose of the Board in reporting this information was to disclose to the district court that educators and courts must rely on other means to bring about educational equivalence. In determining priorities to bring about this equivalence, the courts are ill-fitted to adjudge the various techniques, including the very expensive and disruptive technique of long distance bussing. Determination of such priorities should be left with the educators, who after having made extensive efforts at desegregation, should be permitted judgments based on sound educational consideration. (R. Ex. 64, July 15, 1970).

In an attempt to justify findings that bussing is a desirable and safe practice, the court (Findings Nos. 2, 4, 6, 13 and 32 of August 3 Order) refers to the present transportation of elementary youngsters and of kindergarten children. This observation is irrelevant to the question of how much of such bussing should reasonably be required or permitted under the circumstances existing in the Charlotte-Mecklenburg School System. The implication of the trial judge's findings are at odds with the conclusions of the educators:

Bussing of elementary children away from their neighborhoods is educationally unsound and should be minimized, not increased; the school day of young children should be shortened and not lengthened to accommodate bus schedules; unattended immature children at bus pickup points is neither desirable nor safe; staggered schedules and multiple pickups should be minimized; bus transportation interferes with after-school activities which are an important part of the educational process; bussing of young children away from their neighboring schools dilutes the interchange between home and school which is most important at the elementary level. Transportation should be built around education, rather than make education serve transportation. Dr. Self stated the matter succinctly (Tr. 138, July 15, 1970):

> [O]ur computations have assumed that we would begin with the concept that the transportation system serves the educational program. And instead of operating our schools in such a way as to accommodate a bus fleet, we'd like to try to have the bus fleet serve the schools.

In submitting its estimates, the School Board readily acknowledged that if savings could be realized through educationally sound staggering of school schedules, the use of busses for multiple trips, a reasonable and safe degree of overloading and other economies it would do so.

The foregoing are recited as typical examples of the treatment that was accorded by the trial judge to the evidence of the School Board regarding the practicability and desirability of the massive bussing occasioned by the court approved Finger plan. The district court's findings clearly show its unreasonable view of the Rule of Reason.

D. THE HEW ELEMENTARY PLAN IS EDUCATIONALLY UNSOUND, REQUIRES RACIAL BALANCING, FOSTERS RESEGREGATION AND IS UNREASONABLE.

The HEW elementary plan was built upon the restructured lines of the Board plan which were used to form seven different clusters within each of which 3 or 4 elementary schools were grouped together. Each school within a cluster serves one, two or three grades. The clusters proposed by HEW are shown on Map No. 4. The HEW plan had the dubious distinction of being shot down in flames by the district court, Dr. Finger, the school staff, the Board majority and the Board minority—by everyone except the HEW representatives.

The trial court's August 3 Order (Pets.' Br. A28) outlines its objections to the plan. In rejecting the plan we agree that the trial judge was right—but for the wrong reasons. The district court's complaints are primarily based on the failure of the HEW plan to do a complete job of racial balancing.

The Board's rejection of the HEW plan was prompted by a variety of practical and educational reasons. The plan requires the bussing of about as many children as do the Finger and Minority plans (R. Ex. 47, Tr. 136). In terms of what is accomplished by the plan, the transportation costs are prohibitive (R. Ex. 47, 50, 52 and 61a).

The proposed grade structure which in 4 of the 7 proposed clusters would require children to attend 4 different schools during the course of their elementary education, was severely criticized as being educationally unsound (Tr. 24, 112, 265), imposing a rigidity that would effectively preclude experimentation with programs of ungraded classes (Tr. 24-27, 99) and would necessitate a complete change in teacher assignments (Tr. 110). The head of the HEW team admitted that aside from desegregation he would not recommend this organization of the elementary schools (P. Ex. 4, p. 68). The proposed grade structure unnecessarily increases transportation requirements (Finger, Tr. 228, 233).

Four of the 7 HEW clusters result in a 50-57% black enrollment, a condition that promises resegregation (Tr. 30, 100, 112, 229). The cluster arrangement brings together a predominately black school and several other schools which were already desegregated (Tr. 31-34, 111, 230, 267). It overpopulates some schools and underpopulates others, compounding the system's housing problem (Tr. 30).

As stated by Dr. Finger (Tr. 267), the HEW plan has little to recommend it. We agree.

E. THE ELEMENTARY PLAN OF THE BOARD MINORITY IS INCOMPLETE AND UNLAWFULLY EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING COMPLETE RACIAL BALANCING OF EVERY ELEMENTARY SCHOOL AND THE BUSSING TO IMPLEMENT IT. THE DISTRICT COURT ERRED IN APPROVING THAT PLAN AS A REASONABLE ALTERNATIVE.

The elementary plan was developed by a 4-member minority of the School Board. In his August 3 Order the trial judge approved the Minority plan as a reasonable alternative available for implementation by the Board. This plan was rejected by the Board.

The plan groups all of the 72 elementary schools within 18 separate clusters, many of which are far removed from each other and all of which occasion massive dislocation of elementary children. This Court's attention is invited to Map No. 5 which gives a clear picture of what this plan does to the elementary schools of the Charlotte-Mecklenburg System.

The authors of the plan acknowledge that its purpose is to racially balance the 72 elementary schools of the system. The plan is educationally unsound (Tr. 68, 174). In its various clusters the Minority plan includes schools that are already desegregated (Tr. 180-181, 297).

A random selection for the assignment of children is required within the clusters by the use of a complicated lottery system (Tr. 69, 118). The plan would occasion great administrative difficulties and would involve the problem of selecting children from year to year and could require elementary children of the same family to attend different schools (Tr. 120).

The plan will require the bussing of about the same number of children as would be transported under the Finger and HEW plans (August 3 Order). The burden of this amount of transportation had been declared by the Fourth Circuit, which accepted the district court's discounted estimates, to be too onerous and hence unreasonable with reference to the Finger plan. The transportation system required to implement the plan would be complex and cumbersome and would involve the mass movement of children within the congested areas of the city (Tr. 225, 239). Both Dr. Finger and the Superintendent observed that the Minority plan involved very long-distance bussing for a large number of children (Tr. 265) and could not be implemented without a heavy network of transportation (Tr. 119). Both Dr. Finger and the Superintendent agreed that education should be controlled by the educators rather than by a transportation system (Tr. 138, 303).[40]

The plan would require the closing of Double Oaks School in spite of the fact that the schools of the system are presently overcrowded with a 12% overcapacity.

The Board's objections to the Minority plan include all of the exceptions which it has to the court-approved Finger plan discussed elsewhere in this brief—as well as those peculiar to the Minority proposal. The racial balancing that this plan envisions is 100%. Every one of the 72 elementary schools are involved in this complete reshuffling to achieve the 70/30 racial mix of each student body. In spite of the

[40]This is a rather remarkable concession on the part of Dr. Finger, whose own plan occasions massive cross and satellite bussing of children through the most congested parts of the City.

weaknesses, defects, costs and disruptions of this plan that were pointed out by both the School staff and the court's consultant, Dr. Finger, the trial judge found it to be reasonable. This conclusion is unwarranted and underscores once again that racial balancing is the basic, but erroneous, precept which undergirds this and every other order of the district court.

F. THE EARLIER DRAFT OF THE FINGER ELEMENTARY PLAN IS INCOMPLETE AND UNLAWFULLY EXCEEDS CONSTITUTIONAL REQUIREMENTS BY REQUIRING RACIAL BALANCING. THE DISTRICT COURT ERRED IN APPROVING THAT PLAN AS A REASONABLE ALTERNATIVE.

This draft of Dr. Finger is illustrated by Plaintiff's Exhibit 10. At the hearings preceding the August 3 Order, only a minimal amount of attention was accorded this proposal which was prepared by Dr. Finger in the early days of his appointment as court consultant. It had been abandoned in favor of the one which the consultant evolved by the use of the restructured lines of the Board plan and which was adopted by the judge's February 5 Order.

Dr. Finger himself did not recommend this early draft (Tr. 263). He described it as an incomplete plan that he prepared only "to illustrate what some of the elements are that enter into the problem of determining how a desegregation plan should be prepared" (Tr. 263). Dr. Finger pointed out that the plan has a "complex grade structure" (Tr. 258). It will require transporting about the same number of elementary children as the court-approved February 5 and Board Minority plans (August 3, Order).

The purpose of this draft of Dr. Finger was to achieve racial balancing of elementary schools, which the court consultant admitted (981a). It is not a reasonable alternative.

G. IN ASSESSING THE EFFECTIVENESS OF A DESEGREGATION PLAN, A RULE OF REASON REQUIRES THAT DUE CONSIDERATION SHOULD BE ACCORDED SCHOOL BOARDS AND ADMINISTRATORS IN CONTROLLING THE DESTINY OF PUBLIC EDUCATION.

President Nixon defined the role of a school board:

> In devising local compliance plans, primary weight should be given to the considered judgment of local school boards—provided they act in good faith, and within Constitutional limits. President Nixon's March 24, 1970, policy statement entitled *SCHOOL DESEGREGATION: A Free and Open Society, supra.*

If it were otherwise, the admonition of Judge Coleman in *Bivins v. Bibb County Board of Education,* 419 F.2d. 1211 (5th Cir. 1970), is pertinent:

> Some of these days, the Courts are going to have . . . to free themselves of their tragic failures in the role of school administrators and get back to their primary functions.

The Charlotte-Mecklenburg School Board is an elective body and, as such, is charged with the responsibility of exercising its own judgment regarding the needs of the system and the best interest of its children.

It is the School Board's duty to determine whether the dollars allocated to it by other elective officials (the Board of County Commissioners for Mecklenburg County) for the education of our children shall be spent for *books or buses.* It is for the Board to determine whether the existing transportation system shall be expanded or contracted, whether it is educationally good or bad to stagger the opening and closing of schools at any particular grade level, whether after school activities will suffer, whether inconveniences and disruption to children and parents are justifiable, whether overloaded buses are acceptable or safe, whether the time of children in transit is justifiable and how the host of other value judgments and policies shall be made to administer

effectively a large complex metropolitan school system charged with awesome responsibility of providing 84,500 school children in 103 schools with a quality education.

Books, bricks and buses (and all that they imply) are part of the tools to be used in the educational process. How and when these tools are used must be left to the good faith decision of local school boards or the boards should be disestablished and the administration of school systems should be turned over the courts.

In his findings of fact, the trial court justified his rulings requiring extensive and disruptive transportation by calling attention to the extent that the system already was involved in burdensome bussing. This rationale is unsound. The reasonableness of a desegregation plan should not be measured by the worst aspects of a school program.

The fact that last year the Charlotte-Mecklenburg school system transported 23,000 children with 280 buses, the opening and closing of some of its schools were staggered, in some schools after-school activities were impaired, some school buses travelled over congested traffic arteries, some elementary children waited for the school bus by the side of the road at 6:30 in the morning and others got home at 5:00 in the afternoon, some buses were overloaded and some children had to stand up, some buses were unsound and should have been replaced—is no answer to the administrative and educational problem of how much of this is desirable, tolerable or necessary in a system as large and complex as Charlotte-Mecklenburg. A court mandate that edicts racial balancing and forced bussing supplants the value judgments of the elected school board and the educators on its administrative staff. An overdose of judicial paternalism and control will ultimately sign the death warrant for public education.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that:

1. The judgment of the Fourth Circuit be affirmed only in so far as it vacated the judgment of the district court.

2. The judgment of the district court, including its Orders of August 3 and August 7, 1970, be reversed; and

3. This matter be remanded to the district court with instructions to approve the implementation of the February 2, 1970, plan of the School Board as one complying with the Constitutional requirements for a unitary school system.

Respectfully submitted,

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No. 349

Vide No. 281 for
(3) related briefs.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SWANN ET AL. *v.* CHARLOTTE-MECKLENBURG BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 281. Argued October 12, 1970—Decided April 20, 1971*

The Charlotte-Mecklenburg school system, which includes the city of Charlotte, North Carolina, had more than 84,000 students in 107 schools in the 1968–1969 school year. Approximately 29% (24,000) of the pupils were Negro, about 14,000 of whom attended 21 schools that were at least 99% Negro. This resulted from a desegregation plan approved by the District Court in 1965, at the commencement of this litigation. In 1968 petitioner Swann moved for further relief based on *Green* v. *County School Board*, 391 U. S. 430, which required school boards to "come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." The District Court ordered the school board in April 1969 to provide a plan for faculty and student desegregation. Finding the board's submission unsatisfactory, the District Court appointed an expert to submit a desegregation plan. In February 1970, the expert and the board presented plans, and the court adopted the board's plan, as modified, for the junior and senior high schools, and the expert's proposed plan for the elementary schools. The Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools, fearing that the provisions for pairing and grouping of elementary schools would unreasonably burden the pupils and the board. The case was remanded to the District Court for reconsideration and submission of further plans. This Court granted certiorari and di-

*Together with No. 349, *Charlotte-Mecklenburg Board of Education et al.* v. *Swann et al.*, also on certiorari to the same court.

Syllabus

rected reinstatement of the District Court's order pending further proceedings in that court. On remand the District Court received two new plans, and ordered the board to adopt a plan, or the expert's plan would remain in effect. After the board "acquiesced" in the expert's plan, the District Court directed that it remain in effect. *Held:*

1. Today's objective is to eliminate from the public schools all vestiges of state-imposed segregation that was held violative of equal protection guarantees by *Brown* v. *Board of Education*, 347 U. S. 483, in 1954. Pp. 10–11.

2. In default by the school authorities of their affirmative obligation to proffer acceptable remedies, the district courts have broad power to fashion remedies that will assure unitary school systems. Pp. 11–12.

3. Title IV of the Civil Rights Act of 1964 does not restrict or withdraw from the federal courts their historic equitable remedial powers. The proviso in 42 U. S. C. § 2000c–6 was designed simply to foreclose any interpretation of the Act as expanding the existing powers of the federal courts to enforce the Equal Protection Clause. Pp. 12–13.

4. Policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities are among the most important indicia of a segregated system, and the first remedial responsibility of school authorities is to eliminate invidious racial distinctions in those respects. Normal administrative practice should then produce schools of like quality, facilities, and staffs. P. 14.

5. The Constitution does not prohibit district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. *United States* v. *Montgomery County Board of Education*, 395 U. S. 225, was properly followed by the lower courts in this case. Pp. 14–16.

6. In devising remedies to eliminate legally imposed segregation, local authorities and district courts must see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish a dual system. Pp. 16–17.

7. Four problem areas exist on the issue of student assignment:

(1) *Racial quotas.* The constitutional command to desegregate schools does not mean that every school in the community must always reflect the racial composition of the system as a whole; here the District Court's very limited use of the racial ratio—not as an inflexible requirement, but as a starting point

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in shaping a remedy—was within its equitable discretion. Pp. 18–21.

(2) *One-race schools.* While the existence of a small number of one-race, or virtually one-race, schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part. Pp. 21–22.

An optional majority-to-minority transfer provision has long been recognized as a useful part of a desegregation plan, and to be effective such arrangement must provide the transferring student free transportation and available space in the school to which he desires to move. P. 22.

(3) *Attendance zones.* The remedial altering of attendance zones is not, as an interim corrective measure, beyond the remedial powers of a district court. A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. The pairing and grouping of noncontiguous zones is a permissible tool; judicial steps going beyond contiguous zones should be examined in light of the objectives to be sought. No rigid rules can be laid down to govern conditions in different localities. Pp. 23–25.

(4) *Transportation.* The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not effectively dismantle the dual school system is supported by the record, and the remedial technique of requiring bus transportation as a tool of school desegregation was within that court's power to provide equitable relief. An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process; limits on travel time will vary with many factors, but probably with none more than the age of the students. Pp. 25–27.

8. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once a unitary system has been achieved. Pp. 27–28.

431 F. 2d 138, affirmed as to those parts in which it affirmed the District Court's judgment. The District Court's order of August 7, 1970, is also affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 281 AND 349.—OCTOBER TERM, 1970

James E. Swann et al., Petitioners,
281 *v.*
Charlotte-Mecklenburg Board of Education et al.

Charlotte-Mecklenburg Board of Education et al., Petitioners,
349 *v.*
James E. Swann et al.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[April 20, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

This case and those argued with it [1] arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a

[1] *McDaniel* v. *Barresi*, No. 420; *Davis* v. *Board of School Commissioners of Mobile County*, No. 436; *Moore* v. *Charlotte-Mecklenburg Board of Education*, No. 444; *North Carolina State Board of Education* v. *Swann*, No. 498. For purposes of this opinion the cross-petitions in Nos. 281 and 349 are treated as a single case and will be referred to as "this case."

governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown* v. *Board of Education* was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once. Meanwhile district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

I

The Charlotte-Mecklenburg school system, the 43d largest in the Nation, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. The area is large—550 square miles—spanning roughly 22 miles east-west and 36 miles north-south. During the 1968–1969 school year the system served more than 84,000 pupils in 107 schools. Approximately 71% of the pupils were found to be white and 29% Negro. As of June 1969 there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000—approximately 14,000 Negro students—attended 21 schools which were either totally Negro or more than 99% Negro.

This situation came about under a desegregation plan approved by the District Court at the commencement of the present litigation in 1965, 243 F. Supp. 667 (WDNC), aff'd, 369 F. 2d 29 (CA4 1966), based upon geographic zoning with a free transfer provision. The present proceedings were initiated in September 1968 by Petitioner Swann's motion for further relief based on *Green* v. *County School Board*, 391 U. S. 430 (1968), and its companion cases.[2] All parties now agree that in 1969 the system fell short of achieving the unitary school system that those cases require.

The District Court held numerous hearings and received voluminous evidence. In addition to finding certain actions of the school board to be discriminatory, the court also found that residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions. School board action based on these patterns, for example, by locating schools in Negro residential areas and fixing the size of the schools to accommodate the needs of immediate neighborhoods, resulted in segregated education. These findings were subsequently accepted by the Court of Appeals.

In April 1969 the District Court ordered the school board to come forward with a plan for both faculty and student desegregation. Proposed plans were accepted by the court in June and August 1969 on an interim basis only, and the board was ordered to file a third plan by November 1969. In November the board moved for an extension of time until February 1970, but when that was denied the board submitted a partially completed plan. In December 1969 the District Court held that the board's submission was unacceptable and appointed an expert in education administration, Dr. John Finger,

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[2] *Raney* v. *Board of Education*, 391 U. S. 443 (1968), and *Monroe* v. *Board of Commissioners*, 391 U. S. 450 (1968).

to prepare a desegregation plan. Thereafter in February 1970, the District Court was presented with two alternative pupil assignment plans—the finalized "board plan" and the "Finger plan."

The Board Plan. As finally submitted, the school board plan closed seven schools and reassigned their pupils. It restructured school attendance zones to achieve greater racial balance but maintained existing grade structures and rejected techniques such as pairing and clustering as part of a desegregation effort. The plan created a single athletic league, eliminated the previously racial basis of the school bus system, provided racially mixed faculties and administrative staffs, and modified its free transfer plan into an optional majority-to-minority transfer system.

The board plan proposed substantial assignment of Negroes to nine of the system's 10 high schools, producing 17% to 36% Negro population in each. The projected Negro attendance at the 10th school, Independence, was 2%. The proposed attendance zones for the high schools were typically shaped like wedges of a pie, extending outward from the center of the city to the suburban and rural areas of the county in order to afford residents of the center city area access to outlying schools.

As for junior high schools, the board plan rezoned the 21 school areas so that in 20 the Negro attendance would range from 0% to 38%. The other school, located in the heart of the Negro residential area, was left with an enrollment of 90% Negro.

The board plan with respect to elementary schools relied entirely upon gerrymandering of geographic zones. More than half of the Negro elementary pupils were left in nine schools that were 86% to 100% Negro; approximately half of the white elementary pupils were assigned to schools 86% to 100% white.

The Finger Plan. The plan submitted by the court-appointed expert, Dr. Finger, adopted the school board

zoning plan for senior high schools with one modification: it required that an additional 300 Negro students be transported from the Negro residential area of the city to the nearly all-white Independence High School.

The Finger plan for the junior high schools employed much of the rezoning plan of the board, combined with the creation of nine "satellite" zones.[3] Under the satellite plan, inner-city Negro students were assigned by attendance zones to nine outlying predominately white junior high schools, thereby substantially desegregating every junior high school in the system.

The Finger plan departed from the board plan chiefly in its handling of the system's 76 elementary schools. Rather than relying solely upon geographic zoning, Dr. Finger proposed use of zoning, pairing, and grouping techniques, with the result that student bodies throughout the system would range from 9% to 38% Negro.[4]

The District Court described the plan thus:

> "Like the Board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools

[3] A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding the school.

[4] In its opinion and order of December 1, 1969, later incorporated in the order appointing Dr. Finger as consultant, the District Court stated:

"Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of such a plan from the school board, the court will start with the thought . . . that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable."

> with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school."

Under the Finger plan, nine inner-city Negro schools were grouped in this manner with 24 suburban white schools.

On February 5, 1970, the District Court adopted the board plan, as modified by Dr. Finger, for the junior and senior high schools. The court rejected the board elementary school plan and adopted the Finger plan as presented. Implementation was partially stayed by the Court of Appeals for the Fourth Circuit on March 5, and this Court declined to disturb the Fourth Circuit's order, 397 U. S. 978 (1970).

On appeal the Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools. While agreeing that the District Court properly disapproved the board plan concerning these schools, the Court of Appeals feared that the pairing and grouping of elementary schools would place an unreasonable burden on the board and the system's pupils. The case was remanded to the District Court for reconsideration and submission of further plans. This Court granted certiorari, 399 U. S. 926, and directed reinstatement of the District Court's order pending further proceedings in that court.

On remand the District Court received two new plans for the elementary schools: a plan prepared by the United States Department of Health, Education, and Welfare (the HEW plan) based on contiguous grouping and zoning of schools, and a plan prepared by four members of the nine-member school board (the minority plan) achieving substantially the same results as the Finger

plan but apparently with slightly less transportation. A majority of the school board declined to amend its proposal. After a lengthy evidentiary hearing the District Court concluded that its own plan (the Finger plan), the minority plan, and an earlier draft of the Finger plan were all reasonable and acceptable. It directed the board to adopt one of the three or in the alternative to come forward with a new, equally effective plan of its own; the court ordered that the Finger plan would remain in effect in the event the school board declined to adopt a new plan. On August 7, the board indicated it would "acquiesce" in the Finger plan, reiterating its view that the plan was unreasonable. The District Court, by order dated August 7, 1970, directed that the Finger plan remain in effect.

II

Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings. None of the parties before us challenges the Court's decision of May 17, 1954, that

> "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. . . .
>
> "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity." *Brown* v. *Board of Education, supra,* at 495.

None of the parties before us questions the Court's 1955 holding in *Brown II*, that

> "[s]chool authorites have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibilty in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education*, 349 U. S. 294, 299–300 (1955).

Over the 15 years since *Brown II*, many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate

between public school children on the basis of their race. Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of these dilatory tactics have been noted frequently by this Court and other courts.

By the time the Court considered *Green* v. *County School Board*, 391 U. S. 430, in 1968, very little progress had been made in many areas where dual school systems had historically been maintained by operation of state laws. In *Green*, the Court was confronted with a record of a freedom-of-choice program that the District Court had found to operate in fact to preserve a dual system more than a decade after *Brown II*. While acknowledging that a freedom-of-choice concept could be a valid remedial measure in some circumstances, its failure to be effective in *Green* required that

> "The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." *Green*, at 439.

This was plain language, yet the 1969 Term of Court brought fresh evidence of the dilatory tactics of many school authorities. *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19, restated the basic obligation asserted in *Griffin* v. *School Board*, 377 U. S. 218, 234 (1964), and *Green*, *supra*, that the remedy must be implemented *forthwith*.

The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect,

for the assistance of school authorities and courts.[5] The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population,[6] movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented. Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.

III

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*. That was the basis for the holding in *Green* that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U. S., at 437–438.

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[5] The necessity for this is suggested by the situation in the Fifth Circuit where 166 appeals in school desegregation cases were heard between December 2, 1969, and September 24, 1970.

[6] Elementary public school population (grades 1–6) grew from 17,447,000 in 1954 to 23,103,000 in 1969; secondary school population grew from 11,183,000 in 1954 to 20,775,000 in 1969. Digest of Educational Statistics, 1964 ed. 1, 6, Office of Education Publication # 10024–64; Digest of Educational Statistics, 1970 ed. Table 28, Office of Education Publication # 10024–70.

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

> "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U. S. 329–330 (1944), cited in *Brown II*, *supra*, at 300.

This allocation of responsibility once made, the Court attempted from time to time to provide some guidelines for the exercise of the district judge's discretion and for the reviewing function of the courts of appeals. However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.

The school authorities argue that the equity powers of federal district courts have been limited by Title IV of the Civil Rights Act of 1964, 42 U. S. C. § 2000c. The language and the history of Title IV shows that it was not enacted to limit but to define the role of the Federal Government in the implementation of the *Brown I* decision. It authorizes the Commissioner of Education to provide technical assistance to local boards in the preparation of desegregation plans, to arrange "training institutes" for school personnel involved in desegregation efforts, and to make grants directly to schools to ease the transition to unitary systems. It also authorizes the Attorney General, in specified circumstances, to initiate federal desegregation suits. Section 2000c (b) defines "desegregation" as it is used in Title IV:

> " 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of

students to public schools in order to overcome racial imbalance."

Section 2000c–6, authorizing the Attorney General to institute federal suits, contains the following proviso:

"nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

On their face, the sections quoted purport only to insure that the provisions of Title IV of the Civil Rights Act of 1964 will not be read as granting new powers. The proviso in § 2000c–6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause. There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers. The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "de facto segregation," where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities. In short, there is nothing in the Act which provides us material assistance in answering the question of remedy for state-imposed segregation in violation of *Brown I*. The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

IV

We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause. Although the several related cases before us are primarily concerned with problems of student assignment, it may be helpful to begin with a brief discussion of other aspects of the process.

In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. 391 U. S., at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment. In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs. Something more must be said, however, as to faculty assignment and new school construction.

In the companion *Davis* case, the Mobile school board has argued that the Constitution requires that teachers be assigned on a "color blind" basis. It also argues that

the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention.

In *United States* v. *Montgomery County Board of Education*, 395 U. S. 225 (1969), the District Court set as a goal a plan of faculty assignment in each school with a ratio of white to Negro faculty members substantially the same throughout the system. This order was predicated on the District Court finding that

> "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year 1968–69." Quoted at 395 U. S., at 232.

The District Court in *Montgomery* then proceeded to set an initial ratio for the whole system of at least two Negro teachers out of each 12 in any given school. The Court of Appeals modified the order by eliminating what it regarded as "fixed mathematical ratios" of faculty and substituted an initial requirement of "substantially or approximately" a five-to-one ratio. With respect to the future, the Court of Appeals held that the numerical ratio should be eliminated and that compliance should not be tested solely by the achievement of specified proportions. *Id.*, at 234.

We reversed the Court of Appeals and restored the District Court's order in its entirety, holding that the order of the District Judge

> "was adopted in the spirit of this Court's opinion in *Green* . . . in that his plan 'promises realistically to

> work, and promises realistically to work *now*.' The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. . . . We also believe that under all the circumstances of this case we follow the original plan outlined in *Brown II* . . . by accepting the more specific and expeditious order of [District] Judge Johnson . . . ." 395 U. S., at 235–236 (emphasis in original).

The principles of *Montgomery* have been properly followed by the District Court and the Court of Appeals in this case.

The construction of new schools and the closing of old ones is one of the most important functions of local school authorities and also one of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic

pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system. When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out. Cf. *United States* v. *Board of Public Instruction*, 395 F. 2d 66 (CA5 1968); *Brewer* v. *School Board*, 397 F. 2d 37 (CA4 1968).

V

The central issue in this case is that of student assignment, and there are essentially four problem areas:

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;

(3) what are the limits, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

(4) what are the limits, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

(1) *Racial Balances or Racial Quotas.*

The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring

remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it.

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

In this case it is urged that the District Court has imposed a racial balance requirement of 71%–29% on individual schools. The fact that no such objective was actually achieved—and would appear to be impossible—tends to blunt that claim, yet in the opinion and order of the District Court of December 1, 1969, we find that court directing:

> "that efforts should be made to reach a 71–29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . , that no school [should] be operated with an all-black or predominantly black student body, [and] that pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students."

The District Judge went on to acknowledge that variation "from that norm may be unavoidable." This contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constituency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitu-

tional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

As the voluminous record in this case shows,[7] the predicate for the District Court's use of the 71%–29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans.[8] As the statement of facts shows, these findings are abundantly supported by the record. It was because of this total failure of the school board that the District Court was obliged to turn to other qualified sources, and Dr.

[7] It must be remembered that the District Court entered nearly a score of orders, numerous sets of findings and for the most part each was accompanied by a memorandum opinion. Considering the pressure under which the court was obliged to operate we would not expect that all inconsistencies and apparent inconsistencies could be avoided. Our review, of course, is on the orders of February 5, 1970, as amended, and August 7, 1970.

[8] The final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort. As discussed below, the Charlotte board was under an obligation to exercise every reasonable effort to remedy the violation, once it was identified, and the suggested techniques are permissible remedial devices. Additionally, as noted by the District Court and Court of Appeals, the board plan refused to assign white students to any school unless the student population of that school was at least 60% white. This was an arbitrary limitation negating reasonable remedial steps.

Finger was designated to assist the District Court to do what the board should have done.

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, an equitable remedy for the particular circumstances.[9] As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(2) *One-Race Schools.*

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

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[9] In his August 3, 1970, memorandum holding that the District Court plan was "reasonable" under the standard laid down by the Fourth Circuit on appeal, the District Court explained the approach taken as follows:

"This court has not ruled, and does not rule that 'racial balance' is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*" (Emphasis in original.)

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move. Cf. *Ellis* v. *Board of Public Instruction*, 423

F. 2d
and t 203, 206 (CA5 1970). The court orders in this
option the companion *Davis* case now provide such an
(3) n.

The *Remedial Altering of Attendance Zones.*
strate e maps submitted in these cases graphically demon-
planne that one of the principal tools employed by school
tem h ers and by courts to break up the dual school sys-
mande has been a frank—and sometimes drastic—gerry-
additi ering of school districts and attendance zones. An
of sch ional step was pairing, "clustering," or "grouping"
to ac ools with attendance assignments made deliberately
former complish the transfer of Negro students out of
studen rly segregated Negro schools and transfer of white
not, t nts to formerly all-Negro schools. More often than
indeed hese zones are neither compact [10] nor contiguous;
an int d they may be on opposite ends of the city. As
beyon terim corrective measure, this cannot be said to be
Abs d the broad remedial powers of a court.
basis sent a constitutional violation there would be no
racial for judicially ordering assignment of students on a
discrin basis. All things being equal, with no history of
mination, it might well be desirable to assign pupils

[10] Th

sion of e reliance of school authorities on the reference to the "revi-
is misp . . . attendance areas into *compact* units," *Brown II*, at 300,
be take laced. The enumeration in that opinion of considerations to
suggesi en into account by district courts was patently intended to be
remand ve rather than exhaustive. The decision in *Brown II* to
of speci the cases decided in *Brown I* to local courts for the framing
could n ific decrees was premised on a recognition that this Court
be requ not at that time foresee the particular means which would
We said uired to implement the constitutional principles announced.
"The d in *Green, supra*, at 439:
to asses obligation of the district courts, as it always has been, is
tion. T s the effectiveness of a proposed plan in achieving desegrega-
gation; There is no universal answer to complex problems of desegre-
case. T there is obviously no one plan that will do the job in every
present The matter must be assessed in light of the circumstances
and the options available in each instance."

to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on courts of appeals.

We hold that the pairing and grouping of non-contiguous school zones is a permissible tool and such action is to be considered in light of the objectives sought. Judicial steps in shaping such zones going beyond combinations of contiguous areas should be examined in light of what is said in subdivisions (1), (2), and (3) of this

opinion concerning the objectives to be sought. Maps do not tell the whole story since non-contiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.

(4) *Transportation of Students.*

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations. Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the nation's public school children, approximately 39%, were transported to their schools by bus in 1969–1970 in all parts of the country.

The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case.[11] The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they

[11] During 1967–1968, for example, the Mobile board used 207 buses to transport 22,094 students daily for an average round trip of 31 miles. During 1966–1967, 7,116 students in the metropolitan area were bussed daily. In Charlotte-Mecklenburg, the system as a whole, without regard to desegregation plans, planned to bus approximately 23,000 students this year, for an average daily round trip of 15 miles. More elementary school children than high school children were to be bussed, and four- and five-year-olds travel the longest routes in the system.

alloved almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

Thus the remedial techniques used in the District Court's order were within that court's power to provide equitable relief; implementation of the decree is well within the capacity of the school authority.

The decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most." [12] This system compares favorably with the transportation plan previously operated in Charlotte under which each day 23,600 students on all grade levels were transported an average of 15 miles one way for an average trip requiring over an hour. In these circumstances, we find no basis for holding that the local school authorites may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. District courts must weigh the soundness of any transportation plan in light

[12] The District Court found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally, it should be noted that North Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes. N. C. Stat. § 115–186 (b).

of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students. The reconcilation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.

VI

The Court of Appeals, searching for a term to define the equitable remedial power of the district courts, used the term "reasonableness." In *Green, supra,* this Court used the term "feasible" and by implication, "workable," "effective," and "realistic" in the mandate to develop "a plan that promises realistically to work, and . . . to work *now.*" On the facts of this case, we are unable to conclude that the order of the District Court is not reasonable, feasible and workable. However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.

At some point, these school authorites and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems will then be "unitary" in the sense required by our decisions in *Green* and *Alexander.*

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the

racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

For the reasons herein set forth, the judgment of the Court of Appeals is affirmed as to those parts in which it affirmed the judgment of the District Court. The order of the District Court dated August 7, 1970, is also affirmed.

It is so ordered.